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State of New York Public Employment Relations Board Decisions from November 30, 1982

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 30, 1982

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2A-11/30/82

AVOCA CENTRAL SCHOOL DISTRICT,

Respondent,

Case No. U-5606

-and-

AVOCA CENTRAL SCHOOL TEACHERS
ASSOCIATION, LOCAL 2479, NYSUT,
AFT, AFL/CIO,

Charging Party.

MARILYN N. NORDINE, for Charging Party

HENRY M. HILLE, ESQ., for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Avoca Central School District (District) to a hearing officer's decision which found it to have violated §209-a.1(d) of the Taylor Law. The alleged violation was that it abolished the position of school nurse/teacher, one which was within the negotiating unit represented by the charging party, and established the substantially similar position of school nurse, which it treated as lying outside of that negotiating unit.

7889

FACTS

The Avoca Central School Teachers Association (Association) represents a unit of "all certified personnel" in the District. In April 1981, the District established, but did not fill, the position of school nurse. Shortly thereafter, it abolished the position of school nurse/teacher, which had been within the Association's negotiating unit. The position of nurse/teacher had required both a nursing license and teaching certification. In creating the school nurse position, the District dropped the latter requirement, and treated the position as being outside the Association's unit. The District offered the new position to Ahrens, who, up to that time, had served as nurse/teacher. Ahrens accepted under protest. Her salary as school nurse was set approximately \$2300 lower than that which she had received as nurse/teacher.

DISCUSSION

A public employer is not obligated to negotiate the nature or extent of the services that it chooses to provide to its constituency.^{1/} As such, it may unilaterally abolish unit positions and create nonunit positions having significantly different duties and functions than those of

^{1/}New Rochelle CSD, 4 PERB ¶3060 (1971)

the unit positions it abolishes. Where, however, a public employer abolishes a unit position and creates in its stead a nonunit position having substantially the same duties and functions as those of the abolished unit position, its action does not involve a decision relating to the extent or nature of services to be rendered, and as such, generally falls within the realm of mandatory negotiations.^{2/}

On the record before her, the hearing officer found the duties of school nurse/teacher and those of school nurse to be essentially the same. Having reviewed that record, we affirm the hearing officer's conclusion. As nurse/teacher, Ahrens had not been assigned regular teaching responsibilities. She had sporadically addressed a few classes when request was made of her by regular classroom teachers, but did so under their immediate supervision. Ahrens' only unsupervised instructional activity as nurse/teacher amounted to a single, annual half-hour lecture to fifth grade girls. It is therefore clear that teaching was not a significant aspect of the nurse/teacher's actual duties. In all other material

^{2/} North Shore UFSD, 10 PERB ¶3082 (1971), 11 PERB ¶3011 (1978); see also, Northport UFSD, 9 PERB ¶3003 (1976), aff'd 54 AD2d 935 (2d Dept., 1976), 9 PERB ¶7021 and East Ramapo CSD, 10 PERB ¶3064 (1977).

respects, the duties of nurse/teacher and school nurse were virtually identical. Indeed, the District's own witness, Giacomi, testified that the District's action was taken in order to provide essentially the same services at a lower cost.

The main thrust of the District's exceptions in this regard concerns differences in potential rather than actual job duties. It argues that the positions of school nurse/teacher and school nurse are dissimilar because the former has teaching capability owing to its certification requirement. In support of its argument, the District cites numerous judicial decisions which have held that the two positions are not "similar" within the intendment of §2510.1 of the Education Law. These cases have no binding effect upon our interpretation of the Taylor Law, and are inapposite given the different aims of the two statutes.^{3/} The hearing officer correctly noted that in North Shore UFSD, 10 PERB ¶3082 (1977), we implicitly rejected the argument that certification and teaching potential should be of controlling importance in determining the similarity of nurse/teacher and school

^{3/}Compare the concern for tenure rights underlying §2510.1, as set forth in Bork v. No. Tonawanda City School District, 60 AD2d 13, (4th Dept., 1977), with our effort to define Taylor Law negotiating obligations, as set forth in New Rochelle, supra.

nurse positions.^{4/}

The District's unilateral removal of work from the Association's negotiating unit was an improper practice unless, as in certain cases we have previously decided, the facts and circumstances surrounding the action evidence a predominant interest relating to the performance of a public employer's mission. The hearing officer properly found our decision in West Hempstead UFSD, 14 PERB ¶3096 (1981), to be inapplicable. There, we permitted a unilateral replacement of unit personnel with nonunit personnel due to the District's compelling need to upgrade the quality of its cafeteria supervision and thereby protect its own property and the safety of its students. The hearing officer also correctly ruled that our decisions permitting the "civilianization" of positions formerly held

^{4/} There, we remanded to the hearing officer for further evidence of the actual teaching duties of the respective positions. Upon receiving the hearing officer's report on remand, we found that teaching had been a significant aspect of the abolished nurse/teacher position, since its duties involved 30-40 hours of unsupervised instruction. Creation of the nonunit school nurse position eliminated two-thirds of the instructional hours and imposed a requirement of direct supervision. On these facts, which stand in stark contrast to those present herein, we found a substantial change in the nature of the job assignment, and held that the District's unilateral action did not constitute an improper practice. 11 PERB ¶3011 (1978).

by police officers are inapposite. In those cases,^{5/} we found the employer's action to primarily involve management's fundamental right to determine the employment qualifications of personnel performing the tasks therein at issue. Here, too, the District's decision to drop the requirement of teaching certification for the tasks at issue involves the setting of new employment qualifications. A critical factor in our civilianization decisions, however, was that the employer's action had no adverse impact upon terms and conditions of employment, since the police officers were simply transferred to other, equally compensated unit positions. By contrast, in the present case, the District's decision to alter employment qualifications was coupled with a decision to remove Ahrens from the Association's negotiating unit and to significantly decrease her compensation. The District's exercise of its right to establish employment qualifications neither requires nor empowers it to unilaterally remove Ahrens from the Association's negotiating unit to her distinct detriment.

When an employer simply alters the qualifications for a unit position without substantially altering the position

^{5/} City of New Rochelle, 13 PERB ¶3045 (1980), City of Albany, 13 PERB ¶3011 (1980), County of Suffolk, 12 PERB ¶3123 (1979).

itself through a significant change in duties, it may not, in conjunction therewith, treat the position as lying outside the unit and unilaterally change the terms and conditions of employment of the position's incumbent. To allow such unilateral action would be to allow an employer to circumvent and undermine an employee organization's representative status.

This is not to say that the District may not alter the qualifications for the position encompassing the duties herein at issue and thus drop the requirement of teaching certification. For this reason, the District's exceptions to the remedy ordered by the hearing officer have some merit. By ordering restoration of the nurse/teacher position to the Association's negotiating unit, the hearing officer thereby ordered restoration of the teaching certification requirement. An appropriate remedy ought not interfere with the District's decision to alter employment qualifications, but should only address the unilateral removal of unit work and unilateral alteration of terms and conditions of employment. Thus, while the District need not restore the requirement of teaching certification, it must continue to negotiate with the Association regarding the position now denominated school nurse, since that position is in all material respects the same position as was previously denominated school nurse/teacher, and therefore remains in the Association's unit.

7895

In so ruling, we are not unmindful of the parties' collective agreement, which recognizes the Association as representative of "all certified personnel." A contractual recognition clause, however, does not always accurately reflect actual unit work, especially when, as here, it defines the unit in terms of job qualifications rather than job duties. The actual work of this position, which had been treated as being in the unit, did not substantially change with the change in the job qualifications or with the purported removal of the position from the unit. Since teaching for which certification is required was at most a minimal aspect of the duties of the nurse/teacher position, the recognition clause is not controlling, and does not shield the District from its statutory obligation to negotiate with the Association concerning a position which encompasses unit work. Should there be a dispute as to the continued appropriateness of including the school nurse position in the Association's negotiating unit, the question may be addressed in the parties' future negotiations or raised in a representation proceeding timely filed with this Board.

NOW THEREFORE, WE ORDER the Avoca Central School

District to:

1. Restore Ahrens to the terms and conditions of employment she enjoyed as school nurse/teacher, and return to her

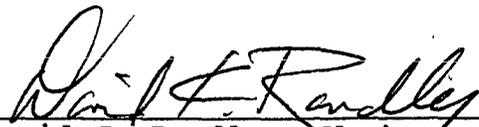
any loss of wages and benefits she suffered by reason of the violation herein found, from the date of abolition of the school nurse/teacher position, with interest thereon at the rate of three percent per annum, and

2. Negotiate in good faith with the Association concerning the terms and conditions of employment of the position of school nurse, and
3. Post the attached notice in those locations normally used by the District to communicate with the employees in the unit represented by the Association.

DATED: November 30, 1982
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

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 all employees that the District:

1. Shall restore Michaelene Ahrens to the terms and conditions of employment she enjoyed as school nurse/teacher, and shall return to her any loss of wages and benefits she suffered since the date of abolition of the nurse/teacher position, with interest thereon at the rate of three percent per annum, and
2. Shall negotiate in good faith with the Avoca Central School Teachers Association, Local 2479, NYSUT, AFT, AFL/CIO concerning the terms and conditions of employment of the position of school nurse.

.....
Avoca Central School District
Employer

Dated

By
(Representative) (Title)

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

7898

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2B-11/30/82

UNITED UNIVERSITY PROFESSIONS, INC.,
NEW YORK STATE UNITED TEACHERS, and
AMERICAN FEDERATION OF TEACHERS,

Respondents,

CASE NO. U-6263

-and-

THOMAS C. BARRY,

Charging Party.

THOMAS C. BARRY, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Thomas C. Barry to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge against United University Professions, Inc. (UUP), the New York State United Teachers (NYSUT) and the American Federation of Teachers (AFT). The charge alleges that UUP and its affiliate organizations NYSUT and AFT violated §209-a.2(a) of the Taylor Law by collecting agency shop fees to which they are not entitled.

Barry asserts three bases for his charge. The first is that the refund procedure is inadequate in that the

agency shop fees are shared by the three affiliated employee organizations but the final appellate step of the refund procedure covers only the monies retained by UUP. The second is that NYSUT and AFT are not entitled to agency shop monies because they are not certified or recognized as representatives of the negotiating unit, and §208.3(a) of the Taylor Law extends agency shop fee privileges to recognized or certified employee organizations only. The third is that the statutory obligation that he pay an agency shop fee violates Barry's religious and philosophical principles and is, therefore, unconstitutional.

Without requiring an answer from the respondent employee organizations, the Director dismissed the charge on the ground that the facts as alleged could not constitute an improper practice as set forth in §209-a of the Taylor Law. Barry has filed timely exceptions.

Having reviewed the charge and the amplification of it which Barry submitted at the request of the Director, we affirm so much of the Director's decision as dismissed the second and third bases of the charge. We have already considered the right of a recognized or certified employee organization to share its agency shop fees with its affiliate organizations and found it to be acceptable so long as the refund procedure covers the monies sent by the

recognized or certified organizations to its affiliates. Indeed, the prior decision dealt with UUP, NYSUT and AFT, the same respondents as here, UUP (Eson), 11 PERB ¶3068 (1978). The third basis of the charge would require this Board to rule upon the constitutionality of the laws under which it operates. This is beyond the power of an administrative agency. Cherry v. Brumbaugh, 255 AD 880 (2d Dept., 1938); Nassau Children's Home v. Board of Zoning, 77 AD2d 898 (2d Dept., 1980).

Turning to the first basis of Barry's charge, we find that facts were alleged which could constitute an improper practice. Barry alleges that between 60 and 70 percent of the agency shop monies received by UUP go to NYSUT and AFT; that neither NYSUT nor AFT has a refund procedure; that UUP has a refund procedure with arbitration as the final appellate step; and that the arbitration step is limited to agency shop fee monies retained by UUP and does not extend to monies transmitted to NYSUT and AFT. In support of the last allegation, Barry cites the decision of one arbitrator who stated that his jurisdiction was determined by UUP's submission to him and that the submission did not authorize him to "go behind the representations of NYSUT and AFT with respect to the amount of refund due from the expenditures of each organization". To the same effect, Barry quotes a second

arbitrator as saying that his jurisdiction, as conferred by UUP, required him to accept the amounts of the refunds of NYSUT and AFT "as is".

Based upon these allegations, Barry contends that he is challenging not the amount of the refund, but the process by which the amount is ascertained and by which its adequacy may be appealed, a process which insulates 60 to 70 percent of his agency shop fees from the review required by the Taylor Law. Thus, according to Barry, his charge sets forth a prima facie case under §208.3(a) of the statute. We agree. Finding that the substance of Barry's allegations is that UUP has not maintained a proper refund procedure, we determine that his allegations are sufficient to require the processing of his charge under part 204 of our Rules of Procedure.

UUP is entitled to agency shop fees from Barry and from other unit employees who chose not to join, provided that it

has established and maintained a procedure providing for the refund to any employee demanding the return [of] any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.
[§208.3(a) of the Taylor Law.]

The employee organization directly enjoying the agency shop fee privilege is free to establish a refund procedure that includes internal appellate steps or it may limit the

7902

agency shop fee payer to a single-step internal refund procedure.^{1/} In either case, however, the procedure must apply to both the part of the agency shop fees that it retains and that which it forwards to its affiliates. UUP (Eson), 11 PERB ¶3068 (1978). This is the clear and rational import of the statutory language, which makes the direct beneficiary of the agency shop fee privilege accountable for all of the agency shop fees it collects even though it transmits some of that money to affiliated organizations to which it is subordinate.^{2/} It cannot escape that responsibility by claiming that it lacks power to impose a refund procedure upon organizations to which it is subordinate. If it cannot obtain

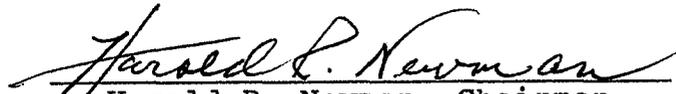
^{1/} While UUP has devised a multi-step internal appellate procedure, the amount of the refunds made by other unions can be challenged only in a plenary court action. Hampton Bays, 14 PERB ¶3018 (1981); St. Lawrence-Lewis County BOCES Teachers Assn., 15 PERB ¶3113 (1982).

^{2/} Compare, New Hyde Park Unit, Nassau Co. Chapter, CSEA, 11 PERB ¶3018 (1978), in which we held that the Chapter's continuing right to dues deduction and agency shop fee privileges depended upon its not striking, and that the dues and fees enjoyed by the Chapter were indivisible. Thus, by striking, it not only lost the part of the dues and fees that it would normally have kept but also that which it would normally have forwarded to its parent organization, CSEA.

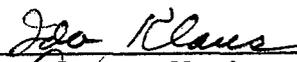
that power from those organizations as a condition for sharing its agency shop fee monies with them, then it cannot itself qualify as a recipient of the agency fee funds.

NOW, THEREFORE, WE ORDER that the charge herein be,
and it hereby is, remanded to the
Director for further proceedings
consistent with this decision.

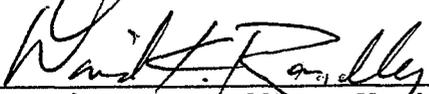
DATED: November 30, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF SCARSDALE,

#2C-11/30/82

Employer-Petitioner,

-and-

CASE NO. C-2321

UNIFORMED FIRE FIGHTERS ASSOCIATION
OF SCARSDALE, INC., LOCAL 1394,

Intervenor.

RAINS & POGREBIN, P.C.
(TERENCE M. O'NEIL, ESQ. and
ERNEST R. STOLZER, ESQ., of Counsel),
for Employer-Petitioner

LOMBARDI, REINHARD, WALSH & HARRISON, P.C.
(RICHARD P. WALSH, JR., ESQ., of Counsel),
for Intervenor

This matter comes to us on the exceptions of the Uniformed Fire Fighters Association of Scarsdale, Inc., Local 1394 (Local 1394) to a decision of the Director of Public Employment Practices and Representation (Director) that fire captains employed by the Village of Scarsdale (Village) should be removed from the negotiating unit in which other firefighters of the Village are represented and placed in a separate unit. The bases of his decision are his finding that the fire captains supervise the other firefighters and his conclusion that a public employer's request that supervisors and rank-and-file employees be

7905

separated for labor relations purposes must be granted. Local 1394's exceptions challenge both bases of the decision.

As to the first basis, Local 1394 asserts that fire captains are team leaders who work alongside the rank-and-file employees when fighting fires. While conceding that the captains exercise traditional supervisory responsibilities over the rank-and-file firefighters in connection with some assignments, it argues that those assignments do not occupy the major part of the working time of the employees. More importantly, according to Local 1394, in the fighting of fires, which is the primary responsibility of firefighters, all firefighters, regardless of rank, constitute a team.

Addressing the second basis of the Director's decision, Local 1394 argues that even if the captains are supervisors, the Village's request that they and the rank-and-file employees be placed in separate units should not be granted. In support of this argument, it cites the report of the Taylor Committee which rejected a per se rule precluding the inclusion of supervisors in rank-and-file units.^{1/} More particularly, it notes that the captains

^{1/} Governor's Committee on Public Employee Relations, Final Report, March 31, 1966, p. 25.

and rank-and-file firefighters have been represented in a single unit for 26 years and the record contains no evidence that this unit structure has caused any bargaining or administrative problems for either the employees or the Village. Based upon these facts, it argues that the unit satisfies the standards prescribed by §207.1 of the Taylor Law.

In response to Local 1394's position, the Village has presented written and oral arguments which support the reasoning of the Director. It contends that the captains are supervisors even though their function when actually fighting fires reflects a greater commitment to teamwork than is typical of a normal supervisor-subordinate relationship. Indeed, that teamwork is a factor in the Village's argument that a per se rule excluding captains from the rank-and-file unit is needed. It asserts that to prove that the existing unit does not satisfy the standards prescribed by §207.1 would require the testimony of some of the captains, and the production of that testimony would be detrimental to the teamwork approach.

Having considered the record, we reverse the conclusion of the Director. Although we agree with the Director that fire captains are supervisors, we do not accept the application of a per se rule requiring their separation from the existing unit. Here, there is a 26-year history of joint representation which should have been considered in

determining whether the existing unit satisfies §207.1. As indicated by us in Buffalo City School District, 14 PERB ¶3051 (1981), while our assumption might be that a unit comprising supervisors and rank-and-file employees would not satisfy the statutory standards, record evidence might persuade us otherwise where a combined unit has existed for a long period of time without any showing of adverse effect on the interests of either group.

In Buffalo, an employee organization sought to represent supervisory employees in a separate unit after 13 years in which they had been represented by another organization in a unit that also contained rank-and-file employees. In support of its petition, the employee organization merely alleged that the employees it was seeking to represent were supervisors. It neither alleged facts nor introduced evidence bearing upon the statutory standards. The petition was opposed by the employer and by the employee organization representing the existing unit, with the employer making the uncontested assertion that its administrative convenience would be better served by the continuation of the existing unit structure. Determining that the basis of the petitioner's case was a presumed conflict of interest between the two groups of employees and finding no evidence of any manifestation of any such conflict during the 13-year history of the unit, we dismissed the petition.

Here, an employer seeks the separation of supervisory and rank-and-file employees after 26 years of joint representation. Its petition is opposed by the only other party, the employee organization which represents the existing unit. The employee organization has demonstrated on the record, that the two groups of employees share a community of interest. The basis of the petitioner's case is that its administrative convenience requires the separation of supervisors from rank-and-file employees so that effective supervision will not be subverted. There is, however, no evidence whatsoever of any manifestation of such a subversion of effective supervision during the 26-year history of the unit. Absent such evidence, the existing unit should not be disturbed.

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

DATED: November 30, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

7909

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2D-11/30/82

NEW YORK CITY TRANSIT AUTHORITY and
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY,

Respondents,

CASE NO. U-5637

-and-

SPECIAL INSPECTORS BENEVOLENT
ASSOCIATION,

Charging Party.

JOAN STERN KIOK, ESQ., for
Charging Party

RICHARD K. BERNARD, ESQ.,
(ROBERT RIFKIN, ESQ., of
Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Special Inspectors Benevolent Association (Association) to a hearing officer's decision dismissing its charge that the New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority (Authorities) violated paragraphs (a), (c) and (d)^{1/} of subdivision 1 of §209-a

^{1/}As filed, the charge alleged only violations of paragraphs (a) and (c). It was amended during the course of the hearing to allege a violation of paragraph (d). We therefore reject the Authorities' argument in opposition to the exceptions that the Association is precluded from asserting that they violated their duty to negotiate in good faith.

of the Taylor Law in that they unilaterally transferred duties previously performed by unit employees (called special inspectors), to newly hired nonunit employees (called confidential investigators), and laid off 30 of 40 special inspectors.^{2/} The hearing officer determined that the duties assigned to the confidential investigators were substantially different from those performed by the special inspectors, thus supporting the Authorities' position that they did not constitute unit work. Accordingly, she found, the Authorities' unilateral action did not violate their duty to negotiate with the Association.^{3/} In the absence of such a duty, she found no basis for concluding that the unilateral action was improperly motivated and, therefore, violative of paragraphs (a) and (c). Finally, she found no evidence that the Association had sought to negotiate the impact of the layoffs and, consequently, that the Authorities had violated no duty to participate in such negotiations.

^{2/}The hearing officer's decision also dismissed a related charge made by the Association in case U-5401. As no exceptions were filed to that part of the hearing officer's decision, the matter is not before us.

^{3/}Cf. Saratoga Springs, 11 PERB ¶3037 (1978), affd. Saratoga Springs CSD v. PERB, 68 AD2d 202 (3d Dept., 1979), 12 PERB ¶7008, lv. app. den. 47 NY2d 711 (1979), 12 PERB ¶7012.

FACTS

The Association was first told on June 26, 1981 by the Authorities that 30 of the 40 positions in its negotiating unit would be eliminated one week later and that the 30 incumbents would be laid off. At that time the Association and the Authorities were negotiating for a first collective bargaining agreement, such negotiations having commenced eight and a half months earlier. One of the demands made by the Association during the negotiations was that there be "no subcontracting of special inspectors' duties, obligations or positions".

Upon being informed of the projected layoffs, Frederick Laverpool, president of the Association, made three unsuccessful attempts to speak to Transit Authority president, John D. Simpson. His purpose in seeking those meetings was to negotiate job opportunities as confidential investigators for the laid off special inspectors.

At the same time as the Authorities laid off the 30 special inspectors, they established a new Office of Inspector General for which they created 23 confidential investigator positions. The amount budgeted for each of these positions was somewhat less than the average salary of the special inspectors. The duties of the special inspectors had been to investigate employee misconduct and fraud by vendors. The authority of the new Office of Inspector General included the investigation of employee

misconduct and vendor fraud, and aspects of crime and corruption which had previously been the concern of the City's Department of Investigation. After the creation of the Office of Inspector General, the responsibilities of the special inspectors were restricted to control of employee absenteeism and employee sick leave abuse. Only ten special inspectors were retained.

DISCUSSION

On the record before us, we determine that the Authorities violated paragraph (d) of §209-a.1 of the Taylor Law, but not paragraphs (a) and (c). The Authorities' unilateral action was taken in violation of its duty to negotiate in good faith. There is insufficient evidence, however, of an improper motive for taking the action.

Although not improperly motivated, the Authorities' conduct violated §209-a.1(d) in three particular respects. First, it constituted a unilateral reassignment of the unit work of special inspectors to the nonunit confidential investigators. The job specifications for both titles show sufficient similarity to support this conclusion.^{4/}

^{4/}Compare Laverpool v. New York City Transit Authority, unreported (Kings Co., special term, July 12, 1982) in which the Court found that for the purpose of Civil Service Law Section 86 which provides that an honorably discharged veteran or exempt volunteer fireman who was laid off should be transferred "to a similar position wherein a vacancy exists," the positions of special inspector and confidential investigator are similar.

Second, and even more clearly established, the Authorities violated their duty to negotiate in good faith by failing to inform the Association of the contemplated layoffs, particularly as plans for those layoffs were being formulated at the very time when the parties were in negotiations for a collective bargaining agreement, which negotiations included a demand prohibiting loss of jobs through subcontracting of unit work. The withholding at such time of information so crucially affecting the employees and the Association was plainly incompatible with the basic requirements of good faith bargaining. By failing to disclose their plan, the Authorities foreclosed any real opportunity for the Association to formulate and negotiate specific demands to ease, or perhaps even avoid, the hardships the employees would suffer.

Finally, we determine that the Association did seek to negotiate the impact of the layoffs when it learned about them and that the Authorities refused to participate in such negotiations. Reason dictates, and the Authorities should have assumed, that when Laverpool, the Association's president, made three unsuccessful attempts to speak to Simpson, the Transit Authority's president, about obtaining job opportunities for the laid off special inspectors as confidential investigators, he was seeking negotiations regarding the impact of the layoffs. The Authorities' argument, that Laverpool could not have been seeking negotiations with Simpson because he knew that the

Authorities' negotiators were Gattuso and Crannan, is not persuasive. In view of the failure of Gattuso and Crannan to tell the Association about the projected layoffs during negotiations, thus frustrating the possibility of impact discussions, they should have assumed that when Laverpool sought on behalf of the Association to speak to Simpson, he was appealing to the president of the Transit Authorities for negotiations on impact.

By reason of the Authorities' refusal to negotiate with the Association, we order them to cease and desist from such conduct in the future. Moreover, as the Authorities' refusal to negotiate included unilateral action that injured unit employees, we order them to make the employees whole for the injuries suffered as a consequence of that unilateral action.^{5/} Accepting the Authorities' testimony that they were required to lay off employees because of financial problems, we do not require them to reinstate all the special inspectors who were laid off. We do, however, require them to reinstate special inspectors by a number equal to that of the nonunit confidential investigators who were hired by the Authorities.

NOW, THEREFORE, WE ORDER the New York City Transit
Authority and Manhattan and Bronx
Surface Transit Operating Authority:

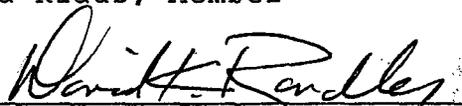
^{5/}Saratoga Springs, supra, at footnote 3.

1. To cease and desist from refusing to negotiate in good faith with the Special Inspectors Benevolent Association; and
2. In accordance with the normal appropriate order of reinstatement, to reinstate special inspectors in a number corresponding to the number of confidential investigators who were employed by the Authorities and who had not previously been special inspectors, such reinstated special inspectors to be made whole for lost wages with 3 percent interest thereon and for other lost benefits; and
3. To post a notice in the form attached at all locations ordinarily used to communicate information to unit employees.

DATED: November 30, 1982
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

7916

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 all unit employees that:

1. The New York City Transit Authority will not refuse to negotiate in good faith with the Special Inspectors Benevolent Association; and
2. The New York City Transit Authority will, in accordance with the normal appropriate order of reinstatement, reinstate special inspectors in a number corresponding to the number of confidential investigators who were employed by it who had not previously been special inspectors, such reinstated special inspectors to be made whole for lost wages with 3 percent interest thereon and for other lost benefits.

..... New York City Transit Authority

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.

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 all unit employees that:

1. The Manhattan and Bronx Surface Transit Operating Authority will not refuse to negotiate in good faith with the Special Inspectors Benevolent Association; and
2. The Manhattan and Bronx Surface Transit Operating Authority will, in accordance with the normal appropriate order of reinstatement, reinstate special inspectors in a number corresponding to the number of confidential investigators who were employed by it who had not previously been special inspectors, such reinstated special inspectors to be made whole for lost wages with 3 percent interest thereon and for other lost benefits.

Manhattan and Bronx Surface
.....Transit Operating Authority.....

Dated

By
(Representative) (Title)

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2E-11/30/82

County of Rensselaer,

Employer,

-and-

New York State Nurses Association,

CASE NO. C-2467

Petitioner,

-and-

Rensselaer County Unit of the
Rensselaer County Local 842, Civil
Service Employees Association, Inc.
AFSCME/AFL-CIO, Local 1000,

Intervenor.

GORDON R. MAYO, ESQ., for Employer

HARDER, SILBER & GILLEN, ESQ.,
(RICHARD J. SILBER, ESQ., of Counsel),
for Petitioner

ROEMER & FEATHERSTONHAUGH, ESQ.,
(DONA S. BULLUCK, ESQ., of Counsel),
for Intervenor.

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the New York State Nurses Association (NYSNA) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition to represent a unit of nurses employed by Rensselaer County. The basis of the

Director's decision is his determination that the appropriate unit in which the nurses should be represented consists of both nurses and other employees of the County. The County and Rensselaer County Unit of the Rensselaer County Local 842, Civil Service Employees Association, Inc., AFSCME/AFL-CIO, Local 1000 (CSEA), which now represents both the nurses and other County employees, agree with the Director's determination.

Upon a prior petition filed by NYSNA in April 1968, a separate unit of nurses employed by the County was found to be appropriate. However, CSEA was victorious in the ensuing election and it was certified as representative of the unit. During the following 13 years, CSEA and the County negotiated a series of contracts covering the County's employees which treated nurses as if they were in the same unit as the other County employees. That 13-year negotiating history reveals no evidence of a conflict of interest between the nurses and the other County employees or that the ability of the County or its employees to fulfill their joint responsibilities to the public had been compromised. Having reviewed the record, we conclude that a 13-year history of negotiations between the County and CSEA supports the Director's determination.

The unit decision made in 1968 was based upon an assumption that the inclusion of nurses and other County employees in a single unit would not satisfy the standards set forth in §207 of the Taylor Law. Although the original unit designation may have remained in theory, the negotiations since that time covered both nurses and other County employees and those negotiations have demonstrated that a unit comprising nurses and other employees of Rensselaer County does satisfy the statutory standards. In view of this evidence, we determine that a separate unit of nurses employed by Rensselaer County is not appropriate and affirm the decision of the Director dismissing the petition.

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

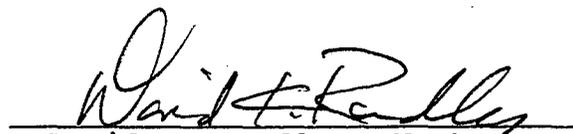
DATED: November 30, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2F-11/30/82

CHAUTAUQUA COUNTY BOARD OF COOPERATIVE
EDUCATIONAL SERVICES,

Employer,

-and-

CHAUTAUQUA COUNTY BOCES TEACHERS
ASSOCIATION,

CASE NO. C-2359

Petitioner,

-and-

BOCES OF CHAUTAUQUA COUNTY NON-
INSTRUCTIONAL EMPLOYEES ASSOCIATION,

Intervenor.

HODGSON, RUSS, ANDREWS, WOODS &
GOODYEAR, ESQS. (ROBERT M. WALKER,
ESQ. and DAVID A. FARMELO, ESQ.,
of Counsel), for Employer

STEPHEN J. MELCHISKEY and RANDY E.
RHINEHART, for Petitioner and
Intervenor

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the
Chautauqua County Board of Cooperative Educational Services
(Employer) to a decision of the Director of Public
Employment Practices and Representation (Director) removing
two nurses from a unit of noninstructional employees
represented by BOCES of Chautauqua County Non-Instructional

Employees Association (Intervenor) and placing them in a unit of teachers, dental hygienists and psychologists represented by Chautauqua County BOCES Teachers Association (Petitioner). The Petitioner and Intervenor, both of which are affiliated with the New York Educators Association, support the Director's decision.

The basis of the Director's decision is his conclusion that nurses have a closer community of interest with the teachers, dental hygienists and psychologists than they do with the noninstructional employees. In support of this conclusion, he quoted the testimony of one of the nurses that:

We feel that the instructional unit provides the more concrete community of interests as far as our responsibilities are concerned; we feel the Teachers Association offers recognition of licensing and educational background; we feel that it provides a more optimum professional atmosphere for advancement and recognition, and we feel that it also would offer a chance for advancement for ourselves.

In support of its exceptions, the Employer alleges that the position of nurses has been in the noninstructional unit since it was created more than six years ago. It further alleges that the six-year negotiating history covering that unit reveals no evidence of a conflict of interest between the nurses and the other noninstructional employees or that the ability of the Employer or its employees to fulfill their joint

responsibilities to the public have been impaired. Finally, it alleges that the placement of nurses in the noninstructional unit was confirmed in a certification issued to the intervenor by this Board two years ago.^{1/}

Having reviewed the record, we find that it supports the employer's allegations and, on the facts shown, we reverse the decision of the Director.

The evidence of the nurses' sense of a community of interest with the teachers, dental hygienists and psychologists is not sufficient to overcome the evidence of six years of representation of the nurses in the noninstructional unit without any evidence that the representation was ineffective.^{2/} Moreover the unit placement of the nurses was reaffirmed two years ago in a certification issued to the intervenor by this Board. Accordingly, no acceptable reason has been shown for

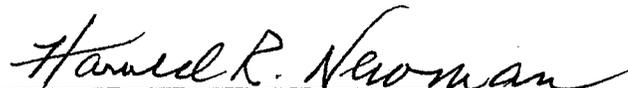
^{1/}Chautauqua County BOCES, 13 PERB ¶3000.09 (1980)

^{2/}We note that the testimony of nurses in Rockland County, 10 PERB ¶3014 (1977), that they felt no community of interest with the other employees in a county-wide unit, was insufficient to justify removing them from that unit. Moreover, in Rockland County, but not here, there was some evidence that the employee organization representing the nurses had not paid as much attention to the nurses' concerns as it should have.

disturbing the stability of the existing unit structure by changing the current unit designation.

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

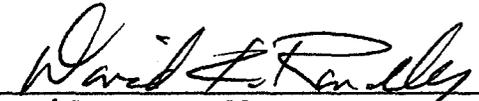
DATED: November 30, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member



#3A-11/30/82

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
50 WOLF ROAD
ALBANY, NEW YORK 12205

COUNSEL
MARTIN L. BARR

CERTIFIED MAIL

December 2, 1982

Charles O. Ingraham, Esq.
~~Aswad & Ingraham, Esqs.~~
46 Front Street
Binghamton, New York 13905

Re: Case No. M-81-473 - Yates County
and Yates County Deputy Sheriff's
Association

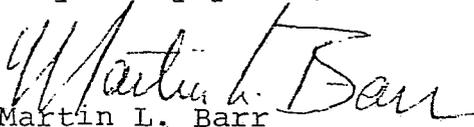
Dear Mr. Ingraham:

I have been directed by the Board to advise you that at its meeting of November 29-30, 1982, it considered the application of the Yates County Deputy Sheriff's Association to review the decision of the Director of Conciliation denying the petition of the Association for interest arbitration pursuant to Civil Service Law §209.4, and affirmed the decision of the Director.

The Board directed that the following be placed in the minutes of its meeting of November 29-30, 1982 as its decision in the matter:

Case No. M-81-473 - Yates County and Yates County Deputy Sheriff's Association - The Board affirms the decision of the Director of Conciliation denying the petition of the Yates County Deputy Sheriff's Association for interest arbitration pursuant to Civil Service Law §209.4. After considering the facts and arguments submitted by the Association, the Board reconfirms its decision in Erie County Sheriff and Erie County, 7 PERB ¶3057 (1974) that a sheriff's department is not an "organized police force or police department" within the meaning of Civil Service Law §209.4 as amended by Chapter 725 of the Laws of 1974.

Very truly yours,


Martin L. Barr
Counsel

MLB/mk

cc: John M. Sheridan, Esq.
Jan S. Scofield, Sheriff, Yates County

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