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12-30-1982

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

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 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-12/30/82

NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION,

Respondent,

CASE NO. U-4779

-and-

HARRY FARKAS,

Charging Party.

ARNOLD W. PROSKIN, P.C., for Respondent

HARRY FARKAS, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Harry Farkas to a hearing officer's decision dismissing his charge that the New York State Public Employees Federation (PEF) failed to represent him adequately in connection with his complaint that the State improperly refused to promote him to the position of Principal Radiological Health Engineer in the Department of Health.^{1/} The hearing officer

^{1/}Farkas withdrew his charge at the pre-hearing conference upon the understanding that PEF would reconsider his complaint against the State. He later complained that PEF did not reconsider his complaint and he sought to revive his charge. When the hearing officer denied his request, he filed exceptions. We then remanded the matter to the hearing officer with instructions that he consider the charge on its merits. PEF (Farkas), 15 PERB ¶3020 (1982). The exceptions herein are to the hearing officer's decision after reconsidering the charge.

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determined that the facts alleged in the charge do not set forth a prima facie case and that, in any event, the record evidence does not establish a violation by PEF.

Farkas complained to PEF that the State manipulated its classification procedures to change its organizational structure and the qualifications of the job he sought in order to evade its obligation to offer him the promotion. He alleged that this conduct of the State violates the merit system and other anti-discrimination and equal opportunity guarantees, laws, rules and regulations.^{2/} When PEF advised him that, in its judgment, the State's conduct was not illegal, Farkas complained that, at the very least, it violated the "spirit and intent" of the law. When PEF refused to initiate action designed to compel the State to promote Farkas, he brought the instant charge.

Noting that the charge did not allege a contract violation, the hearing officer ruled that PEF's duty of fair representation did not obligate it to seek to protect statutory rights of Farkas not derived from the Taylor Law unless its refusal to do so was discriminatory. As the

^{2/}In his exceptions he alleges that the State's conduct also violates its contract with PEF. No such allegation was made in the charge and there is no record evidence to support it.

charge did not allege any evidence of any such discrimination, the hearing officer found that the facts as alleged did not set forth a violation. Moreover, according to the hearing officer, the record supports PEF's contention that it made a reasoned determination that a lawsuit or a grievance based upon Farkas' complaint against the State could not be won because the State had not violated the letter of the law. Therefore, he ruled, its decision not to initiate proceedings on behalf of Farkas was not improper.

Farkas has specified nine exceptions to the hearing officer's decision. Their first theme is that PEF should have called the State to task for the State's violation of the "spirit and intent" of various laws.^{3/} The second underlying theme of Farkas' exceptions is that PEF's consideration of his complaint was so superficial as to constitute an improper practice even though he was not singled out for such superficial treatment.

Having reviewed the record, we affirm the hearing officer's findings of fact and conclusions of law. On the

^{3/}In this connection, he alleges in his exceptions that articles 37 and 41 of the collective bargaining agreement support his position. As there is no reference to these contractual provisions in the charge or anywhere else in the record, the contract itself not having been placed in evidence, we find it inappropriate to consider this allegation as a basis for reversing the hearing officer.

facts as alleged, PEF was not obligated to try to help Farkas get the promotion he sought. Even so, it did evaluate his request and it made a reasoned judgment that any efforts that it could make on Farkas' behalf would be unsuccessful. Accordingly, the hearing officer's conclusion that PEF's conduct did not breach its duty of fair representation toward him was correct.

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

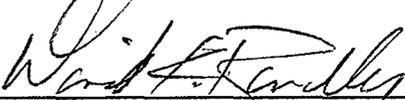
DATED: December 30, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
COUNTY OF NASSAU,

#2B-12/30/82

Respondent,

-and-

CASE NO. U-5571

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE POLICE DEPARTMENT OF THE
COUNTY OF NASSAU, INC.,

Charging Party.

EDWARD G. McCABE, ESQ. (JACK OLCHIN, ESQ., of
Counsel), for Respondent

AXELROD, CORNACHIO & FAMIGHETTI, ESQS. (MICHAEL C.
AXELROD, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the County of Nassau (County) to a hearing officer's decision that it unilaterally changed terms and conditions of employment of employees represented by the Patrolmen's Benevolent Association of the Police Department of the County of Nassau, Inc. (PBA).

The record shows that prior to July 6, 1981, a unit employee could have requested a meal period at certain times during his tour of duty. The County could reject the request but, if it rejected two such requests during a single tour, the employee would receive a premium payment to

compensate him for the missed meal period. Effective July 6, 1981, the County began to offer unit employees a meal break at times that suited its own convenience. If a unit employee rejected the meal break at the offered time, the County would not give him the premium payment if it then denied his request for a meal break at some other time.

According to the County, the new practice merely assures it of an adequate complement of unit employees at all times and its adoption was therefore the exercise of a management prerogative. Moreover, the County relies upon a management rights clause contained in its agreement with PBA which reserves to it the right "to regulate work schedules".

The hearing officer concluded that the County's unilateral change involves neither the exercise of a management prerogative nor a right given to it by the agreement. In reaching this conclusion he determined that the pre-July 6, 1981 procedure did not restrict the County's authority to deploy unit employees, but only required it to compensate unit employees when it exercised that authority in a manner that deprived them of a benefit. Thus, the County's adoption of the new practice constituted a unilateral change depriving unit employees of the premium pay. According to the hearing officer, the change involved a mandatory subject of negotiation and the unilateral action violated the County's duty to negotiate in good faith.

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In its exceptions, the County argues that the hearing officer erred in not finding that its conduct was authorized by the management rights clause in the agreement and that there was no past practice which included the right of a unit employee to decide when to take his meal break.

Having reviewed the record, we affirm the decision of the hearing officer. All of the County's arguments are directed to the proposition that it, and not the unit employees, could decide when the unit employees could take their meal breaks. However, this proposition has not been questioned either by charging party or by the hearing officer. The charge merely alleges, and the hearing officer found, that the County unilaterally decided to discontinue its practice of making premium payments to unit employees when it refused their requests for meal breaks at their preferred times. The parties' agreement does not reserve to the County the right to discontinue such premium pay. Accordingly, the unilateral discontinuance of the premium pay was improper.^{1/}

^{1/}The County apparently takes the position that the payment of premium pay for missed lunch breaks interferes with its ability to deploy its policemen by making it more costly. All premium pay provisions impose some costs upon employers for exercising a right that they enjoy. Thus, premium payments inevitably discourage the exercise of that right. Nevertheless, premium pay provisions are a mandatory subject of negotiation if the pay bears a reasonable relationship to the circumstance giving rise to the premium pay. Spring Valley PBA, 14 PERB ¶3010 (1981).

NOW, THEREFORE, WE ORDER the County to restore the practice of premium payments as it existed prior to July 6, 1981 and to compensate those employees who may have been improperly denied such premium payments, together with 3 percent interest thereon.

WE FURTHER ORDER the County to post a notice in the form annexed hereto at all places used by it for the purpose of communicating with members of the unit represented by the charging party.

DATED: December 30, 1982
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
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 all members of the unit represented by the PBA that:

The County of Nassau will restore the practice of premium payments for meal periods as it existed prior to July 6, 1981, and compensate those employees who, as the result of the change in that practice, have been denied such premium payments, together with interest thereon.

COUNTY OF NASSAU

.....
(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.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

#2C-12/30/82

Employer,

-and-

UNITED FEDERATION OF TEACHERS, NYSUT,
LOCAL 2, AFT, AFL-CIO,

CASE NO. C-1986

Petitioner,

-and-

THE COMMITTEE FOR PER DIEM ORGANIZATION,

Intervenor.

JACK SCHLOSS, ESQ., for Employer

JAMES R. SANDNER, ESQ. (JEFFREY S. KARP,
ESQ., of Counsel), for Petitioner

JUDITH SEPHTON, for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of The Committee for Per Diem Organization, the intervenor herein, to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its objections to the conduct of an election. The election was held by mail ballot in a unit of "occasional" per diem

substitute teachers^{1/} employed by the Board of Education of the City School District of the City of New York (District) and was won by the United Federation of Teachers, NYSUT, Local 2, AFT, AFL-CIO (UFT), the petitioner herein.^{2/}

A list prepared by the District on March 25, 1982, was used to check the showing of interest of the petitioner and of the intervenor.^{3/} The eligibility list used

^{1/}The Board of Education of the City School District of the City of New York employs three categories of per diem substitute teachers: "full term" per diems, who are hired after the fifteenth day of the term for the remainder of the term, "other-than-occasionals", who replace particular teachers for a period of at least 30 consecutive days and "occasional" per diems, who replace teachers for less than 30 days. The Director had previously determined that "full term" per diems and "other-than-occasional" per diems should be in the same negotiating unit as regular teachers. New York City Board of Education, 10 PERB ¶4043 (1977). In the instant proceeding, the Director determined that the "occasional" per diem substitute teachers constitute a separate negotiating unit.

^{2/}There were 7,289 occasional substitutes on the eligibility list. Of these, 3,452 cast ballots, 2,392 voting for the petitioner, 1,013 for the intervenor and 41 for neither. Six ballots were challenged and not counted.

^{3/}The list contained the names of 3,629 occasional substitutes who worked for the District from September through December 1981. Many occasional substitutes who worked for the District after December 1981 had not worked for it earlier in the school year and thus were not included on this list.

in the mail ballot election was given to the parties on June 9, 1982.^{4/} Election notices were posted by the District on or about June 17, 1982 in all schools. The ballots were mailed by the Director on June 23, 1982, and were returnable to him by July 14. Any person claiming to be entitled to a ballot and asserting that he had not received one could call PERB's New York City office on June 30 or July 1 and request a ballot. The ballots were then counted on July 14, 1982.

The intervenor has objected to the conduct of the election and to the conduct affecting the results of the election on various grounds. It argues that the two-week period between the furnishing of the new eligibility list and the mailing of the ballots was insufficient for it to check the additional 2,660 names on it in order to prepare proper challenges, to correct mistakes in addresses so as to be able to communicate with all unit employees and, generally, to run an effective campaign. Thus, according to the intervenor, the Director erred in not granting its request to postpone the election. The intervenor

^{4/}This list contained all the occasional substitutes who had worked for the District at least one day in the 1981-82 school year and who were sent on June 9, 1982, a letter from the District giving them a reasonable assurance of continuing employment during the 1982-83 school year.

acknowledges that the petitioner was furnished with the same list at the same time. It argues, however, that the petitioner, as an established organization, was better able to meet the problems occasioned by the short period of time between the furnishing of the list and the mailing of the ballots.

The intervenor also complains that the failure of the District to post notices before June 17 was a serious defect because few occasional substitutes worked after that date and would therefore not have seen the posted notices. An earlier posting was made all the more important, it asserts, because some of the addresses contained in the second eligibility list were missing, others were wrong and the names of some eligible employees were not on it.^{5/}

The intervenor challenges the second eligibility list on the ground that some persons were improperly included because they were either per diem secretaries or retired teachers who worked as occasional substitutes. According to the intervenor, these secretaries and retired teachers

^{5/}The record shows that the addresses of 400 occasional substitutes were missing from the June 9 eligibility list. It also shows that some occasional substitutes were listed twice. In addition to these established inaccuracies, the intervenor asserts that the addresses of 125 occasional substitutes were inaccurate.

should have been excluded from the unit because they had independent relationships with petitioner in their nonsubstitute teacher capacities. Finally, the intervenor asserts that yet another group included as occasional substitutes were regular teachers of the District.^{6/}

We conclude that the Director did not abuse his discretion in deciding that the ballots should be mailed two weeks after the eligibility list was given to the two employee organizations. We recognize that his decision created a problem for both employee organizations of examining the list and communicating with the newly added employees within a short period of time. The problem, however, was not insurmountable as indicated by the fact that both employee organizations sent out mailings after the issuance of the list. In view of this fact, the Board finds that both organizations were able to meet the problem effectively.

^{6/}Some of the intervenor's assertions were made in supplemental exceptions and in a reply to the petitioner's response to the exceptions. The petitioner objects to our considering these assertions because they were submitted after the time for filing exceptions had expired. As we conclude that these additional assertions add no substance to the intervenor's position, it is unnecessary for us to decide whether to disregard them.

While the record shows that there were some imperfections in the second eligibility list, we see no basis for finding that they affected the outcome of the election, particularly in view of the size of the petitioner's victory. As to the asserted inadequacies in the list relating to retired teachers and per diem secretaries who also worked as occasional substitutes, we find them to be without merit because these employees served as occasional substitutes and therefore are properly in the unit in that capacity. The intervenor's other claimed inadequacies relating to inclusions or exclusions of names are unsupported statements.

We also affirm the decision of the Director dismissing the intervenor's objection to the conduct of the election and to conduct affecting the election on the ground that the notices of election were not posted before June 17, 1982. The Director properly concluded that the posting did not deprive unit employees of an opportunity to participate in the election. In Bethpage UFSD, 15 PERB ¶3094 (1982), we determined that representation elections involving per diem substitute teachers must be by mail ballot because the intermittent nature of their employment makes it unlikely that a substantial number of them would be at work on any particular day. As noted by the Director, because of this circumstance, the posting of a notice of an election is not

the most effective way of notifying all such employees of the election. The mailing of ballots to employees at their homes does give them effective notice of the election and a fair opportunity to participate.

Accordingly, we affirm the Director's dismissal of the objections and we find that a representation proceeding has 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 that a negotiating representative has been selected.

NOW, THEREFORE, pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Federation of Teachers, NYSUT, Local 2, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:

Included: Occasional per diem substitute teachers who have received the reasonable assurance of continuing employment referred to in Civil Service Law, §201.7(d).

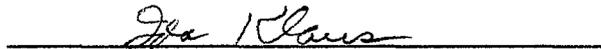
Excluded: All other employees.

Further, IT IS ORDERED that the Board of Education of the City School District of the City of New York shall negotiate collectively with the United Federation of Teachers, NYSUT, Local 2, AFT, AFL-CIO 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.

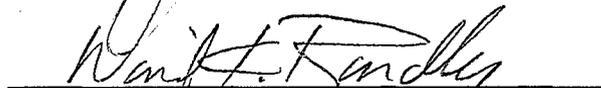
DATED: December 30, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2D-12/30/82

AUBURN INDUSTRIAL DEVELOPMENT AUTHORITY,

Employer,

CASE NO. C-2313

-and-

TEAMSTERS LOCAL UNION 506,

Petitioner.

EDWARD A. O'HARA, III, ESQ., for Employer

ROCCO A. DE PERNO, ESQ. (GEORGE C. MURAD,
ESQ., of Counsel), for Petitioner

BOARD DECISION AND ORDER

On September 22, 1982, we determined that the maintenance workers employed by the Auburn Industrial Development Authority (Authority) constitute a negotiating unit and we instructed the Acting Director of Public Employment Practices and Representation (Acting Director) to ascertain whether a majority of the employees in the unit wished to be represented by Teamsters Local Union 506 (Teamsters), the petitioner herein. There were two such maintenance workers at the time. Thereafter, on October 19, 1982, the Acting Director issued a decision determining that the Teamsters had submitted evidence of support from both unit employees and that the evidence was sufficient to satisfy the requirements of §201.9(g)(1) of this Board's rules for certification without an election.

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The matter now comes to us for certification of the Teamsters. However, on October 20, 1982, the Acting Director received a letter from the Authority informing him that one of the two unit employees had been dismissed, thus leaving a one-person unit, and arguing that no certification should be issued because one-person units are inappropriate. When the Acting Director informed the Authority that its letter was received after the issuance of his decision, the Authority filed exceptions to that decision.

The Authority's exceptions argue that this Board should not certify the Teamsters because one-person units are inappropriate. The Teamsters' response to the exceptions is that changes in the composition of the unit subsequent to its definition by this Board on September 22, 1982, must be deemed an attempt by the Authority to evade and circumvent the obligations of our unit determination. It does not, however, deny that there is now only one person in the unit, or assert that the employee had been released for other than business reasons not related to this representation matter.^{1/}

On the record before us, we must conclude that the Authority's decision to dismiss one of the two unit

^{1/}The Authority had informed the Teamsters on October 1, 1982, that one of the two unit employees would be dismissed because the Authority had lost its major tenants and was operating at a deficit which was exhausting its capital.

employees was not an attempt "to evade or circumvent" the obligations of our decision of September 22, 1982, defining the unit. We must therefore decide whether a certification may be issued to an employee organization to represent a one-person unit.

This question has not come before us previously^{2/} and is not directly covered by the Taylor Law. However, since the time of the passage of the National Labor Relations Act, the National Labor Relations Board has dismissed representation petitions involving one-person units. It has explained its position by stating:

The National Labor Relations Act creates the duty of employers to bargain collectively. But the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain. MGM Studios, 8 NLRB 181, 2 LRRM 327 (1938).

Indeed, when a union has been certified by the National Labor Relations Board in a unit of more than one person that subsequently shrinks to a single person, the right of the union to negotiate ceases.^{3/} In our view this

^{2/}In an unappealed decision, the Director of Public Employment Practices and Representation decided that one-person units are not appropriate under the Taylor Law, North Tonawanda Housing Authority, 10 PERB ¶4046 (1977), and Counsel to this Board has issued an opinion to the same effect, 11 PERB ¶5005 (1978).

^{3/}See Westinghouse Electric Corp., 179 NLRB No. 289, 72 LRRM 1316 (1969) and Roman Catholic Orphan Asylum, 229 NLRB No. 251, 95 LRRM 1118 (1977).

reasoning applies to collective negotiations under the Taylor Law and we adopt it. Moreover, §207.1(a) of the Taylor Law gives further support to the conclusion that one-person units are not appropriate. It provides that a negotiating unit "shall correspond to a community of interest among the employees in the unit". A community of interest among employees contemplates more than one employee.

Here, the unit contained more than one person when the petition was filed, when the unit was defined and when majority support for the Teamsters was established. All the procedures of this representation proceeding had been completed before the unit shrank, perhaps temporarily, to one person. It would therefore be unfair and impractical to withhold certification and to require the filing of a new petition if the Authority should hire additional employees.^{4/} However, so long as there is only a single person in the unit, the Teamsters will have no right to negotiate pursuant to the certification.

NOW, THEREFORE, pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Teamsters Local Union 506 has been designated and selected by a majority of the employees of the above named public employer, in the unit

^{4/}Section 201.3(g) of our Rules of Procedure would not authorize the filing of such a petition for one year.

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described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All maintenance employees

Excluded: All other employees.

DATED: December 30, 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

#2E-12/30/82

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

BOARD DECISION
AND ORDER

Employer,

-and-

UNION OF SCHOOL LUNCH SUPERVISORS, LOCAL 74
ORGANIZING COMMITTEE, AMERICAN FEDERATION OF
SCHOOL ADMINISTRATORS, AFL-CIO,

Petitioner,

-and-

TERMINAL EMPLOYEES LOCAL 832, JOINT
COUNCIL 16, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

CASE NO. C-2390

Intervenor.

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Employer,

-and-

UNION OF SCHOOL LUNCH MANAGERS, LOCAL
74 ORGANIZING COMMITTEE, AMERICAN
FEDERATION OF SCHOOL ADMINISTRATORS,
AFL-CIO,

Petitioner,

-and-

TERMINAL EMPLOYEES LOCAL 832, JOINT
COUNCIL 16, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

CASE NO. C-2391

Intervenor.

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MARC Z. KRAMER, ESQ., for Employer

JOHN T. MURRAY, ESQ., for Petitioners

COHEN, WEISS & SIMON, ESQS. (JAMES L.
LINSEY, ESQ., of Counsel), for
Intervenor

On November 30, 1981, Local 74, American Federation of School Administrators, AFL-CIO (Local 74) filed two petitions to represent employees of the Board of Education of the City School District of the City of New York (District). The first (C-2390), on behalf of the Union School Lunch Supervisors Organizing Committee, was to represent school lunch supervisors. The second (C-2391), on behalf of the Union of School Lunch Managers Organizing Committee, was to represent school lunch managers.

The petitions were opposed by Terminal Employees Local 832, Joint Council 16, International Brotherhood of Teamsters (Local 832) which currently represents both groups of employees. It asserted that Local 74's showing of interest was defective in that the signatures on some of the designation cards which it submitted were fraudulent. It also asserted that both groups of employees are in a single negotiating unit which, it argued, should not be fragmented. The District supported the position of Local 74 that school lunch supervisors and school lunch managers should be represented in distinct negotiating units.

After an investigation, the Director of Public Employment Practices and Representation (Director) determined that while several designation cards submitted by Local 74 were defective, these defects did not establish fraudulent conduct on the part of Local 74. He also found that the valid cards were numerically sufficient. The Director also determined that there should be separate negotiating units for the school lunch supervisors and the school lunch managers. The matter now comes to us on the exceptions of Local 832 to both these determinations of the Director.

FACTS

The District employs about 400 managers to run its lunch programs and to supervise its rank and file food service employees at its various schools. There are three titles in the school lunch manager series - school lunch manager, head school lunch manager and chief school lunch manager; the larger the school to which the manager is assigned, the higher his title. All three titles have been in one negotiating unit and have been represented by Local 832 since the early 1960's.

The position of school lunch supervisor was created about 10 years after Local 832 first represented the managers. One supervisor is assigned to run the lunch program in each of the 32 community school districts

and he exercises undisputed supervisory authority over the school lunch managers in his district. Shortly after the position of school lunch supervisor was created, Local 832 was recognized as the representative of a separate unit of the supervisors.

In early 1978, an organization which is not a party to the instant proceeding, petitioned to represent the supervisors and managers in a single unit. That organization, Local 832 and the District stipulated that the combined unit was the appropriate one and an election was held which was won by Local 832. Without considering the appropriateness of the stipulated unit, this Board certified Local 832 in the combined unit. Local 832 relies upon that certification for its position that there is now one rather than two units.

After the merger of the units in 1978, contract negotiations were conducted separately, the contracts were separately ratified by the unit employees and separately approved both by the District and by the New York City Emergency Financial Control Board.

DISCUSSION

1. The Showing of Interest

Local 832 contends that the Director should have rejected Local 74's showing of interest. We do not

agree.^{1/}

A showing of interest is merely designed to permit this Board to screen out cases in which there is no showing of substantial support by a petitioner so that public funds will not be needlessly expended in the processing of those cases; it is not designed to protect an incumbent employee organization.^{2/} We have therefore deemed the Director's determination, that a showing of interest exists, to be an internal administrative act which is not subject to review.^{3/}

^{1/}In doing so it does not challenge the test used by the Director - whether Local 74 deliberately submitted false designation cards. It argues, however, that the Director erred by excluding it from his investigation.

^{2/}See §201.4(c) of our Rules of Procedure, State of New York, 15 PERB ¶3014 (1982), Yonkers Board of Education, 10 PERB ¶3100 (1977) and Erie County, 13 PERB ¶3105 (1980). See also Suffolk Chapter CSEA v. Helsby, 63 Misc. 2d 403 (Sup. Ct., Suf. Co., 1970), 3 PERB ¶7008; PBA of New York State v. Helsby, 84 Misc. 2d 17 (Sup. Ct., Alb. Co., 1975), 8 PERB ¶7016; CSEA v. Milowe, 66 AD2d 38, (3rd Dept., 1979), 12 PERB ¶7001, affirmed in relevant part, 46 NY2d 1005, 12 PERB ¶7005 (1979).

^{3/}In any event, Local 832 had no legitimate interest in the Director's investigation. Moreover, the decision of the Director that the defective designation cards did not taint the showing of interest was correct. Local 74's method of collecting its showing of interest was a reasonable one and there is no evidence of any impropriety in its utilization of that method.

2. The Unit Determination

In Village of Scarsdale, 15 PERB ¶3125 (1982), we ruled that a history of long-standing, combined representation of supervisors and rank and file firefighters is sufficient to justify continuation of the combined unit in the absence of any evidence that the combined representation had adversely affected the statutory rights of either group of employees or interfered with the ability of the public employer or the public employees to serve the public. We indicated, however, that absent such a history, we would hold that a unit comprising supervisors and rank and file employees would not satisfy the requirements of §207.1 of the Taylor Law that a negotiating unit correspond to a community of interest among the employees and that it be compatible with the joint responsibilities of the public employer and the public employees to serve the public.

In the instant case there was in effect for four years a certification of a single unit for the school lunch managers and those who supervise them. Nevertheless, the managers and supervisors were represented as if they were in separate units. Accordingly, that four-year history affords no basis for a conclusion that the combined representation of the two groups would serve the interests of both groups of employees or that it would be consistent with the responsibilities of the public employer and public employees

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to serve the public.^{4/}

NOW, THEREFORE, WE ORDER that Local 832's exceptions to the decision of the Director be, and they hereby are, dismissed.

Affirming the decision of the Director, we find the following two units to be appropriate:

Included: Supervisor of School Lunch

Excluded: All other employees

Included: School Lunch Manager; Head School Lunch Manager; Chief School Lunch Manager

Excluded: All other employees

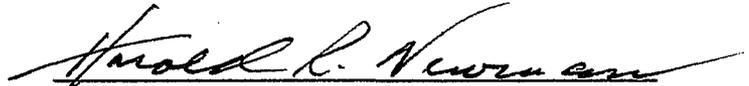
WE FURTHER ORDER:

1. that elections by secret ballot shall be held under the supervision of the Director among the employees in the negotiating units set forth above who were employed on the payroll date immediately preceding the date of this decision; and

^{4/}Local 832 argues that, having agreed to a combined unit in 1978, the District cannot now be heard to assert that such a unit diminishes its ability to serve the public. This argument is rejected. A public employer may change its mind about the appropriateness of a negotiating unit to which it agreed. All that is required is that it do so in a representation proceeding before this Board and not by unilateral action. County of Orange, 14 PERB ¶3060 (1981).

2. that the District shall submit to the Director and to the representative of each employee organization, within ten days from the date of its receipt of this decision, alphabetized lists of the employees in the negotiating units set forth above who were employed on the payroll date immediately preceding the date of this decision.

DATED: December 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

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK
and LEO E. SILVERSTONE,

#2F-12/30/82

Respondents,

CASE NO. U-5970

-and-

MAURICE GUMBS, JAMES BAUMANN, EDWARD
JOHNSON and FRANKLIN K. LANE HIGH
SCHOOL CHAPTER, UNITED FEDERATION OF
TEACHERS, LOCAL 2, AFT, AFL-CIO,

Charging Parties.

THOMAS P. RYAN, ESQ. (MARC Z. KRAMER, ESQ.
and RAYMOND F. O'BRIEN, ESQ., of Counsel),
for Respondents

JAMES R. SANDNER, ESQ. (ROBERT J. WARNER,
ESQ., of Counsel), for Charging Parties

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Maurice Gumbs, James Baumann, Edward Johnson and Franklin K. Lane High School Chapter, United Federation of Teachers, Local 2, AFT, AFL-CIO, the charging parties, to a hearing officer's decision dismissing their charge that the Board of Education of the City School District of the City of New York (District) and Leo E. Silverstone, an assistant principal

employed by the District, retaliated against them in violation of §209-a.1(a) of the Taylor Law. The charge alleged that Silverstone brought a frivolous defamation action against them in state court because they filed a grievance against him. The hearing officer dismissed the part of the charge which alleged a violation by Silverstone on the ground that §209-a.1(a) of the Taylor Law deals with acts committed by public employers and their agents but not with the acts of an individual. Thus, insofar as Silverstone acted on his own behalf, his conduct is beyond the reach of the Taylor Law. The hearing officer dismissed the part of the charge which alleged a violation by the District on the ground that Silverstone was not acting as its agent when he brought the court action and that the bringing of the court action was in no way attributable to it.

The record shows that on June 25, 1981, the charging parties wrote a letter to the principal of the school complaining about Silverstone, an assistant principal at the school. Charging parties characterize this letter as a grievance. Silverstone then commenced a civil action against the charging parties in which he complained that the letter defamed him. Several assistant principals and one principal encouraged Silverstone to bring the defamation action and even contributed to the cost involved.

We affirm the decision of the hearing officer dismissing the charge. Silverstone brought his defamation

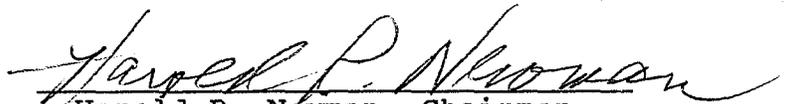
action on his own behalf. The record contains no evidence that Silverstone acted on behalf of the District. The fact that he was a supervisory employee of the District is not a basis for attributing his conduct to it since he had a personal interest in the lawsuit and the District could not have prevented him from filing it. Similarly, the support of Silverstone's colleagues reflected their identification with him personally rather than any concern for the District.

The charge must also be dismissed because the commencement of a lawsuit itself cannot constitute an improper practice. In Clyde Taylor Corp., 127 NLRB 108, 45 LRRM 1514 (1960), the National Labor Relations Board held that a threat to bring a lawsuit could constitute an unfair labor practice but the actual institution of a suit could not. It reasoned that the National Labor Relations Act could not deny "the normal right of all persons to resort to the civil courts to obtain an adjudication of their claims." Thus, according to the National Labor Relations Board, a party claiming to be aggrieved by the bringing of a lawsuit can vindicate his rights only by bringing a lawsuit of his own for malicious prosecution.^{1/}

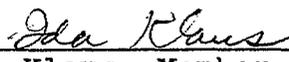
^{1/}To the same effect, see Machinists, the United Aircraft Corp., 534F 2d 422, 464 (CA2, 1975), 90 LRRM 2272, 2305. This Board has reached a similar conclusion in East Ramapo, 11 PERB ¶3075 (1978), when we held that except, perhaps, for extraordinary circumstances, the bringing of a representation case cannot constitute an improper practice. Cf. Village of Johnson City, 12 PERB ¶3020 (1979).

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

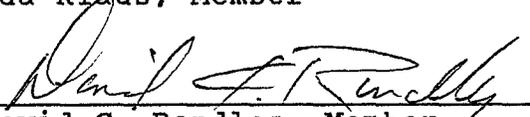
DATED: December 30, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :
OTSELIC VALLEY CENTRAL SCHOOL DISTRICT, : #3A-12/30/82
Employer, :
-and- : Case No. C-2508
OTSELIC VALLEY EMPLOYEES ASSOCIATION, :
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 the Otselic Valley Employees Association 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 non-instructional employees.

Excluded: Superintendent of Buildings and Grounds, Director of Transportation, Director of Food Service, Secretary to the Superintendent, Teachers, District Administrators, District Treasurer, Secretary to the Elementary Principal and Substitute Food Service Helpers.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Otselic Valley Employees Association 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.

DATED: December 30, 1982
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Union of the Town of Newark Valley Highway Department Employees 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.

DATED: December 30, 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 :
TOWN OF MASSENA, #3C-12/30/82 :
Employer, :
-and- :
LOCAL UNION 1249, INTERNATIONAL : Case No. C-2431
BROTHERHOOD OF ELECTRICAL WORKERS, :
AFL-CIO, :
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 Union 1249, International Brotherhood of Electrical Workers, AFL-CIO has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit 1 -- White Collar Unit

Included: Cashier, Customer Service Clerk,
Senior Billing and Collection Clerk,
Billing Machine Operator, Clerk-
Typist, Meter Reader, Meter Man,
Storekeeper.

Excluded: All other employees.

7994

Unit 2 -- Blue Collar Unit

Included: Chief Lineman, 1st Class Lineman,
Maintenance Custodian, Meter
Technician.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Local Union 1249, International Brotherhood of Electrical Workers, AFL-CIO 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.

DATED: December 30, 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 :
TOWN OF CHILI, : #3D-12/30/82
Employer, :
-and- : Case No. C-2506
AFSCME, NEW YORK, COUNCIL 66, :
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 AFSCME, New York, Council 66 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 full-time and regular part-time employees who work at least twenty hours per week.

Excluded: Supervisor, Highway Superintendent, Town Clerk, Budget Officer, Secretary to Supervisor, Assessor, Director of Recreation, seasonal and library employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with AFSCME, New York, Council 66 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.

DATED: December 30, 1982
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member