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8-5-1982

## State of New York Public Employment Relations Board Decisions from August 5, 1982

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from August 5, 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

#1A-8/5/82

In the Matter of	:	
JOHNSTOWN CITY SCHOOL DISTRICT,	:	
Respondent,	:	<u>BOARD DECISION</u>
-and-	:	<u>AND ORDER</u>
JOHNSTOWN TEACHERS ASSOCIATION,	:	<u>CASE NO. U-5286</u>
Charging Party.	:	

HANCOCK, ESTABROOK, RYAN, SHOVE  
& HUST (JAMES P. BURNS III, ESQ.  
of Counsel) for Respondent

JOHN R. SOLE, for Charging Party

This matter comes to us on the exceptions of the Johnstown City School District (District) to a hearing officer's decision that it violated Civil Service Law (CSL) §209-a.1(a) and (c) when it retaliated against the Johnstown Teachers Association (Association) by changing the method of teacher evaluation because of the Association's unreasonably harsh pursuit of a grievance. The District, in support of its exceptions, asserts that the record does not contain adequate evidence to support the hearing officer's finding of interference and discrimination; that the decision of the hearing officer is contrary to PERB precedents and that even if the hearing officer was correct the recommended remedy is disproportionate and should not be adopted.

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FACTS

On January 5, 1981, the first school day following the Christmas recess, Lindenberger, a principal at one of the District's elementary schools, observed a teacher, Gordon. While his evaluation was totally "satisfactory," it was, as the District later conceded, made in violation of a contractual provision which prohibited any evaluation on a day following an extended vacation. Upon learning of the incident, the Association building representative, Fallon, and grievance representative, Winn, met with Lindenberger. They told him they believed he had breached the contract, and demanded a written admission of the violation, which would contain a promise that there would be no recurrence. Lindenberger asked what would happen if he did not write the letter, and they replied that they would pursue the grievance to the Superintendent of Schools and, if necessary, to arbitration<sup>1/</sup>. Following the meeting, Lindenberger wrote Fallon urging that the grievance be informally settled and that the Association accept his oral admission of an "oversight" and assurance that "it will not happen again." The next day, January 14, Fallon and Winn met with Lindenberger and continued to insist upon a further writing. At this point, Lindenberger remonstrated and allegedly warned, "if I'm treated like this I will retaliate through the building." The two representatives walked out for a minute,

~~and then returned with a written admission of the violation.~~

<sup>1/</sup> The parties have a four-step grievance procedure: the first step is with the immediate supervisor and requires an initial attempt to settle the complaint; and failing that, that it be submitted in writing. The second step is an appeal to the Superintendent; the third, to the Board of Education; and the fourth, to arbitration.

returned and presented him with a formal grievance. A few days later Lindenberger responded, rejecting the grievance on the basis that it had been settled at the informal stage. When told that his response was unacceptable, he asked to meet with Fallon and the other building representative. At this meeting, he expressed his displeasure with the Gordon grievance, mentioned his earlier promise concerning evaluations, and declared that it had to be a "two-way street." He asked that the two speak to the faculty, about 20 teachers, at an upcoming Association building meeting, and "come back to him with some reassurance" as to the faculty's intentions. Before the meeting, however, Lindenberger himself had an opportunity to address the teachers. Referring to the grievance he advised that he would not suffer a double standard, where he would be lenient while teachers would treat him poorly, and that he would respond in kind. Thereafter, Fallon and Winn reported to Lindenberger that they intended to continue with the grievance. About a month later, on February 25, a second-step hearing was held, and on March 4, the Superintendent issued a decision sustaining the grievance.

From January 14, when the Gordon grievance was filed, to the end of the semester, Lindenberger evaluated eleven teachers. Seven, including Fallon and Winn, apparently received nothing but "satisfactory" ratings. Of the 57 items rated, four teachers received one or more "needs improvement" ratings. After post-evaluation conferences, he removed the "needs improvement" ratings from two of the teachers; he refused to do so for either Santa Maria or Johnson. In Santa Maria's case, her written rebuttal and Lindenberger's reply indicate that the two had only recently had

a serious dispute over a parent-teacher conference, which was the focus of three of her four "needs improvement" ratings. The principal, in his reply, which was introduced by the Association, denied having threatened retaliation but admitted to a resolve to respond "in kind."

#### DISCUSSION

Having reviewed the record, we find that the Association has failed to establish that the District violated CSL §209-a.1(a) or (c).

Although the District concedes that the school principal made threatening statements, we find that these were in response to the unreasonable pursuit by Fallon and Winn of their demand for a formal admission of guilt by the school principal. We are not convinced that the statements attributed to the school principal by the Association's witnesses can be characterized as invectives. At worst, we might characterize them as an understandable response to provocation. The principal had already provided a written statement admitting an "oversight" and assuring that "it will not happen again". Under these circumstances, we find that the statements of the school principal do not constitute an interference with the Taylor Law rights of the Association.

We also find that the record does not support the finding of discrimination. To establish a discrimination violation, the charging party has the burden of proving knowledge of involvement in protected activities, anti-union animus, and conduct which,

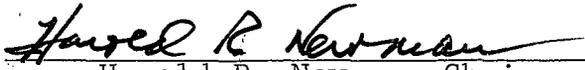
"but for" the protected activity, would not have occurred.<sup>2/</sup>

All of the evaluations were satisfactory. In four of them, "needs improvement" ratings were assigned, two of which were changed after conference and two were not. There is no evidence in the record as to why the principal upgraded some teachers' "needs improvement" ratings and not others. The Association failed to introduce any evidence that the principal had discriminatorily singled out Santa Maria or Johnson. Absent evidence that Santa Maria and Johnson were engaged in protected activity of which the principal was aware, and absent proof that "but for" such activity the principal would have acted otherwise, we cannot find a violation of CSL §209-a.1(c). We, therefore, determine that the Association has failed to sustain its burden that a violation of CSL §209-a.1(a) or (c) has occurred.

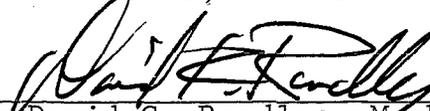
NOW, THEREFORE, WE REVERSE the hearing officer, and WE ORDER that the charge herein be, and it hereby is,

DISMISSED.

DATED: August 5, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

2/ City of Albany, 3 PERB ¶3096 (1970), conf. sub nom. Mtr. City of Albany v. Helsby, 36 AD2d 348 (1971), mod. on other grounds 29 NY2d 433 (1972). City of Albany, 9 PERB ¶3055 (1976), conf. sub nom. Mtr. of Albany v. PERB, 57 AD2d 374 (1977) aff. 43 NY2d 954 (1978); Village of Wayland, 9 PERB ¶3084 (1976), conf. sub nom. Village of Wayland v. PERB, 61 AD2d 764 (1978)

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#1B-8/5/82

In the Matter of :

TOWN OF BABYLON, :

Respondent, :

-and- :

TEAMSTERS LOCAL 237, SUFFOLK COUNTY, :

Respondent, :

-and- :

SIMON J. HICK, :

Charging Party. :

BOARD DECISION

AND ORDER

CASE NO. U-5908

KAUFMAN & KAUFMAN, P.C.  
(Joseph L. Kaufman, Esq. of Counsel),  
for Respondent

SCHLACHTER & MAURO, ESQS.  
(David Schlachter, Esq. of Counsel),  
for Charging Party

This matter comes to us on the exception of Simon J. Hick (charging party) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge because of his failure to set forth a prima facie case and to prosecute the charge. The Town of Babylon (town) has filed a Motion to Intervene to support the decision of the Director.

BACKGROUND

On February 10, 1982 charging party filed an improper practice charge naming the town and Teamsters Local 237, Suffolk County (Local 237), appearing to allege that the charging party was

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improperly passed over for hiring.

By letter dated February 19, charging party was advised that the charge failed to indicate which provisions of the Act were supposed to have been violated and which actions by the town and/or Local 237 constituted a violation. The same letter advised the charging party that the charge would be dismissed unless the deficiencies were corrected "promptly."

Because the charging party failed to respond, the Director dismissed the charge on April 6, 1982. The record indicates that the decision of the Director was received by charging party on April 13, 1982.

The affidavit of the charging party and the affirmation of his attorney in support of the exceptions allege, and the record discloses, the following:

(a) Charging party received the letter from the hearing officer requesting additional information. As claimed, the letter did not set any time limits within which to reply. It warned that, unless the charge was "promptly" revised, it might be dismissed.

(b) Charging party's affidavit states that he wrote a letter during the second week of March 1982 requesting additional time so that he could retain counsel. The record discloses that no such letter was received.

(c) On March 22, charging party telephoned the hearing officer and talked to a secretary who advised that PERB had not received the letter he claimed to have

sent. The notes made of the telephone message indicate that charging party would send a duplicate of the letter. No such duplicate has been received.

(d) Charging party consulted with his attorney who, in turn, requested a copy of the charge from PERB. A note concerning the telephone request for a copy of the charge indicates that a copy was sent on March 23.

(e) The affidavit of charging party, who until March 23 appeared pro se, asserts that he is not sophisticated as to legal procedures and assumed that his follow-up efforts served to maintain his charge.

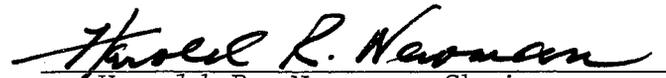
The record further discloses that by letter dated April 15, 1982, the attorneys for charging party submitted a letter, received on April 21, 1982, purportedly remedying the deficiencies of the already dismissed improper practice charge.

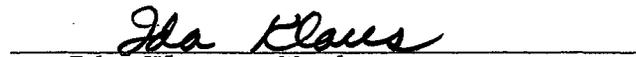
#### DISCUSSION

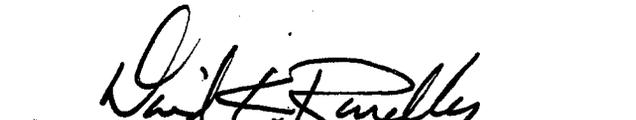
Having reviewed the record, we conclude that the exceptions have merit. The letter advising Hick of the deficiencies of the charge was not definite as to the time limits within which he was to respond. We conclude that it was not unreasonable for charging party, initially appearing pro se, to have assumed that he was acting in a timely fashion to correct the deficiencies. Accordingly, in the circumstances of this case, we conclude that this pro se charging party should have been permitted additional time to furnish the information requested.

NOW, THEREFORE, WE ORDER that this case be reopened and  
remanded to the hearing officer  
for further proceedings.

DATED: August 5, 1982  
Albany, New York

  
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Harold R. Newman, Chairman

  
\_\_\_\_\_  
Ida Klaus, Member

  
\_\_\_\_\_  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #1C-8/5/82  
EASTCHESTER UNION FREE SCHOOL DISTRICT, :  
Respondent, : BOARD DECISION  
-and- : AND ORDER  
EASTCHESTER TEACHERS ASSOCIATION, : CASE NO. U-5775  
LOCAL 2655, NYSUT, AFT, AFL-CIO, :  
Charging Party. :

VAN DE WATER & VAN DE WATER, ESQS.  
(SUSANNA E. BEDELL, ESQ. of Counsel),  
for Respondent

ANTHONY D. WILDMAN, for Charging  
Party

This matter comes to us on the exceptions of the Eastchester Union Free School (District) to a hearing officer's decision finding merit in the improper practice charge filed by the Eastchester Teachers Association, Local 2655, NYSUT, AFT, AFL-CIO (Association) alleging that the District's reprimand of an agent of the Association for advice given to a unit employee was improper.

BACKGROUND

The improper practice charge filed by the Association alleged that the actions of the District constituted a violation of CSL §209-a.1(a) and (c). Details of the charge contained fourteen allegations. The answer of the District denied the conclusory allegations of law and denied three of the factual allegations.

It admitted the rest. As a consequence of a conference held by the hearing officer and an exchange of correspondence, the Association amended the improper practice charge by deleting the factual allegations to which the District had interposed a denial.

On the basis of the amended charge, which left no contested allegations of fact, and on the basis of the District's response to the hearing officer's request that it make an offer of proof concerning what it would offer as evidence at a hearing, the hearing officer concluded that no hearing was necessary. Accordingly, he determined the charge on the basis of the pleadings, finding that the actions of the District constituted a violation of CSL §209-a.1(a). As regards the alleged violation of CSL §209-a.1(c), the hearing officer concluded, in a footnote, that it was not necessary to make a finding regarding such alleged violation.

The District has filed exceptions challenging the failure of the hearing officer to hold a hearing; the failure to make a finding concerning the alleged violation of CSL §209-a.1(c); and challenging the scope of the remedial order recommended by the hearing officer.

#### FACTS

Sullivan, the District's high school principal, instructed an employee in the Association's unit to meet with him and the employee's immediate supervisor concerning an alleged violation by the employee of the faculty handbook.

The employee went to the meeting, accompanied by Pace, a co-worker who served as the Association's high school building representative. During the meeting, the employee, on Pace's advice, refused to answer the questions put to him by Sullivan.

Thereafter, Sullivan wrote Pace to inform him that he considered Pace's instruction to the employee not to answer his questions to be "insubordinate and a direct interference into the administration of this school district." Sullivan warned Pace that "any recurrence of these actions" would result in his recommendation to the superintendent that disciplinary action be taken against Pace. A copy of this letter was placed in Pace's personnel file. After the pre-hearing conference, the warning letter was withdrawn from Pace's personnel file.

#### DISCUSSION

In our recent holding in Comsewogue UFSD<sup>1/</sup>, we held that the reprimand of an employee because, as a union official, he advises a fellow worker as to what he believes his Taylor Law rights to be, constitutes interference with a protected right and a violation of CSL §209-a.1(a). The hearing officer, relying upon Comsewogue UFSD, found that the District had violated CSL §209-a.1(a). We affirm.

We also affirm the hearing officer's ruling that no hearing was necessary. When originally submitted, the District's answer did controvert some of the factual allegations contained in the Association's improper practice charge. However, when the Association withdrew those controverted allegations, no dispute

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<sup>1/</sup> 15 PERB ¶3018 (1982).

as to the facts remained, and the District's offer of proof did not identify other relevant issues of fact. Hence, no hearing was necessary. Furthermore, the ultimate withdrawal of the reprimand against Pace does not create any issue of fact for which a hearing is necessary.

We are not persuaded that the failure of the hearing officer to make a finding concerning the alleged violation of CSL §209-a.1(c) was erroneous. The hearing officer noted in his decision that in view of his finding of a violation of CSL 209-a.1(a) it was unnecessary to make a finding concerning the discrimination charge. In any event, if anyone was adversely affected by the "failure" of the hearing officer to rule upon the alleged CSL §209-a.1(c) violation, it would be the Association which has not filed exceptions, and not the District.

We find some merit to the District's policy argument concerning the scope of the remedial order.

The hearing officer, while noting that the District had withdrawn from Pace's personnel records the letter of reprimand, concluded that such withdrawal could, in the absence of an order from PERB, be rescinded. To achieve an enforceable remedy, the hearing officer determined that an order was needed. He recommended that the reprimand letter be withdrawn, that the District cease and desist from acts of interference, and that the District sign and post a notice in the form attached to his decision. The District argues that the recommendation of the hearing officer does not promote harmonious relationships and detracts from the statutory policy of settling disputes. It argues that there is no incentive to settle disputes if the employer is compelled to publicize the missteps of its agents. While we agree with the

hearing officer that the withdrawal of the reprimand does not obviate the need for an appropriate order, we also agree with the District that the requirement for posting, under the facts of this case, would not promote the policies of the Act.

NOW, THEREFORE, we affirm the decision of the hearing officer but modify his recommended order by deleting the requirement for posting, and

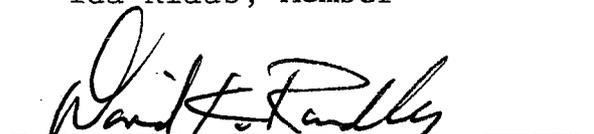
WE ORDER that the Eastchester Union Free School District:

1. Remove, and immediately destroy, the original and all copies of a letter dated November 16, 1981 from John F. Sullivan to Raymond Pace, and all references thereto, from any file in the custody or control of the District, its officers, agents or employees and not consider or otherwise use the letter or references thereto for any purpose;
2. Not interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

DATED: August 4, 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	:	#1D-8/5/82
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,	:	
Respondent,	:	
-and-	:	<u>BOARD DECISION</u>
TOWN OF EVANS,	:	<u>AND ORDER</u>
Charging Party.	:	<u>CASE NO. U-5876</u>
	:	
	:	

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ROEMER & FEATHERSTONHAUGH, ESQS.  
(STEPHEN J. WILEY of Counsel), for  
Respondent

EARL C. KNIGHT, for Charging Party

This matter comes to us on the exceptions of the Civil Service Employees Association, Inc. (CSEA) to a hearing officer's decision that it violated its duty to negotiate in good faith by submitting a nonmandatory subject of negotiation to factfinding.

FACTS

The Town of Evans (Town) filed an improper practice charge against CSEA alleging that the latter had violated Civil Service Law (CSL) §209-a.2(b) by submitting four nonmandatory subjects of negotiation to factfinding. The hearing officer found that three of the four proposals were nonmandatory subjects of negotiation and directed CSEA to withdraw those demands from factfinding. CSEA has filed exceptions with respect to one of the demands which the hearing officer had directed CSEA to withdraw.

The at-issue demand provided as follows:

(20) NEW.. Add Maintenance of Benefit Clause

All conditions or provisions now in effect which have been replaced by provisions of this agreement, shall remain in effect for the duration of this agreement unless mutually agreed otherwise between the Town and the Union.

On the authority of our holding in Police Association of the City of Mount Vernon, Inc., 13 PERB ¶3071 (1980), the hearing officer held that the subject demand was nonmandatory because it might continue in effect nonmandatory subjects of negotiation.

CSEA's exceptions assert that the hearing officer committed error because in its answer to the improper practice charge CSEA alleged that the at-issue demand "was intended to refer only to terms and conditions of employment or mandatory subjects of negotiation." It argues that Hudson Valley Community College, 12 PERB ¶3030 (1979) requires that a maintenance of benefits clause be deemed a mandatory subject of negotiation.

A review of the record and the cited authorities leads us to conclude that the hearing officer's decision should be affirmed.

In Hudson Valley Community College the demand we found to be a mandatory subject of negotiation provided that "the parties agree to maintain all terms and conditions of employment in effect until the negotiation of a successor agreement." In contrast, the at-issue demand provides "all conditions or provisions now in

effect...remain in effect...unless mutually agreed otherwise...."  
CSEA's intention, as announced in its answer to the improper  
practice charge, that the language "refer only to terms and  
conditions of employment" does not amend the demand. The state-  
ment of intention, made dehors the demand, cannot convert the  
plain nonmandatory language into a demand conforming to our  
finding in Hudson Valley Community College.

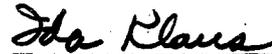
Accordingly, we affirm the findings of the hearing officer  
that CSEA has violated CSL §209-a.2(b).

NOW, THEREFORE, WE ORDER CSEA to negotiate in good faith by  
withdrawing the demand entitled "(20) Maintenance of Benefits  
Clause" from factfinding.

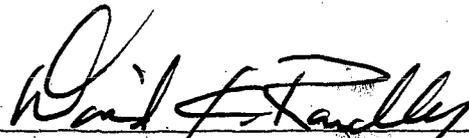
DATED: August 4, 1982  
Albany, New York



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 : #1E-8/5/82  
HEUVELTON TEACHERS ASSOCIATION, :  
Respondent, : BOARD DECISION AND ORDER  
 : CASE NO. D-0233  
upon the Charge of Violation of :  
Section 210.1 of the Civil Service :  
Law. :  
:

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On June 29, 1982, Martin L. Barr, Counsel to this Board, filed a charge alleging that the Heuvelton Teachers Association (Association) had violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a one-day strike against the Heuvelton Central School District (District) on May 6, 1982.

The charge further alleged that approximately 38 teachers out of a negotiating unit of 52 participated in the strike.

The Association filed an answer but thereafter agreed to withdraw it, thus admitting the factual allegations of the charge, upon the understanding that the charging party would recommend, and this Board would accept, a penalty of loss of the Association's right to have dues and agency shop fees deducted to the extent of one-fourth (1/4) of the amount that would otherwise be deducted during a year.<sup>1/</sup> The charging party has so recommended.

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<sup>1/</sup> This is intended to be the equivalent of a three month suspension of such right. Since the deductions are not made uniformly throughout the year, it is expressed as a fraction of the annual deduction.

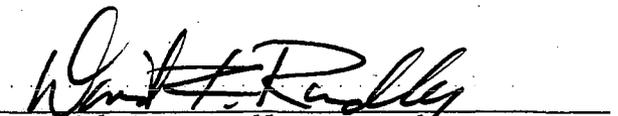
On the basis of the unanswered charge, we find that the Association violated CSL §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one and will effectuate the policies of the Act.

WE ORDER that the deduction rights of the Heuvelton Teachers Association be suspended, commencing on the first practicable date, and continuing for such period of time during which one-fourth (1/4) of its annual agency shop fees, if any, and dues would otherwise be deducted. Thereafter, no dues or agency shop fees shall be deducted on its behalf by the Heuvelton Central School District until the Heuvelton Teachers Association affirms that it no longer asserts the right to strike against any government, as required by the provisions of CSL §210.3(g).

DATED: Albany, New York  
August 4, 1982

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member