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Board (PERB)

2-11-1983

State of New York Public Employment Relations Board Decisions from February 11, 1983

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from February 11, 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

In the Matter of

#2-2/11/83

WYANDANCH UNION FREE SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-5818

WYANDANCH TEACHERS' ASSOCIATION,
NYEA/NEA,

Charging Party.

PACHMAN, OSHRIN & BLOCK, P.C. (ALAN D. OSHRIN, ESQ.,
of Counsel), for Respondent

FRANK SAYERS, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Wyandanch Union Free School District (District) to a hearing officer's decision that it violated its duty to negotiate in good faith with the Wyandanch Teachers' Association, NYEA/NEA (Association) by unilaterally increasing the teaching time of the employees who teach in its middle school and who are represented by the Association.

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The record establishes that the school day of the students was increased 25 minutes, several of the periods having been increased five minutes each. The teaching time of teachers at the middle school was increased 25 minutes along with the school day of the students, but there was no increase in the overall teacher workday or change in their other conditions of employment. The Association and the District had negotiated a 6 3/4 hour workday for teachers, which was retained after the increase in the student day. The record does not show, and the Association does not claim, that the teachers' working time within that 6 3/4 hour workday was increased. Their lunch time remained unchanged and their preparation periods were actually increased by five minutes.

The hearing officer determined that the increase in teaching time constituted an increase in work load and was therefore a mandatory subject of negotiation. In reaching her conclusion, she relied primarily upon State of New York (SUNY), 14 PERB ¶3068 (1981), aff'd ___ AD2d ___ (3d Dept., 1982), 15 PERB ¶7031. In that case we found that the State violated its duty to negotiate in good faith when it unilaterally changed from 12 to 15 the number of weekly

classroom teaching periods (student contact hours) of certain teachers at Morrisville College. Our reason was that for such teachers, the number of teaching periods actually determined the extent of their workday.^{1/}

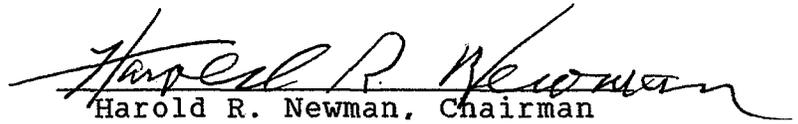
We do not find State of New York to be dispositive of the issue before us because here the actual length of teaching time did not control the extent of the working time of the teachers within their total workday. On the contrary, the negotiated workday for the teachers was not affected by the increase in teaching time. It follows that the change did not constitute an improper unilateral action.^{2/}

^{1/}The State had argued that the increase of teaching time did not establish an increase of teacher work load because the teachers had nonteaching responsibilities including "participation on committees, student advising, job placement and community service." This argument implies that the increase in teaching time was matched by a decrease in the time spent on other duties. We did not find this implication to be substantiated, there being no evidence as to the amount of time spent by the teachers on these other activities either before or after the increased teaching load.

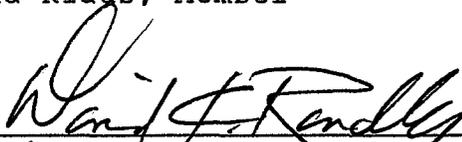
^{2/}See Norwich City School District, 14 PERB ¶3059 (1981).

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

DATED: February 11, 1983
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
TOWN OF SANTA CLARA,

#2B-2/11/83

Respondent,

CASE NO. U-6076

-and-

TEAMSTERS LOCAL UNION NO. 687,

Charging Party.

JOHN D. DELEHANTY, ESQ., for Respondent

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

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Teamsters Local Union No. 687 (Local 687) to a hearing officer's decision dismissing its charge that the Town of Santa Clara (Town) fired William J. Brown because he took the lead in organizing the employees of the Town's highway department. The hearing officer found that Brown had taken a lead in organizing the Town's highway department on behalf of Local 687 and that he was fired shortly thereafter. However, the hearing officer concluded that Brown's organizing activity was not the reason for his discharge.

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The record shows that the Town is divided into two geographical districts 40 miles apart. The primary responsibility of Brown, who resides in District 1, was to operate snow removal equipment in District 2. In the past, this had been the job of Robert Hickok, now the Town's highway superintendent and the Town officer who fired Brown. When Hickok resigned from that position in January 1981, he stated publicly that the snow removal operations in District 2 could not be properly performed by someone who lived far from the district. Thereafter when he campaigned for election as highway superintendent in the Fall of 1981, one of his campaign positions was that District 2's snow removal equipment operator would be a District 2 resident.

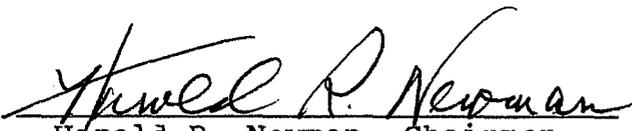
Brown initiated an organizing effort on behalf of Local 687 on December 8, 1981, which was after Hickok's election as highway superintendent. The record establishes that Hickok knew of Brown's organizational activities and that he was hostile to them. Nevertheless, when the Local submitted its showing of interest, the Town Board recognized it as negotiating representative. The Local presented its demands on February 9, 1982. Brown was fired on February 26, 1982.

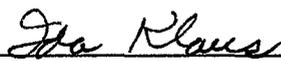
Having reviewed the record, we affirm the decision of the hearing officer that Hickok decided to fire Brown, not because of Brown's organizing activities but because Brown

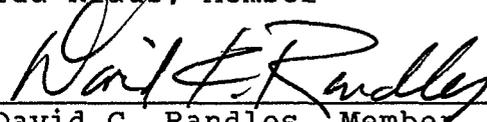
did not live in District 2. Accordingly, we cannot find that the discharge violated the Taylor Law.^{1/}

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

DATED: February 11, 1983
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

^{1/}See City of Albany v. Helsby, 29 NY2d 433 (1972), 5 PERB ¶7000, in which the Court said, "[T]he mere coincidence of an employee's union activity and the employer's transfer, demotion or discharge will [not] support a charge of discrimination."

We do not find it necessary to consider the correctness of an alternative basis for the hearing officer's decision, i.e., that Hickok did not act as an agent of the Town when he fired Brown.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2C-2/11/83

DUNDEE CENTRAL SCHOOL DISTRICT,

Respondent,

CASE NO. U-5705

-and-

MARTIN MILLER,

Charging Party.

MURRY F. SOLOMON, for Respondent

JOHN B. SCHAMEL, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Martin Miller to a hearing officer's decision dismissing his charge that Dundee Central School District (District) coerced and discriminated against him because he engaged in conduct protected by the Taylor Law.^{1/} His primary complaint is that the hearing officer erred in not finding that the

^{1/}The District filed three exceptions of its own. The first is that the hearing officer did not permit it to introduce evidence showing that Miller had committed perjury in another matter. The District's second exception parallels its first, dealing with the truth of statements contained in a letter sent by Miller. The hearing officer committed no error in rejecting this evidence as it was not relevant to the basis for his decision. The District's third exception is to the hearing officer's finding that it had evidenced concern, inter alia, about Miller's grievances. That finding is supported by the evidence. Accordingly, we dismiss the District's exceptions.

District acted improperly when it denied him reappointment as chairman of the math department. He also argues that the hearing officer erred in not finding that the District acted improperly when it denied him an opportunity to be accompanied by a fellow employee to a meeting with District representatives which was held at his request and at which the District was to explain to him why he had not been reappointed chairman of the mathematics department. Finally, Miller contends that the hearing officer erred in not finding that the District acted improperly when on August 26, 1981, it placed various documents in his file.

Miller had been chairman of the math department of the District for many years when he was denied reappointment. The District has asserted several reasons for its actions, all of which are supported by the record. He had filed an enormous number of complaints with various officials which, the school principal asserts, generated about one hour's work a day for him. He also engaged in insubordinate conduct and took inappropriate actions with respect to a student.

Among the complaints filed by Miller, there were nine grievances. On the record before us, however, we affirm the finding of the hearing officer that Miller's nonprotected activities were sufficiently distressing to the District so that it would not have reappointed him department chairman regardless of any concern it may have had about his filing

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of the grievances.^{2/}

We further conclude, as did the hearing officer, that the District was not obligated to permit Miller to be accompanied at the meeting with the District which he had requested and which was held so that the District could inform him of its reasons for the action it had already taken.^{3/} We also find that the hearing officer gave ample attention to Miller's allegation that the District acted improperly when it put various documents in Miller's file and we affirm his findings of fact and conclusions of law regarding this matter.

^{2/}Compare Smithtown, 11 PERB ¶3099 (1978), in which we said:

Thus, the record supports the hearing officer's conclusion that the decision not to rehire Glasheen, made by Germain, was arrived at because he deemed her to be a disruptive individual within his department. We agree with the hearing officer that the record does not establish that, but for her exercise of protected rights, Glasheen would still be working for the Town of Smithtown.

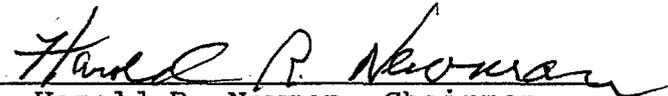
and City of Albany, 9 PERB ¶3055 (1976), aff'd City of Albany v PERB, 57 AD2d 37, 10 PERB ¶7012 (1977), (3d Dept., 1977), aff'd 43 NY2d 954, 11 PERB ¶7007 (1978).

See also City of Albany, 4 PERB ¶3056 (1971), in which we held that the evidence did not establish that the employees involved would have been promoted but for their having engaged in protected activities.

^{3/}See Tokheim Corp., 265 NLRB No. 210, 112 LRRM 1057 (1982).

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

DATED: February 11, 1983
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
CIVIL SERVICE TECHNICAL GUILD, LOCAL 375,

#2D-2/11/82

Respondent,

-and-

CASE NO. U-5972

LEON KATZ,

Charging Party.

BEVERLY GROSS, ESQ., for Respondent

LEON KATZ, pro se

BOARD DECISION AND ORDER

On July 21, 1982, a hearing officer determined that the Civil Service Technical Guild, Local 375 (Local) violated §209-a.2(a) of the Act by not providing Leon Katz, the charging party herein, with adequate financial information explaining the amount of the 1980 agency fee refund that it made to him. Having found merit to the charge, the hearing officer ordered the Local to refund to Katz the entire amount of his agency fee deduction for 1980 not forwarded to its affiliates,^{1/} with interest. She further ordered that at the time of making future refunds, the Local should furnish, together with those refunds, "an itemized, audited

^{1/}The charge concerns only the portion of the 1980 refund provided by the Local, not its affiliates.

statement of its receipts and disbursements."^{2/}

The matter now comes to us on the exceptions of the Local. The sole issue raised by the exceptions relates to the hearing officer's order that at the time of making future refunds the Local must give the person seeking the refund a "statement of its receipts and disbursements." The Local argues that this Board has no statutory authority to require disclosure of receipts. It argues that under the provisions of CSL §208.3(b) union receipts are irrelevant to the question of the refund amount. It argues that the refund calculation requires only determining the proportion which political and ideological expenditures are of all expenditures, and rebating an amount equal to that percentage. It reasons that since the itemization of rebatable and nonrebatable expenditures provides all relevant information, the inclusion by the hearing officer of the requirement of the disclosure of receipts has no statutory or record basis.

^{2/}The order adopted by the hearing officer in this regard is as follows:

It is further ordered that at the time of making any other and future refunds, it furnish, together with those refunds, an itemized, audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of its revenues from agency fees, such statement to indicate the basis of the determination of the amount of refund, including identification of those disbursements that are refundable and those that are not.

DISCUSSION

At the outset we observe that the hearing officer's requirement of the disclosure of receipts as well as expenditures follows the remedial order which we adopted when we first held that a union's failure to furnish an objector with detailed financial information at the time of refund constituted a violation of §209-a.2(a) of the Act. UUP (Barry), 13 PERB ¶3090 (1980). In that case we stated that detailed financial information should be furnished "so that employees may understand the basis on which their refund has been calculated and thus be able to determine whether an appeal is warranted and likely to succeed." In confirming that decision, the Appellate Division, Third Department, stated, in part: "Finally, we conclude that the remedy adopted by PERB was proper and well suited to prevent future improper practices." UUP v. Newman, 86 AD2d 734, 735 (1982), lv to app den 56 NY2d 504 (1982). We have since that decision uniformly included in our remedial orders the requirement that future refunds be accompanied by an "itemized, audited statement of receipts and expenditures".^{3/}

^{3/}See Hampton Bays, 14 PERB ¶3018 (1981); East Moriches, 14 PERB ¶3056 (1981); Westbury, 14 PERB 3063 (1981); Middle Country, 15 PERB ¶3004 (1982); Professional Staff Congress, 15 PERB ¶3012 (1982); Public Employees Federation, 15 PERB ¶3024 (1982).

We have been empowered "to establish procedures for the prevention of improper...employee organization practices... and to take such affirmative action as will effectuate the policies" of the Act. (CSL §205.5(d)). In our view, the real question raised by the Local is whether it will effectuate the policies of the Act to require an employee organization to furnish information concerning its receipts as well as its disbursements at the time of refund. We conclude that full disclosure of the receipts and expenditures of the employee organization provides a reasonable method of assisting the objector to understand the basis on which the refund has been calculated, thereby assuring more complete protection of the underlying rights of the public employees involved. This requirement is entirely consistent with the limited purposes of the agency fee statute and necessary to the proper effectuation of the essential policies of the basic Act.

The Local argues that expenditures are the only relevant elements in the calculation of the refund since the statute refers only to "expenditures". This misreads the statute. CSL §208.3(b) states that the refund shall represent "the employee's pro rata share of expenditures...of a political or ideological nature...". The significant term in this definition, for this purpose, are the words "pro rata share". "Pro rata" is defined as "proportionately according to some exactly calculable

factor...".(Websters' Third International Dictionary). The statute does not state how that proportion is to be calculated. It does not mandate a particular method for calculating the refund. The statute, therefore, cannot be construed as limiting our remedial orders to a particular method of refund calculation.

The Local argues that expenditures are the only relevant elements in the calculation of the "pro rata share" since the proportion can only be determined by comparing political and ideological expenditures to the total expenditures. Whether or not this is so, we know that it is not the method which some other unions use. In response to previous orders, we have been furnished with financial disclosures from other unions which show that the pro rata share is determined by them by computing the proportion of their political and ideological expenditures to their income. There may be still other methods used for calculating the refund.

Of more importance, however, if this Board were to accept this contention of the Local, we would, in effect, be holding that only one method of calculating the refund is proper. We believe that it would exceed our powers so to hold. We have previously held that we have not been granted the authority either by CSL §208.3(b) or §205.5(d), to review the accuracy of the refund determination, i.e., the

correctness of the amount of the refund. Hampton Bays, 14 PERB ¶3018 (1981). Essential to such a review would be the judgment as to the proper method of calculating the "pro rata share". The determination of that issue must be left to other forums. If we were now to choose one method as proper, we would be interfering with a process over which we have no jurisdiction.

It is the Chairman's view that until the courts determine that a particular formula is mandated, an employee organization which only uses expenditures in its calculation of the pro rata share should be required only to furnish information concerning its expenditures. We do not agree. We believe that in the proper administration of the statute, it is incumbent upon this Board to make the basic determination in the first instance as to the information that is needed. We cannot accept the Chairman's limited requirement because it would not reasonably assure the employee of an adequate basis for deciding whether an appeal from the organization's determination of the pro rata share is warranted and likely to succeed. Since on appeal, the objector is free to raise the question of the proper method of calculating the employee's pro rata share, it is appropriate that he be given sufficient information relevant to that question. The employee needs to know more than just the simple arithmetic process of how the employee

organization calculated the pro rata share. A statement of income and expenditures will enable him to determine whether, in the light of all the operations of the employee organization, it computed the refund on the basis of an inapposite formula. With that information in his possession, the employee will be afforded a reasonable basis for believing either that no further action is necessary or that an appeal is warranted.

Nor do we consider it necessary or administratively wise to examine the particular method by which each employee organization makes its determination and to fashion each of our orders accordingly. We believe our established order encompasses a reasonable range of methods of calculation and is properly applicable to all. We perceive no unreasonable burden on the Local by our established order.

Accordingly, we reject the exceptions of the Local, affirm the findings and conclusions of law of the hearing officer and adopt her remedial order.

WE ORDER Civil Service Technical Guild, Local 375:

1. To refund to Leon Katz the entire amount of his agency shop fee deduction for 1980 which it did not forward to its affiliates, less the sum already refunded, with interest at the rate of nine (9) percent per annum from November 21, 1981, the date of Katz' receipt of his refund determination.

2. At the time of making any other and future refunds, to furnish, together with those refunds, an itemized, audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of its revenues from agency fees, such statement to indicate the basis of the determination of the amount of refund, including identification of those disbursements that are refundable and those that are not.

3. To post a notice in the form attached, at each facility at which any unit personnel are employed, on bulletin boards to which it has access by contract, practice or otherwise.

DATED: February 11, 1983
Albany, New York

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

DISSENTING OPINION OF BOARD CHAIRMAN HAROLD R. NEWMAN

The majority opinion of this Board correctly notes that the reason why an employee organization must provide a unit employee receiving an agency shop fee refund with financial information is that he should be able to understand the basis on which his refund "has been calculated and thus be able to determine whether an appeal is warranted and likely to succeed." (emphasis supplied) In the instant case the refund has been calculated by the Local without any reference to its receipts.

Section 208.3(b) of the Taylor Law provides that an employee organization must refund that part of a unit employee's agency shop fee which represents his

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.
(emphasis supplied)

Based upon its understanding of the statute, the Local calculated Katz' pro rata share, i.e. his refund, as standing in the same proportion to his total agency fee as the Local's political and ideological expenditures stand in relation to its total expenditures. As noted in the majority opinion, this method of calculating the amount of the refund is not the only possible one. Indeed, other employee organizations use formulas that do take into consideration the receipts of the organization. However, citing our decision in Hampton Bays, 14 PERB ¶3018 (1981),

the Board majority has properly ruled that it is for the Courts, and not this Board, to determine whether the statute requires the utilization of a single formula and, if so, what that formula would be.

I read our decision in Hampton Bays as requiring an employee organization to furnish no more than an explanation of the amount of the refund that it actually made. The Local has done so. Katz now has financial information which explains the amount of the refund in terms of the formula actually used by the employee organization and he may therefore consider whether to challenge the refund on the ground that the Local's calculations were flawed. He does not require any financial information from the Local in order to determine whether, in his judgment, it used an unacceptable formula in calculating the refund. He merely has to know what formula was used by the Local.

Until such time as the courts determine that a particular formula is mandated by the statute, I believe it to be sufficient for an employee organization giving an agency shop fee refund to provide those receiving the refund with information setting forth the formula that it actually used and the financial data utilized in applying that formula. Where, as in some cases, the formula is based upon the employee organization's receipts, the information concerning the amount of those receipts must be provided.

Where, as here, the formula actually used did not include the employee organization's receipts, the information concerning those receipts need not be provided.

The fact that, in past decisions, we have ordered other employee organizations to provide information about their receipts along with their agency shop fee refunds does not compel such an order here. The specific question raised by the exceptions before us here had not been raised and was not considered in those decisions.


Harold R. Newman, Chairman

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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 Civil Service Technical Guild, Local 375, will refund to Leon Katz the entire amount of his agency shop fee deduction for 1980 which was not forwarded to its affiliates, less the sum already refunded, with interest at the rate of nine (9) percent per annum from November 21, 1981.
2. The Civil Service Technical Guild, Local 375, will, at the time of making agency shop fee refunds, furnish together with those refunds an itemized, audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of their revenues from agency fees or dues, such statement to indicate the basis for the determination of the amount of refund, including identification of those disbursements of the Civil Service Technical Guild, Local 375, and its affiliates, that are refundable and those that are not.

Civil Service Technical Guild, Local 375
Employee Organization

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.

8075

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CIVIL SERVICE TECHNICAL GUILD, LOCAL 375,
Respondent,

#2E-2/11/83

-and-

CASE NO. U-5990

RAJENDRA PRASAD,

Charging Party.

BEVERLY GROSS, ESQ., for Respondent
RAJENDRA PRASAD, pro se

BOARD DECISION AND ORDER

On July 30, 1982, a hearing officer determined, inter alia, that the Civil Service Technical Guild, Local 375 (Local) violated §209-a.2(a) of the Act in regard to certain aspects of its refund procedure and the adequacy of financial information furnished to the charging party herein. As part of her remedial order the hearing officer directed that at the time of making future refunds the Local furnish, together with those refunds, "an itemized, audited statement of its receipts and disbursements".

The matter comes to us on the exceptions of the Local. The sole issue raised by the exceptions relates to that portion of the hearing officer's order directing that at the

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time of making future refunds the Local must give a statement of receipts as well as disbursements. No other part of the decision or remedial order is challenged by the Local. The issue raised by the Local is identical to that raised by it in Case No. U-5972, Civil Service Technical Guild, Local 375 (Leon Katz) (decided concurrently herewith).

For the reasons set forth in our decision in Case No. U-5972, Civil Service Technical Guild, Local 375 (Leon Katz) (decided concurrently herewith), we reject the exceptions of the Local, affirm in all respects the report of the hearing officer and adopt in full the remedial order. Therefore,

WE ORDER Civil Service Technical Guild, Local 375:

1. To refund to Rajendra Prasad the entire amount of his 1979 and 1980 agency shop fee deductions less the sum already refunded, with interest from the dates of receipt of refund determination at the rate of six (6) percent per annum until June 25, 1981 from which date the rate of interest is nine (9) percent per annum.

2. That at the time of making any other and future refunds, to furnish, together with those refunds, an itemized, audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of its revenues from agency fees, such statement to indicate the basis for the determination of the amount of

refund, including identification of those disbursements of the Local and its affiliates that are refundable and those that are not.

3. To complete its entire refund procedure for applications made in subsequent years by April 2 of the year following the application.

4. To post a notice in the form attached, at each facility at which any unit personnel are employed, on bulletin boards to which it has access by contract, practice or otherwise.

DATED: Albany, New York
February 11, 1983



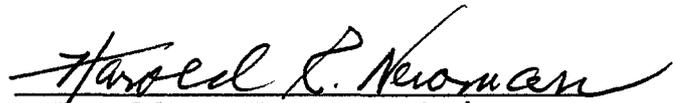
Ida Klaus, Member



David C. Randles, Member

DISSENTING OPINION OF BOARD CHAIRMAN HAROLD R. NEWMAN

For reasons set forth in my dissenting opinion in Case No. U-5972, Civil Service Technical Guild, Local 375 (Leon Katz) (decided concurrently herewith), I dissent from the majority opinion herein.


Harold R. Newman, Chairman

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 Civil Service Technical Guild, Local 375, will refund to Rajendra Prasad the entire amount of his 1979 and 1980 agency shop fee deductions, less the sum already refunded, with interest from the dates of receipt of refund determination, at the rate of six (6) percent per annum until June 25, 1981, from which date the rate of interest is nine (9) percent per annum.
2. The Civil Service Technical Guild, Local 375, will, at the time of making agency shop fee refunds, furnish together with those refunds an itemized, audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of their revenues from agency fees or dues, such statement to indicate the basis for the determination of the amount of refund, including identification of those disbursements of the Civil Service Technical Guild, Local 375, and its affiliates, that are refundable and those that are not.
3. The Civil Service Technical Guild, Local 375, will complete its entire refund procedure for applications made in subsequent years by April 2 of the year following the application.

..... Civil Service Technical Guild, Local 375.....
Employee Organization

Dated.....

By.....
(Representative) (Title)

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2F-2/11/83

BUFFALO TEACHERS FEDERATION

CASE NO. D-0138

Upon the Charge of Violation of Section
210.1 of the Civil Service Law.

MARTIN L. BARR, ESQ. (JEROME THIER,
ESQ., of Counsel), Charging Party

ROBERT CLEARFIELD, ESQ., for Respondent

BOARD DECISION AND ORDER

On October 29, 1976, Counsel to this Board (Charging Party) charged the Buffalo Teachers Federation (BTF) with violating §210.1 of the Public Employees' Fair Employment Act (Act) by engaging in a 13-day strike against the Buffalo City School District (District) in September 1976. The hearing officer issued his decision on May 11, 1982.^{1/} In it he determined that BTF engaged in the strike as charged, but that the District engaged in such acts of extreme provocation as to detract from the responsibility of BTF for the strike.

^{1/}The hearing was not commenced until June 1981. This is because prosecution of the charge was stayed by an order of the United State District Court for the Southern District of New York. Buffalo Teachers Federation v. Helsby, 435 F. Supp. 1098, 10 PERB ¶7015 (1977). The stay was lifted on March 18, 1981, when the District Court rejected the BTF challenge to the constitutionality of the Act and to this Board's prior application of the Act. Buffalo Teachers Federation v. Helsby, 515 F. Supp. 215 (S.D.N.Y., 1981), 14 PERB ¶7008, aff'd 628 F. 2d 28 (2d Cir., 1982), 15 PERB ¶7009.

Addressing the other circumstances which, according to §210.3(f) of the Act, we must consider in fixing the duration of the forfeiture of dues deduction and agency shop fee privileges to be imposed upon the employee organization, the hearing officer made findings regarding the impact of the strike on the community and the impact of a penalty on BTF. He found that the failure of 90 percent of the teachers to report to work was directly responsible for a substantial decline in student attendance and in loss of student instruction. He also determined that "the financial resources of BTF would be seriously strained by an extended loss of dues deduction and agency shop privileges [in that a]s of July, 1981, the BTF's Treasurer's Report projected a \$21,725 deficit for fiscal year 1980-81."

Charging Party has filed exceptions to the hearing officer's determination that the District engaged in acts of extreme provocation. BTF has filed no exceptions to the hearing officer's decision and has submitted a response to Charging Party's exceptions.^{2/}

^{2/}The Corporation Counsel of the City of Buffalo has, on behalf of the District, moved to intervene in this matter for the purpose of contesting the hearing officer's determination that the District engaged in acts of extreme provocation. He asserts that the District now seeks to "protect its own reputation." We deny this motion. The record shows that the Corporation Counsel had been given notice of the proceeding and, in fact, attended on both days of the hearings. However, upon the direction of the District, he declined invitations of the hearing officer and the Charging Party to participate. The District knew at the time when it decided not to participate that the hearing officer was being called upon to decide issues which might be construed to affect its reputation. In view of its decision not to participate at that time, we find no compelling reason to grant the District's motion, and the District has given none.

The hearing officer's conclusion that the District engaged in acts of extreme provocation is based on his finding as to the District's conduct: specifically, it did not give its negotiators authority to reach an agreement except upon the basis of its initial position; it refused to consider the merits of the BTF's demands; and it unilaterally changed the terms and conditions of employment of employees in BTF's negotiating unit upon the opening of school in September 1976 by withholding sabbaticals, supplemental health insurance benefits, and increments. He found no merit in the District's reason for refusing to consider the demands, that reason being that the City of Buffalo was concerned that any concessions made to BTF would lead to pressure upon the City to make comparable concessions to other employee organizations.

Having read the record, we determine that it supports the hearing officer's conclusion that the District engaged in acts of extreme provocation reflecting a disposition not to negotiate in good faith that detracted from BTF's responsibility for the strike.

The authority that the District delegated to its negotiators limited them to the execution of an agreement on the terms originally proposed by the District. The effect of that restriction was that the District's original proposal was put forth on a take-it-or-leave-it basis, thereby foreclosing any

opportunity for discussion or exchange of views leading to agreement. Further, it refused to consider the merits of BTF's demands. Instead, it denied them out of hand for the unacceptable reason of the potential impact that concessions by it might have on negotiations between another public employer and public employees.^{3/} Having refused to allow genuine negotiations with BTF, the District further exacerbated the situation by unilaterally changing the existing terms and conditions of employment upon the opening of school. One of the changes made was the withholding of increments. Because at that time the employees reasonably expected to receive the increment, the withholding of them

^{3/}Compare United Mine Workers v. Pennington, 381 U.S. 657 (1965), in which the Supreme Court said:

[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units On the contrary. The duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

was a clear act of provocation.^{4/} Moreover, the withholding of sabbaticals and supplemental health insurance benefits was a flagrant disregard of the District's obligations to recognize and deal in good faith with the representative of its employees.

Charging Party argues that we should reject BTF's defense of extreme provocation because, in an action to enjoin the strike, a state court determined that BTF had not presented evidence of extreme provocation by the District. Board of Education v. Pisa, unreported (Sup. Ct., Erie County, Sept. 27, 1976), aff'd 55 AD2d 128 (4th Dept., 1976), 9 PERB ¶7533. That determination is not res judicata as to the issues in the instant proceeding. Rye UFSD #4 v. PERB, 74 Misc. 2d 741, 6 PERB ¶7007 (1973). In any event, BTF presented additional evidence to the hearing officer which we find supports its claim of extreme provocation.

In determining the duration of the forfeiture of the dues deduction and agency shop fee privileges of BTF, we must consider the past conduct of the organization. The record reveals that once before, in March 1970, BTF engaged in a strike. The Board then noted that the strike was limited to two of the District's ninety schools. It also found that there were mitigating circumstances which

^{4/}This conclusion is not affected by the subsequent decision of the Court of Appeals in Rockland County v. PERB, 41 NY2d 753, 10 PERB ¶7010 (1977), that the withholding of increments did not constitute an illegal practice.

diminished BTF's responsibility for the strike.

In view of the particular circumstances of the prior strike and the presence of other relevant considerations, we determine it appropriate to diminish the extent of the penalty we would normally impose for a second strike. Where an employee organization representing teachers engages in a 13-day strike and has engaged in a prior strike, we would, absent extreme provocation, order the suspension of its dues deduction and agency shop fee privileges for an indefinite period of time of not less than 18 months. Here, however, there were acts of extreme provocation by the District which detracted from the responsibility of BTF for the

5/See Buffalo Teachers Federation Inc., 5 PERB ¶3025 (1972). As to one school, the mitigating circumstances were the failure of school administration to remedy disruption by pupils and parents which had already interfered with classroom instruction before the strike. The Board also noted that BTF had failed to utilize the grievance procedure to eliminate this condition and had instead resorted to the strike. Accordingly, BTF's dues checkoff rights with respect to employees of that school were suspended for a period of four months.

The mitigating circumstances in the other school were greater in that there had been confrontations between unit employees and unauthorized outsiders whom the administration did not keep out of the school and that BTF had not had an opportunity to file a grievance at that time. Accordingly, BTF's dues checkoff privileges were suspended for three months with respect to employees at that school.

Because of these mitigating circumstances, the fact that the strike was not called by BTF and that it did not spread throughout the school system, no penalty was assessed against BTF with respect to unit employees working at other than those two schools.

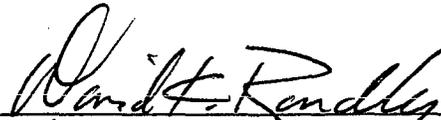
strike and there is an indication of a current serious strain on the financial resources of BTF. Accordingly, we determine that BTF's dues deduction and agency shop fee privileges should be suspended for a definite period of six months.

NOW, THEREFORE, WE ORDER that the dues deduction and agency shop fee privileges, if any, of BTF be forfeited for six months commencing on the first practical date. Thereafter, no dues or agency shop fees shall be deducted on its behalf by the District until BTF affirms that it no longer asserts the right to strike against any government, as required by the provisions of §210.3(g) of the Act.

DATED: February 11, 1983
Albany, New York



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2G-2/11/83

PROFESSIONAL STAFF CONGRESS/CITY
UNIVERSITY OF NEW YORK,

Respondent,

CASE NO. U-6349

-and-

ARNOLD M. ROTHSTEIN,

Charging Party.

ARNOLD M. ROTHSTEIN, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Arnold M. Rothstein to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge against Professional Staff Congress/City University of New York (PSC) on the ground that the allegations contained therein failed to establish a violation of the Taylor Law.

Rothstein is employed by the City University of New York and is in a negotiating unit represented by PSC. He is not a member of PSC but pays an agency shop fee to it in accordance with an agreement reached by PSC and the City University pursuant to §208.2(b) of the Taylor Law. He charges PSC with failure to maintain an appropriate refund procedure as required by that statute. In support of his

exceptions, Rothstein argues that the Director should have determined that PSC's refund procedure is inadequate in that it does not provide information that is qualitatively sufficient for a person receiving a refund to decide whether to challenge the amount of the refund.

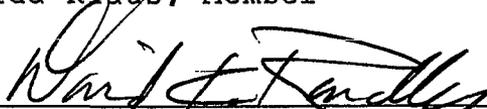
In Hampton Bays Teachers Association, 14 PERB ¶3018 (1981), we indicated (at footnote 2) that an employee organization must provide agency shop fee payers receiving a refund with the same financial information it is required to make available by §727 of the State's Labor Law. Additionally, we required it to specify the extent to which each of the disbursements listed in the Labor Department report is refundable. PSC has complied with the requirement set forth in Hampton Bays. The Director therefore acted correctly when he dismissed the charge, and we affirm his decision.

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

DATED: February 11, 1983
Albany, New York



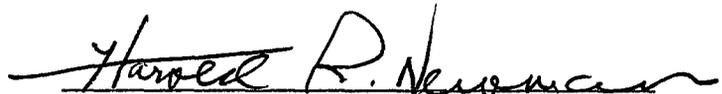
Ida Klaus, Member



David C. Randles, Member

CONCURRING OPINION OF BOARD CHAIRMAN HAROLD R. NEWMAN

As I indicated in my dissenting opinion in Civil Service Technical Guild, Local 375 (Katz), 16 PERB ¶3008 (1983), issued today, "I read our decision in Hampton Bays as requiring an employee organization to furnish no more than an explanation of the amount of the refund that it actually made." PSC has done so in the instant case.


Harold R. Newman, Chairman

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2H-2/11/83

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

Respondent,

CASE NO. U-6262

-and-

HARVEY M. ELENTUCK,

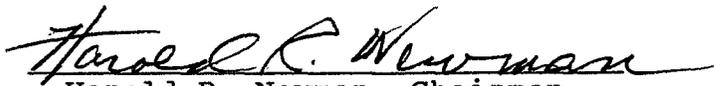
Charging Party.

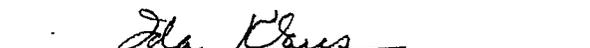
BOARD DECISION ON MOTION

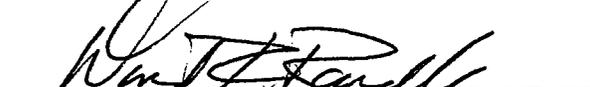
On January 14, 1983, we dismissed the charge made by Harvey M. Elentuck against the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) on the ground that the facts as alleged did not constitute a violation of the Taylor Law. The matter comes to us once again on Elentuck's motion for reconsideration. The papers supporting that motion, however, contain no further allegations of fact and show no other basis for reconsideration.

ACCORDINGLY, WE ORDER that the motion herein be, and it hereby is, denied.

DATED: February 11, 1983
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

8091

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the

#2I-2/11/83

WESTMORELAND NON-INSTRUCTIONAL EMPLOYEES
SERVICE ORGANIZATION, NYSUT, AFT, AFL-CIO

Case No. D-0215

Upon the Charge of Violation of Section
210.1 of the Civil Service Law.

BOARD DECISION AND ORDER

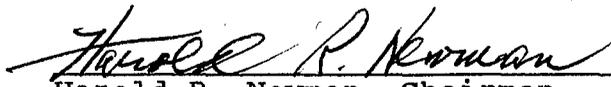
This matter comes to us on the application of the Westmoreland Non-Instructional Employees Service Organization, NYSUT, AFT, AFL-CIO (Organization) for restoration of the dues and agency shop fee deduction privileges afforded under Section 208 of the Civil Service Law. The Organization's privileges had been suspended indefinitely by an order of this Board dated July 10, 1981, 14 PERB ¶3054. At that time we determined that the Organization had violated CSL §210.1 by engaging in a 29-day strike against the Westmoreland Central School District commencing on January 12, 1981. We ordered that the Organization's dues deduction privileges and agency shop fee privileges, if any, should be suspended indefinitely "provided that it may apply to this Board after December 31, 1982 for the full restoration of such privileges". The application was to be supported by proof of good faith

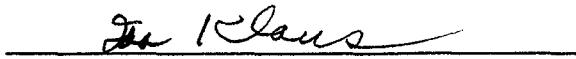
compliance with CSL §210.1 since the violation found, and accompanied by an affidavit, that the Organization no longer asserts the right to strike, as required by CSL §210.3(g).

The Organization has submitted an affidavit that it does not assert the right to strike against any government and we have ascertained that it has not engaged in, caused, instigated, encouraged or condoned a strike against the Westmoreland Central School District since the date of the above-stated violation.

NOW, THEREFORE, WE ORDER that the indefinite suspension of the dues and agency shop fee deduction privileges of the Westmoreland Non-Instructional Employees Service Organization, NYSUT, AFT, AFL-CIO be, and it hereby is, terminated.

DATED, February 11, 1983
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

WESTERN REGIONAL OFF-TRACK BETTING
CORPORATION,

#2J-2/11/83

Respondent,

CASE NO. U-5909

-and-

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 222,

Charging Party.

MOOT & SPRAGUE, ESQS. (JOHN B. DRENNING, ESQ.,
of Counsel), for Respondent

DAVIDSON, FINK, COOK & GATES, ESQS. (THOMAS A.
FINK, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Service Employees International Union, Local 222 (Local 222) to a hearing officer's decision dismissing its charge. The charge alleges that Western Regional Off-Track Betting Corporation (OTB) violated its duty to negotiate in good faith in that it assigned work that had been performed by branch managers to branch supervisors and, during vacation periods, to senior line operators or ticket machine operators. All three titles are in the unit represented by Local 222.

8094

In support of its exceptions, Local 222 argues that the hearing officer erred in not finding that OTB refused to negotiate the impact of the layoffs. The charge, however, does not allege a refusal to negotiate the impact of layoffs. Moreover, if such a refusal were alleged, the evidence would not support the allegation. On the contrary, it shows that the subject was negotiated and an agreement reached.

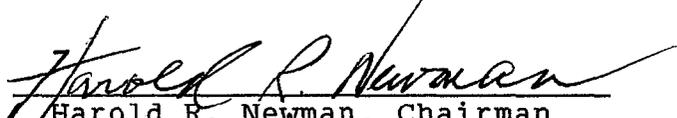
Local 222 also argues that the hearing officer erred in not finding that OTB violated its duty to negotiate when it reassigned the responsibilities of branch managers to lower ranking employees. The record shows, however, that the work of the managers which was assigned to the lower ranking employees had been performed by them in the past, although not on so regular a basis. Moreover, the parties appear to have reached an agreement concerning the rate of pay to be earned by the lower ranking employees when they perform the work of the managers. This is evidenced by the fact that Local 222 filed and won several grievances for increased compensation on their behalf.

These circumstances indicate that, as found by the hearing officer, Local 222's charge complains that OTB has not fulfilled its contract obligations. The language of the charge itself and the manner in which Local 222 prosecuted its charge before the hearing officer support this

conclusion. Accordingly, we affirm the decision of the hearing officer dismissing the charge on the ground that OTB's impropriety, if any, does not constitute a Taylor Law violation.^{1/}

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

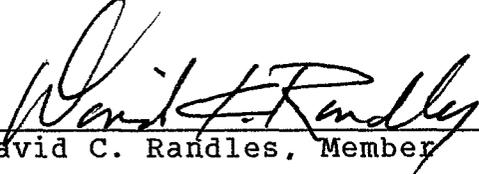
DATED: February 11, 1983
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

^{1/}Local 222 also asserts that the hearing officer erred in granting OTB an opportunity to amend its answer at the beginning of the hearing. However, it was not a violation of the Board's rules for the hearing officer to permit OTB to amend its answer at the opening of the hearing (Rule 204.3[d]). Neither was it an abuse of her discretion; the amendment did not prejudice Local 222.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2K-2/11/83

LOCAL 100, TRANSPORT WORKERS UNION OF
AMERICA,

CASE NO. D-0190

Upon the Charge of Violation of
Section 210.1 of the Civil Service Law.

BOARD DECISION ON MOTION

This matter comes to us on a motion dated December 28, 1982, made by Local 100, Transport Workers Union of America (Local 100). It moves this Board for an order remitting the order of this Board that was previously issued in this matter on October 5, 1981 (14 PERB ¶3074), which directed the forfeiture of its dues deduction and agency shop fee privileges, if any.^{1/} The forfeiture was imposed as a penalty because Local 100 engaged in an illegal 11-day strike against the New York City Transit Authority and the Manhattan and Bronx Surface Operating Authority from April 1 through April 11, 1980.^{2/}

^{1/}The forfeiture did not commence until one year later because a temporary stay was not dissolved by the U.S. Court of Appeals until September 20, 1982, Lowe v. Newman, 689 F2d 378 (2d Cir. 1982), 15 PERB ¶7021.

^{2/}Our order provided that the dues deduction and agency shop fee privileges, if any, of Local 100 be forfeited for a period of 18 months and that thereafter no dues or agency shop fees shall be deducted on its behalf until Local 100 affirms that it no longer asserts the right to strike against any government.

8097

In our 1981 decision, we noted that:

[T]he impact of the forfeiture penalty may require reconsideration of that penalty if, after having made an effort to do so by reasonable available alternative methods, an employee organization is not able to collect sufficient dues to insure proper representation of unit employees. (at p. 3132, fn. 8)

It is upon this language that Local 100 now relies. The basis of Local 100's motion is that the forfeiture has threatened its solvency thereby rendering it incapable of providing necessary services to unit employees.

In support of its motion, Local 100 has submitted evidence that its staff is contacting its members individually and engaging in the hand collection of dues. It has also written to its 33,000 active members urging them to pay their dues by mail or to cooperate with the staff personnel collecting dues. Notwithstanding these efforts, however, its financial statement shows that during the ten-week period between October 9, 1982 and December 11, 1982, its dues collection amounted to \$557,656.83. This compares to \$990,000.00 it collects from its 33,000 members during a normal ten-week period. This amounts to a 44% falloff in its normal dues income. In part, this may be explained by Local 100's difficult task of having to collect dues from members working at more than 700 different locations, many of which are serviced by several shifts covering 24 hours a day.

Local 100's statement also shows increased monthly expenses directly related to its dues collection efforts amounting to 11% of its normal income.^{3/} Thus, Local 100 has sustained a 55% burden by reason of its loss of checkoff privileges.^{4/}

The ability of Local 100 to provide representational services to its negotiating unit has been severely impaired by its loss of income and, even more so, by its need to use its staff in dues collection efforts to the detriment of their normal representational duties. At present, for those unit employees working for the Transit Authority, there is a backlog of 1,450 step 5 grievances, 75 step 4 grievances and 300 disciplinary cases. This compares with the total

^{3/}In calculating this amount, we added one eighteenth of the startup costs (corresponding to the 18-month period of the forfeiture) to the amount of the ongoing monthly costs, and we divided that sum by the normal monthly dues income of Local 100.

^{4/}In United Federation of Teachers, 15 PERB ¶3091 (1982), we suspended the forfeiture of the dues deduction privileges of the United Federation of Teachers because the financial losses it was suffering threatened its solvency and impaired its ability to provide representational services to the public employees whom it represented. UFT's loss of income was only 29% but its collection costs amounted to 18% of normal income. Thus, it suffered an aggregate burden amounting to 47% of its normal income. The consequent impact of this loss upon its ability to represent unit employees, as detailed in that decision, was less severe than the impact upon Local 100.

backlog of 50 cases of all kinds one year ago. Similarly, for those unit employees working for Division 2 of the Manhattan and Bronx Surface Operating Authority, there is a current backlog of 225 cases instead of the 35 case backlog last year.^{5/}

On the basis of this evidence, we conclude that, by reason of its loss of dues and agency shop fee deduction privileges, the ability of Local 100 to provide necessary material services to unit employees has been and continues to be severely impaired.^{6/} This justifies reconsideration of our order of October 5, 1981, and a suspension of that penalty.^{7/}

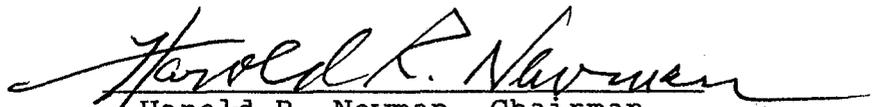
^{5/}The data for the Manhattan and Bronx Surface Operating Authority, Division 1, was presented in a different form. It shows the increased time taken to process cases rather than the increased backlog. The time taken to process a case has more than doubled.

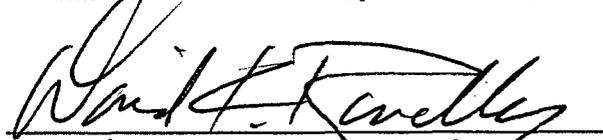
^{6/}Writing on behalf of the Transit Authority and the Manhattan and Bronx Surface Operating Authority, the Chairman of the Metropolitan Transportation Authority has confirmed that Local 100's ability to administer its contract and handle grievances in an expeditious manner has been impaired. He has encouraged us to grant the motion herein.

^{7/}We note that Local 100 has affirmed that it no longer asserts a right to strike against any government, to assist or participate in such strike, or to impose an obligation to conduct, assist or participate in such a strike.

NOW, THEREFORE, WE MODIFY our order to the extent that the forfeiture of the dues deduction and agency shop fee privileges, if any, of Local 100 be suspended; that such suspension is subject to revocation in the event of a strike or strike threat. Local 100 may apply to this Board, on notice to the New York Transit Authority and the Manhattan and Bronx Surface Operating Authority, in April 1984 for full restoration of its dues and agency shop fee deduction privileges.

DATED: February 11, 1983
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2L-2/11/83

In the Matter of

AMALGAMATED TRANSIT UNION, AFL-CIO,
LOCAL 726,

CASE NO. D-0191

Upon the Charge of Violation of
Section 210.1 of the Civil Service Law.

BOARD DECISION ON MOTION

This matter comes to us on a motion dated February 2, 1983, made by the Amalgamated Transit Union, AFL-CIO, Local 726 (Local 726). It moves this Board for an order remitting the order of this Board that was previously issued in this matter on October 5, 1981 (14 PERB ¶3074), which directed the forfeiture of its dues deduction and agency shop fee privileges, if any. The forfeiture was imposed as a penalty because Local 726 engaged in an illegal 11-day strike against the New York City Transit Authority^{1/} from April 1 through April 11, 1980.^{2/}

^{1/}The New York City Transit Authority has taken no position with respect to the motion.

^{2/}Our order provided that the dues deduction and agency shop fee privileges, if any, of Local 726 be forfeited for a period of 18 months and that thereafter no dues or agency shop fees shall be deducted on its behalf until Local 726 affirms that it no longer asserts the right to strike against any government as provided by §210.3(g) of the Taylor Law.

In our 1981 decision, we noted that:

[T]he impact of the forfeiture penalty may require reconsideration of that penalty if, after having made an effort to do so by reasonable available alternative methods, an employee organization is not able to collect sufficient dues to insure proper representation of unit employees. (at p. 3132, fn. 8)

It is upon this language that Local 726 now relies. The basis of Local 726's motion is that the forfeiture has threatened its solvency thereby rendering it incapable of providing necessary services to unit employees.

In support of its motion, Local 726 has submitted evidence that it has urged its members to prepay their dues or to have their dues paid on their behalf by a credit union.^{3/} It has also hired two additional employees to assist in its collection efforts. Notwithstanding these efforts, however, its financial statement shows that it sustained a 36% falloff in its income in the period between October 4, 1982^{4/} and January 2, 1983, as compared with the period from July 3, 1982 to September 25, 1982.

^{3/}It notes that the Transit Authority has objected to this procedure on the ground that it is a circumvention of the Taylor Law penalty. To the same effect, see the opinion of Counsel to this Board at 6 PERB ¶5002 (January 17, 1973).

^{4/}The forfeiture did not commence until then because a temporary stay was not dissolved by the U.S. Court of Appeals until September 20, 1982, Lawe v. Newman, 689 F2d 378 (2d Cir. 1982), 15 PERB ¶7021.

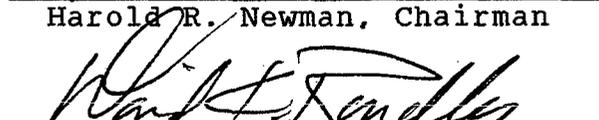
Its statement does not show the amount of its increased monthly expenses directly related to its dues collection efforts.

Local 726 has not shown that its ability to provide representational services to its negotiating unit has been impaired by its loss of dues checkoff privileges. While it has shown a loss of income and a depletion of its resources, its papers merely allege that its ability to provide representational services in the future will be impaired if it does not recover its dues deduction privileges soon. That allegation is not a sufficient basis for the motion herein. Relief from a dues checkoff forfeiture is only granted when the effect of that forfeiture is an actual, rather than a prospective, impairment of the employee organization's ability to provide representational services.^{5/}

NOW, THEREFORE, WE ORDER that the motion herein be, and it hereby is, DENIED.

DATED: February 11, 1983
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

^{5/}Compare United Federation of Teachers, 14 PERB ¶3073 (1981).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2M-2/11/83

AMALGAMATED TRANSIT UNION, AFL-CIO,
LOCAL 1056,

CASE NO. D-0192

Upon the Charge of Violation of
Section 210.1 of the Civil Service Law.

BOARD DECISION ON MOTION

This matter comes to us on a motion dated January 7, 1983, made by the Amalgamated Transit Union, AFL-CIO, Local 1056 (Local 1056). It moves this Board for an order remitting the order of this Board that was previously issued in this matter on October 5, 1981 (14 PERB ¶3074), which directed the forfeiture of its dues deduction and agency shop fee privileges, if any. The forfeiture was imposed as a penalty because Local 1056 engaged in an illegal 11-day strike against the New York City Transit Authority^{1/} from April 1 through April 11, 1980.^{2/}

^{1/}The New York City Transit Authority has taken no position with respect to the motion.

^{2/}Our order provided that the dues deduction and agency shop fee privileges, if any, of Local 1056 be forfeited for a period of 18 months and that thereafter no dues or agency shop fees shall be deducted on its behalf until Local 1056 affirms that it no longer asserts the right to strike against any government as provided by §210.3(g) of the Taylor Law.

8105

In our 1981 decision, we noted that:

[T]he impact of the forfeiture penalty may require reconsideration of that penalty if, after having made an effort to do so by reasonable available alternative methods, an employee organization is not able to collect sufficient dues to insure proper representation of unit employees. (at p. 3132, fn. 8)

It is upon this language that Local 1056 now relies. The basis of Local 1056's motion is that the forfeiture has threatened its solvency thereby rendering it incapable of providing necessary services to unit employees.

In support of its motion, Local 1056 has submitted evidence that its officers are contacting its members individually and engaging in the hand collection of dues. Notwithstanding these efforts, however, its financial statement shows that it sustained a 42% falloff in its income in the period between October 5, 1982, the date on which the forfeiture commenced,^{3/} and January 7, 1983, the date of the motion herein, as compared with the prior 13-week period. Its statement also shows increased monthly expenses directly related to its dues collection efforts

^{3/}The forfeiture did not commence until then because a temporary stay was not dissolved by the U.S. Court of Appeals until September 20, 1982, Lowe v. Newman, 689 F2d 378 (2d Cir. 1982), 15 PERB ¶7021.

amounting to 5% of its normal income. Thus, Local 1056 has sustained a 47% burden by reason of its loss of checkoff privileges.^{4/}

The ability of Local 1056 to provide representational services to its negotiating unit has been severely impaired by its loss of income and even more so, by its need to use its officers in dues collection efforts almost to the exclusion of their normal representational duties. Whereas the local normally handles between seven and ten step 5 grievance hearings each month dealing with differential pay and sick leave, it has handled none in December 1982, none in January 1983 and none is scheduled for February 1983. Similarly, where it would have ordinarily taken at least five regular grievances to arbitration each month, it has taken none since its loss of dues checkoff privileges because its leadership is preoccupied with dues collection. For the same reason, Local 1056 has been unable to provide

^{4/}In United Federation of Teachers, 15 PERB ¶3091 (1982), we suspended the forfeiture of the dues deduction privileges of the United Federation of Teachers because the financial losses it was suffering threatened its solvency and impaired its ability to provide representational services to the public employees whom it represented. UFT's loss of income was only 29% but its collection costs amounted to 18% of normal income. Thus, it too suffered an aggregate burden amounting to 47% of its normal income. The consequent impact of this loss upon its ability to represent unit employees, as detailed in that decision, was less severe than the impact upon Local 1056.

normal representational services to employees facing disciplinary hearings.

On the basis of this evidence, we conclude that, by reason of its loss of dues and agency shop fee deduction privileges, the ability of Local 1056 to provide necessary material services to unit employees has been and continues to be severely impaired. This justifies reconsideration of our order of October 5, 1981, and a suspension of that penalty.^{5/}

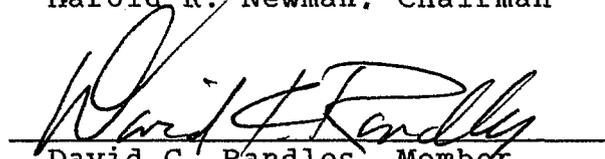
NOW, THEREFORE, WE MODIFY our order to the extent that the forfeiture of the dues deduction and agency shop fee privileges, if any, of Local 1056 be suspended; that such suspension is subject to revocation in the event of a strike or strike threat. Local 1056 may apply to this Board, on notice to the New York Transit Authority, in April 1984 for

^{5/}We note that Local 1056 has affirmed that it no longer asserts a right to strike against any government, to assist or participate in such strike, or to impose an obligation to conduct, assist or participate in such a strike.

full restoration of its dues and agency
shop fee deduction privileges.

DATED: February 11, 1983
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2N-2/11/83

WASHINGTONVILLE CENTRAL SCHOOL DISTRICT,

CASE NO. E-0828

Upon the Application for Designation of
Persons as Managerial or Confidential.

RAINS & POGREBIN, P.C. (ERNEST R. STOLZER, ESQ. and
FREDERICK D. BRAID, ESQ., of Counsel), for Petitioner

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

BOARD DECISION AND ORDER

The Washingtonville Central School District (District) filed the application herein for the designation of four of its clerical employees as confidential within the meaning of §201.7(a) of the Taylor Law. It was opposed by Orange County Local 836, Civil Service Employees Association, Inc., AFL-CIO, (CSEA) which represents the four positions. After a hearing, the Director of Public Employment Practices and Representation (Director) determined that two of the positions, that of Sandy Gauquie, part-time secretary to the Superintendent, and Edna Weinheim, bookkeeper, are confidential and two, that of Roslyn Himelson, payroll clerk, and Polly Mogge, part-time account clerk/typist, are not. This matter now comes to this Board on

the exceptions of the District to the Director's determination that Himelson and Mogge are not confidential employees.^{1/}

Himelson and Mogge maintain the payroll and attendance records of the District and there is no showing that anything in these records is confidential. From time to time, Himelson and Mogge are asked to compile statistical information from the records they maintain, such as attendance data concerning provisional teachers who are being considered for tenure and the leave time taken by teachers to work on negotiations and grievances. By way of contrast, Weinheim, whom he determined to be confidential, prepares analyses of alternative negotiation proposals which the District is considering but has not yet placed. As such, she is privy to information to which CSEA has no right.

The Director properly determined that the assignments of Himelson and Mogge do not justify their designation as confidential.

An alternative basis of the District's application is that Himelson and Mogge work in the same room as Weinheim and, perforce, are exposed to confidential information. Mogge,

^{1/}No exceptions were filed to that part of the Director's decision holding that Gauquie and Weinheim are confidential.

moreover, performs Weinheim's work when she is absent. The record does not show, however, that Himelson and Mogge cannot reasonably be insulated from exposure to the occasional confidential work performed by Weinheim. Without such a showing, Himelson and Mogge cannot be deprived of the right of representation which the law has given to them. The record also does not show that Mogge has ever worked on confidential material in place of Weinheim. Her substitution for Weinheim, too, is therefore no basis for designating her confidential.

NOW, THEREFORE, WE ORDER that the exceptions of the
District be, and they hereby are, DISMISSED.

DATED: February 11, 1983
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

#20-2/11/83

STATE OF NEW YORK, DIVISION OF
MILITARY AND NAVAL AFFAIRS,

Employer,

CASE NO. C-2437

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner.

JOSEPH M. BRESS, ESQ. (WILLIAM F. COLLINS, ESQ.,
of Counsel), for Employer

ROEMER & FEATHERSTONHAUGH, ESQS. (PAULINE ROGERS
KINSELLA, ESQ., of Counsel), for Petitioner

BOARD DECISION AND ORDER

On March 22, 1982, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) filed a petition seeking certification as the negotiating representative of a unit of all employees of the Division of Military and Naval Affairs (DMNA) of the State of New York (State) except members of the organized militia as defined by §2.1 of the State Military Law.^{1/} The State opposed

^{1/}Military Law §2.1 provides: The organized militia shall be composed of the New York army national guard; the New York air national guard; the inactive national guard; the New York naval militia; the New York guard whenever such a state force shall be duly organized and such additional forces as may be created by the governor.

the petition, arguing that DMNA employees were not entitled to representation under the Taylor Law.^{2/} The matter has come to us on the exceptions of the State to the determination of the Director of Public Employment Practices and Representation (Director) rejecting the State's argument.

Section 203 of the Taylor Law provides that public employees have a right to representation. The term "public employee" is defined by §201.7(a) of the Law. Subject to specified exceptions, it means "any person holding a position by appointment or employment in the service of a public employer" Section 201.6(a) of the Law defines the term "public employer" to mean, among other entities, the State of New York. DMNA is a division of the Executive Department of the State of New York and its employees are therefore employees of the State. Accordingly, they are entitled to representation under the Taylor Law unless excluded by §201.7(a) of the Law.

^{2/}This contention did not extend to civilian employees of DMNA who perform civil defense functions. Unlike other employees of DMNA, they are in the civil service of the State. Depending upon their occupations, they are presently included in the Administrative unit, in the Operational unit or in the Professional, Scientific and Technical unit of State employees.

The relevant language of that section excludes "persons holding positions by appointment or employment in the organized militia of the state" Thus, the question before us is whether a reasonable distinction may be made between the employees of DMNA and the organized militia.

That distinction is clearly specified in §1.6 of the Military Law which particularizes more than one kind of military service. It provides:

The term "military service of the state" as to military personnel shall mean service in or with a force of the organized militia or in the division of military and naval affairs of the executive department of the state.

Notwithstanding the clear distinction made by the Military Law between service in or with a force of the organized militia and service in DMNA, the State asserts that the Taylor Law exclusion which refers to the organized militia must be read to exclude DMNA employees as well. In doing so it relies upon the fact that civilian employees of DMNA are in the military rather than the civil service of the State; upon a letter written by this Board's Counsel on March 13, 1968, giving his opinion that the Taylor Law does not cover employees of DMNA^{3/}; and upon claimed

^{3/}See 1 PERB ¶523 (1968).

legislative intention to deny Taylor Law coverage to all employees of DMNA.

We do not find the position of the State to be persuasive. Coverage under the Taylor Law is not restricted to employees in the civil service of the State. It extends to all employees of the State, unless otherwise excluded, regardless of whether they are in the civil service. The Director has correctly noted that the Taylor Law has covered persons employed pursuant to provisions of the Federal Comprehensive Employment and Training Act and civilian deputies employed by a county sheriff, even though they were not civil service employees.^{4/}

As noted in its last paragraph, the 1968 opinion of this Board's Counsel was but an advisory opinion because authoritative determinations may only be made by this Board in actual cases presented to it. Nevertheless, that opinion appears to have misled CSEA, causing it to support the introduction of several bills designed to specify that only "military positions" be excluded from Taylor Law coverage. None of those bills was reported from the committees of either the Senate or the Assembly to which they were

^{4/}See also McCoy V. Helsby, 34 AD2d 252 (3d Dept., 1970), 3 PERB ¶7007, aff'd 28 NY2d 290 (1971), 4 PERB ¶7007, in which the courts held that employees of the judiciary were covered by the Taylor Law even though they were not otherwise covered by the Civil Service Law.

assigned. The State argues that this demonstrates a legislative intention that the civilian employees of DMNA should not enjoy representation rights under the Taylor Law.

We do not reach that conclusion. In the face of the explicit language of §201.7(a) of the Taylor Law and the applicable provisions of the Military Law, it would be wrong to place so heavy a reliance upon the mere failure of two legislative committees to act upon bills before them. Their inaction is ambiguous at best. The committee members may have concluded, as we do now, that civilian employees of DMNA were already covered by the Taylor Law and that the proposed amendment was therefore redundant.

In another aspect of its legislative history argument, the State relies upon separate and unrelated employee benefit bills which it prepared. Those bills sometimes refer to employees of DMNA as being employees "excluded from negotiation rights." However, the reference itself is not clear as the bills also, at times, refer to them as employees "excluded from collective bargaining units". It would therefore not be unreasonable to conclude that, to the extent that it gave any thought to the matter at all, the Legislature considered the two references to be synonymous for the purposes of those particular bills. We find no sufficient basis in the sources cited by the State for concluding that the Legislature intended to deny Taylor Law coverage to DMNA employees. The intent of the Legislature

is more clearly reflected in the provisions of the Taylor Law and the Military Law.

NOW, THEREFORE, WE AFFIRM the decision of the Director,

and

WE REMAND the matter to him for further proceedings consistent with this decision.

DATED: February 11, 1983
Albany, New York

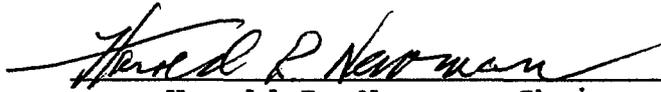

Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 182, International Brotherhood of Teamsters 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: February 11, 1983
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member