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New York State Public Employment Relations  
Board (PERB)

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1-28-1983

## State of New York Public Employment Relations Board Decisions from January 28, 1983

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from January 28, 1983

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

#2A-1/28/83

COUNTY OF NASSAU (DEPARTMENT OF  
PROBATION),

Respondent,

CASE NO. U-5772

-and-

NASSAU CHAPTER CIVIL SERVICE  
EMPLOYEES ASSOCIATION, LOCAL 830  
AFSCME, LOCAL 1000, AFL-CIO,

Charging Party.

---

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

RICHARD M. GABA, ESQ. (HOWARD E. GILBERT,  
ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

The charge herein was filed by Nassau Chapter Civil Service Employees Association, Local 830 AFSCME, Local 1000, AFL-CIO (CSEA). It alleges that Nassau County coerced and discriminated against probation officers represented by CSEA because they filed a grievance. The hearing officer found that the evidence sustained the charge. This matter now comes to us on the exceptions of Nassau County to the hearing officer's decision.

FACTS

The probation officers worked one night each week in addition to working their normal 8:15 a.m. to 4:00 p.m. shift that day. Until July 1979, the probation officers had received no compensation for the night work. Thereafter they were given compensatory time off. The change in July 1979 followed the filing of a grievance. The grievance was withdrawn when Nassau County's Director of Probation threatened the probation officers that if it were pursued he "would be forced to lay off personnel, install time clocks, [and] change shifts." Nevertheless, the County apparently made concessions regarding compensatory time off when the grievance was withdrawn.

Two years later, on October 5, 1981, several probation officers requested premium pay for the night work. The Deputy Director of Probation warned the probation officers that the established shifts would be changed if they filed a grievance on the issue. The request for premium pay was then denied and the grievance was filed. Thereupon, Nassau County reduced the hours of day shift work on days when night work was scheduled, which had the effect of eliminating overtime work.<sup>1/</sup> CSEA then filed the charge

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<sup>1/</sup>The change was formally made by Division Order #25-81, dated November 17, 1981.

herein. It also filed a grievance alleging that Nassau County had also acted in violation of the parties' contract.

DISCUSSION

Nassau County makes three arguments in support of its exceptions. The first is that its decision to eliminate overtime was not made in retaliation for the filing of the grievance. It also argues that its action was sanctioned by the management rights and zipper clauses of its contract with CSEA. Finally, it argues that by filing a grievance CSEA lost any right it may have had to consideration of its improper practice, the issues in both proceedings being identical.

We find no merit in the County's exceptions.

The evidence supports the hearing officer's conclusion that it changed the hours of work of the probation officers in retaliation for their filing the grievance complaining about the denial of premium pay. The record shows that both in 1979 and in 1981 the County threatened the probation officers with retaliatory action if the grievances were pursued. It did not tell the probation officers who requested premium pay in 1981 that it would avoid the problem of premium pay by eliminating overtime work. Rather it told them that it would do so if a grievance were filed.

Against this evidence, Nassau County cites the testimony of its Deputy Director of Probation denying

improper motivation. That testimony, dealing as it does with subjective attitude rather than observable facts, is not sufficient to overcome the implications of the record evidence. City of Long Beach, 13 PERB ¶3008 (1980), aff'd City of Long Beach v. PERB, 82 AD2d 1016 (1st Dept., 1981), 14 PERB ¶7018.

The County's claim of a contractual right to shorten the daytime hours of work of its probation officers is not relevant to the charge before us. While an employer's claim of contractual right might be a relevant defense to a charge alleging a violation of the duty to negotiate in good faith, it is not properly applicable to a charge alleging coercion or discrimination. Comsewoque UFSD, 15 PERB ¶3018 (1982). It is beyond debate that action that might otherwise be legal by sanction of statute or contract, may become illegal if it is designed to coerce or discriminate against public employees because of their exercise of protected rights.

There is a distinction between coercive and discriminatory action on the one hand and a violation of contract obligations on the other. Accordingly, we view CSEA's action in filing both the charge herein and the related grievance as proper recognition that separate and independent recourse is available to it for the vindication of the separate rights provided by the statute and by the

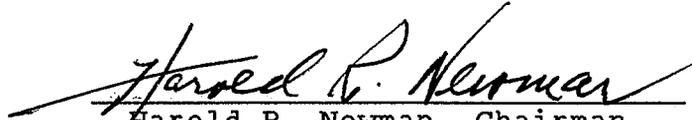
contract. The charge alleges a statutory violation. The grievance alleges a violation of contract. There is accordingly no inconsistency involved in CSEA's bringing these two proceedings, and no loss of the rights under the one by the pursuit of the other. The County's final defense is therefore rejected and we affirm the decision of the hearing officer.

NOW, THEREFORE, WE ORDER Nassau County to:

1. Rescind Division Order #25-81, dated November 17, 1981, and return to the night report duty schedule and overtime compensation practice in effect prior to October 5, 1981;
2. Credit the employees affected with the number of overtime hours they would have worked but for Nassau County's improper conduct and compensate them in accordance with the parties' contract;
3. Cease and desist from interfering with the exercise of rights protected by the Act and from discriminating against employees because of their exercise of rights protected by the Act; and
4. Conspicuously post copies of the Notice attached hereto at all locations

ordinarily used to communicate with  
employees represented by CSEA.

DATED: January 28, 1983  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

**we hereby notify** our employees that the County of Nassau will:

1. Rescind Division Order #25-81, dated November 17, 1981, and return to the night report duty schedule and overtime compensation practice in effect prior to October 5, 1981.
2. Credit the employees affected with the number of overtime hours they would have worked but for the scheduling change made by Nassau County on October 5, 1981, and compensate them in accordance with the parties' contract.
3. Not interfere with the exercise of rights protected by the Act and will not discriminate against employees because of their exercise of rights protected by the Act.

..... County of Nassau .....

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.*

8038

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
CROTON POLICE ASSOCIATION,

#2B-1/28/83

Respondent,

CASE NO. U-6224

-and-

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VILLAGE OF CROTON-ON-HUDSON,

Charging Party.

---

CORCORAN AND BRADY, P.C. (ROBERT D. BRADY,  
ESQ., of Counsel), for Respondent

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

BOARD DECISION AND ORDER

This matter comes to the us on the exceptions of the Village of Croton-on-Hudson (Village) to a hearing officer's decision dismissing its charge that three negotiation demands presented by the Croton Police Association (Association) for interest arbitration pursuant to §209.4 of the Taylor Law were not mandatory subjects of negotiation.<sup>1/</sup>

The first of the demands being challenged by the Village would provide:

Absence due to accident incurred on the job shall not count against sick leave.

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<sup>1/</sup>The hearing officer's decision contains other scope of negotiation rulings, but they were not challenged in the exceptions.

The Village argues that this is a redundant demand because it merely paraphrases a benefit already provided by General Municipal Law §207-c to the policemen who are represented by the Association.<sup>2/</sup> Citing Chateaugay CSD, 12 PERB ¶3015 (1979), it argues that a demand which does no more than assert a statutory right is not a mandatory subject of negotiation.

Our decision in Chateaugay is not applicable here. In that case we held a demand redundant which provided that the public employer would not replace a teacher with a paraprofessional. It was conceded that such action would violate §3009 of the Education Law and §80.33 of the Regulations of the Commissioner of Education.

Here, the statute merely provides that a policeman injured in the line of duty should be paid his salary in full. Unlike the contract demand, it does not say that a policeman's absence due to such an injury could not be treated as sick leave. Moreover, the Village has not been

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<sup>2/</sup> In pertinent part General Municipal Law §207-c provides:

Any member of a police force of any . . . village . . . who is injured in the performance of his duties or who is taken sick as a result of the performance of his duties so as to necessitate medical or other lawful remedial treatment shall be paid by the municipality by which he is employed the full amount of his regular salary or wages until his disability arising therefrom has ceased . . . .

able to cite any authoritative interpretation of the statute to this effect. Where, as is the case with this demand, there is any legitimate uncertainty that a statute covers the same ground as a demand, we will not determine the demand to be nonmandatory on the ground of redundancy.

Another demand being challenged by the Village would indemnify policemen for liability and lawsuit costs arising out of job connected activities. The demand states:

The Village shall indemnify and save harmless any member of the Department from and against any and all liability arising from injury to person or property occasioned wholly or in part by an act or omission of a member of the Department including any and all expenses, legal or otherwise, incurred in the defense of any claim or suit arising out of the performance of duty on behalf of the Village, provided the payment of same is not unlawful. (Emphasis supplied)

The Village argues that General Municipal Law §50-j makes this demand redundant.<sup>3/</sup> But the statute merely

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<sup>3/</sup>In pertinent part General Municipal Law §50-j provides:

Notwithstanding the provisions of any general, special or local law, charter or code to the contrary, every . . . village, . . . shall be liable for, and shall assume the liability to the extent that it shall save harmless, any duly appointed police officer of such municipality, authority or agency for any negligent act or tort, provided such police officer, at the time of the negligent act or tort complained of, was acting in the performance of his duties and within the scope of his employment.

provides for the indemnification of policemen for liability costs while the demand goes further, requiring their reimbursement for legal and other expenses in connection with a claim filed against them. Accordingly, this demand, too, is not a mere restatement of a statutory provision and is, therefore, not a nonmandatory subject of negotiation by reason of redundancy.

The remaining demand provides:

It is imperative that during the forthcoming contract year equality shall be attained in the rotation of shifts among all ranks and grades within the bargaining unit . . . .

It shall be a shared labor/management goal to achieve equality in the rotation of shifts among all ranks and grades within the bargaining unit and as attainable within the limits of the current manpower pool and budgetary appropriations. The Chief of Police will be directed to implement this goal by June 1, 1982. (Emphasis supplied)

The reference to "all ranks and grades" is ambiguous. Understanding the demand to mean that rotation will take place within rank and grade only to the extent that the Village chooses to have policemen of such rank and grade assigned to any shift, the hearing officer ruled that it was a mandatory subject of negotiation. The Village argues, however, that the meaning of the demand is that it must rotate policemen of all ranks and grades from shift to shift whether or not it chooses to assign policemen of such rank and grade to work each shift. The correctness of the

Village's interpretation of the demand is now made clear by the Association's brief in opposition to the exceptions. It indicates that the demand is designed to compel the Village to rotate the shifts of sergeants, there being four sergeants, all of whom now work the night shift only.

As clarified by the Association, the demand is not a mandatory subject of negotiation in that it interferes with the right of the Village to decide the rank of supervisors to be assigned each shift.<sup>4/</sup>

NOW, THEREFORE, WE ORDER the Croton Police Association to withdraw the demand found herein to be a nonmandatory subject of negotiation from further consideration under the impasse procedures set forth in §209.4 of the Taylor Law. WE FURTHER ORDER that with respect to the demands found herein to be

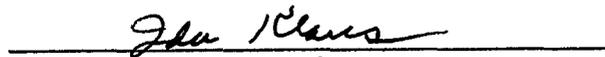
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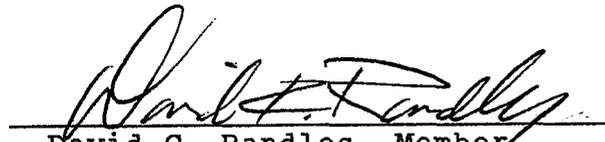
<sup>4/</sup>This is an extension of our ruling in Amherst Police Club, 12 PERB ¶3071 (1979), in which we held, "[t]he rank of supervisors to be assigned a particular duty is a management prerogative and not a mandatory subject of negotiation". (at p. 3126) See also Troy Uniformed Firefighters Association, 10 PERB ¶3015 (1977), in which we said, ". . . the rank of supervisors to be assigned to a particular duty is a management prerogative." (at p. 3034)

mandatory subjects of negotiation, the  
charge herein be, and it hereby is,  
dismissed.

DATED: January 28, 1983  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of :  
 : #3A-1/28/83  
TOWN OF NORTH CASTLE, :  
 :  
Employer, :  
 : Case No. C-2495  
-and- :  
 :  
CIVIL SERVICE EMPLOYEES ASSOCIATION, :  
INC., AFSCME, AFL-CIO, :  
 :  
Petitioner, :

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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 Civil Service Employees Association, Inc., AFSCME, AFL-CIO 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.

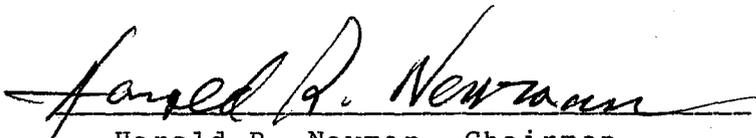
Unit:      Included:      Water & Sewer Maintenance Man G. I,  
Assistant Court Clerk, Sr. Account  
Clerk, Laborer, Intermediate Typist,  
Chief Water Treatment Plant Operator,  
Secretary to Zoning Board, Court  
Clerk, Intermediate Account Clerk  
Typist, Water Maintenance Man G. II,  
Recreation Leader, Secretary to Town  
Clerk, Intermediate Clerk, Maintenance  
Laborer, Secretary to Police Chief.

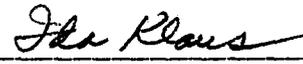
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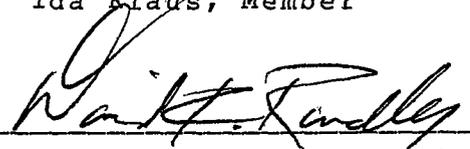
Excluded: Department Heads, Deputy Department Heads, temporary and seasonal employees, part-time employees earning less than \$4,000, and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., AFSCME, 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: January 28, 1983  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of : #3B-1/28/83  
:   
TOWN OF DRESDEN (HIGHWAY DEPARTMENT), :   
:   
Employer, :   
: Case No. C-2547  
-and- :   
:   
TEAMSTERS LOCAL 294, INTERNATIONAL :   
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, :   
WAREHOUSEMEN AND HELPERS OF AMERICA, :   
:   
Petitioner, :   
:

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that Teamsters Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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 employees of the Town Highway  
Department

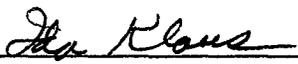
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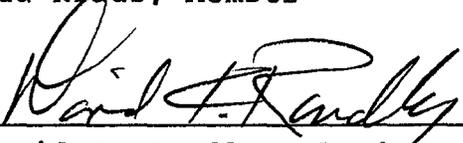
Excluded: Superintendent of Highways and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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: January 28, 1983  
Albany, New York

  
\_\_\_\_\_  
Harold R. Newman, Chairman

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

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

\_\_\_\_\_ : #3C-1/28/83  
In the Matter of :  
SOUTH SENECA CENTRAL SCHOOL DISTRICT, :  
Employer, :  
-and- : Case No. C-2519  
SOUTH SENECA TEACHERS ASSOCIATION, :  
NYSUT/AFT, :  
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 South Seneca Teachers Associaton, NYSUT/AFT 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 teacher assistants

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the South Seneca Teachers Association, NYSUT/AFT 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.

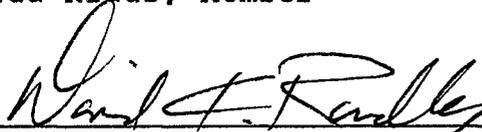
DATED: January 28, 1983  
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member