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Board (PERB)

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6-28-1983

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

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from June 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

#2A-6/28/83

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In the Matter of

TOWN OF GREECE

CASE NO. E-0847

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

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BERNARD WINTERMAN, for Town of Greece

ROBERT FLAVIN, for Communication Workers of America,  
Local 1170

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Town of Greece (Town) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its application for the designation of Florence DiPonzio as managerial.<sup>1/</sup> The application was opposed by Local 1170

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<sup>1/</sup>The Director granted the application insofar as it sought the designation of Nancy Johnson as confidential. There were no exceptions to this part of the Director's determination.

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of the Communication Workers of America, which represents the negotiating unit that includes DiPonzio's position.

DiPonzio is the clerk to the town justices. She supervises the work of five part-time and three full-time employees. The Town asserts that she participates in the formulation of policy. In support of this proposition, it has introduced evidence that she has effectively recommended a decision with respect to the collection of parking fines. It asserts that this shows that she "regularly participates" in the formulation of policy.

The record shows that there had been no system for collecting unpaid parking tickets until DiPonzio devised one. She initiated the idea that a system be developed and discussed the problem with the Town's director of finance and with the judges. With their approval, she then spoke to the Town's computer staff who developed a procedure for her. She submitted the procedure to the judges, who approved it. She then implemented it.

The Director determined that this action on DiPonzio's

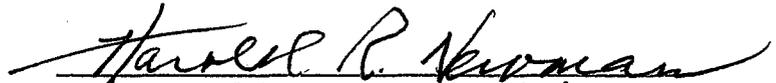
part merely involved the determination of a method of operation of a technical nature and therefore did not constitute the formulation of policy. Having reviewed the record, we affirm his factual determination. We also affirm his conclusion of law. The relevant test is given in City of Binghamton, 12 PERB ¶3099, at 3185 (1970), in which we held:

To formulate policy is to participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the government. The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.

The Town's second basis for urging a determination that DiPonzio is managerial is that DiPonzio once made a decision that the Town should terminate the services of a probationary employee. DiPonzio's action was actually a recommendation to the Town supervisor. It was merely indicative of her supervisory responsibility. It is not, however, a basis for designating her managerial.

NOW, THEREFORE, WE ORDER that the Town's application  
that DiPonzio be designated a managerial  
employee be, and it hereby is, dismissed.

DATED: June 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

#2B-6/28/83

HUNTINGTON UNION FREE SCHOOL  
DISTRICT, NO. 3,

Respondent,

~~and~~

CASE NO. U-6178

HUNTINGTON UFSD CLERICAL UNIT,  
LOCAL 870, SUFFOLK EDUCATIONAL  
CHAPTER, CSEA,

Charging Party.

---

JOSEPH W. CAMPANELLA, ESQ., for Respondent

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

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Huntington Union Free School District, No. 3 (District) to a hearing officer's decision that it violated §209-a.1(d) of the Taylor Law by unilaterally increasing the salaries of six employees who are in a unit represented by Huntington UFSD Clerical Unit, Local 870, Suffolk Educational Chapter, CSEA (CSEA). The District acknowledged giving the increases but asserted that those increases had been agreed to by McCarthy, its superintendent, and Glenn, the CSEA president.

The six employees operated computers and other business machines. Neither party made any specific proposal relating to them during negotiations for an agreement to succeed one that expired on June 30, 1981; however, during those negotiations, the District's business manager indicated his desire to pay these people more money because their work had become more difficult. This concern was expressed once again in the fall while the parties were reviewing the language of the agreement they had negotiated, but the approach of the parties was then to seek reclassification of the six positions by reason of the job changes.

The reclassification attempt came to an end in February 1982 because the machine operators did not pass the examination for the higher level positions. Early in March, McCarthy telephoned Glenn to discuss the problem and we have two versions of what was said during that discussion.

According to McCarthy, he told Glenn that the reclassification approach would not work and explained the reason why. He then asked her whether the District could increase the salaries of the six employees by \$2,000. She, in turn, asked questions about Civil Service procedures. When he readdressed the \$2,000 increase, she said that she would have to consult with Walters, the CSEA representative. McCarthy testified that he told Glenn: "I want to take this up with the Board of Education . . . on March 15th and if there is any problem, get back to me.

[and] She said all right." McCarthy further testified that Glenn never got back to him before the March 15 Board of Education meeting.

According to Glenn the telephone conversation merely focused on Civil Service changes. She testified that she reported the telephone conversation to Walters and then called McCarthy to say that "any new title or upgrading which would eventually benefit the entire membership would not be adverse to us."

At the Board of Education meeting of March 15, 1982, the District approved a resolution granting each of five of the six unit employees \$2,000 increases retroactive to January 1, 1982. The sixth unit employee was given an annual stipend of \$1,000.

It is the position of the District that the telephone conversation between the superintendent and the CSEA president in early March 1982 constituted a negotiation regarding increases for the employees during which CSEA's president agreed that the District could go ahead with them if she did not "get back" to the superintendent by March 15. The hearing officer found, however, that McCarthy and Glenn reached no agreement because they were each talking about a different proposal; McCarthy was talking about straight salary increases, while Glenn was talking about salary increases based upon classification.

In support of its exceptions, the District argues that the hearing officer erred in not making a credibility determination as to whether McCarthy's description of the telephone conversation was accurate. The District contends that, according to his testimony, McCarthy had explained to Glenn in clear terms that he was asking permission to grant increases to the six employees, that she had given her conditional consent, and that the conditions for the consent had been met. The District further argues that McCarthy and the District had a right to rely on the consent implicit in Glenn's silence even if Glenn had not fully understood what she had consented to, because her alleged misunderstanding of McCarthy's proposal was not a reasonable one.

Having reviewed the record, we affirm the decision of the hearing officer. McCarthy's own description of the telephone conversation does not indicate that his request for permission to pay salary increases in the absence of job reclassifications was made so clearly that it could not have been misunderstood. More particularly, we do not find that McCarthy's statement "I want to take this up with the Board of Education . . . on March 15th and if there is any problem, get back to me", or Glenn's affirmative response were sufficient to have put Glenn on notice that her subsequent silence would constitute an agreement to the salary increases.

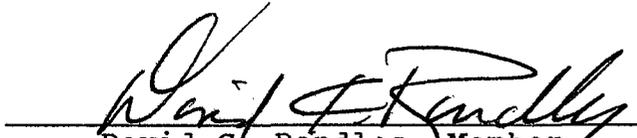
NOW, THEREFORE, WE ORDER the District to:

1. cease paying the unilateral salary increases commencing the date of this order, and
2. cease and desist from refusing to negotiate in good faith with CSEA, and
3. sign and post the attached notice at all places ordinarily used for communications to unit employees.

DATED: June 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** all employees of the Huntington Union Free School District, No. 3, within the unit represented by the Huntington UFSD Clerical Unit, Local 870, Suffolk Educational Chapter, CSEA:

1. That the Huntington Union Free School District, No. 3 will not pay unilateral salary increases granted on March 15, 1982 to Marie Abbate, Nancy DeRiso, Betty Jacobus, Helen Keller, Margaret O'Grady and Dorothy Jenó.
2. That the District will negotiate in good faith with the Huntington UFSD Clerical Unit, Local 870, Suffolk Educational Chapter, CSEA.

Huntington Union Free School District

Dated .....

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

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

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2C-6/28/83

In the Matter of

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 222,

Respondent,

-and-

CASE NO. U-6668

WESTERN REGIONAL OFF-TRACK BETTING  
CORPORATION,

Charging Party.

MOOT & SPRAGUE, ESQS. (RONALD A. SIPOS, ESQ., of  
Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on appeal of the Western Regional Off-Track Betting Corporation (OTB) from a decision of the Director of Public Employment Practices and Representation (Director) dismissing its charge that Service Employees International Union, Local 222 (Local 222) violated its duty to negotiate in good faith by filing certain

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grievances on the ground that the facts alleged did not, as a matter of law, constitute a violation of the Taylor Law.<sup>1/</sup>

The charge alleges the following facts. Ticket machine operators (TMO's) had been selling lottery tickets as well as horse race wagering tickets for approximately a year and a half when, during negotiations for an agreement that expired on June 30, 1982, Local 222 had demanded that either the TMO's receive additional compensation or that they not be required to sell lottery tickets. There were some discussions of this demand but no agreement upon it, and the demand was then withdrawn by Local 222. Thereafter the parties declared impasse on the remaining issues and the demand in question was not among those agreed upon by the parties for submission to the fact finder. Moreover, on December 9, 1982, Local 222 attempted to submit the lottery ticket issue to the fact finder, but when OTB objected on the ground that Local 222 had dropped the demand previously, the fact finder determined that Local 222 could not properly submit the demand to him.

The charge proceeds to allege that Local 222 had earlier filed a group grievance on behalf of several TMO's

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<sup>1/</sup>In accordance with normal procedures, Local 222 was not formally served with the charge and is not a party to the proceeding at this stage.

complaining that they were improperly required to sell both kinds of tickets. A few days later, one TMO, Marian Marano, refused to operate both machines and she was reprimanded. On November 18, 1982, Local 222 filed a second grievance; this one complained about the reprimand.

On the basis of these alleged facts, OTB charged that Local 222 violated §209-a.2(b) of the Taylor Law:

in that it attempts to raise as an arbitrable controversy a proposal which it had withdrawn during contract negotiations . . . and . . . which the fact finder found was not properly submitted as part of the impasse proceedings between the parties.

OTB's appeal reasserts the argument made to the Director that Local 222 violated §209-a.2(b) by reason of abuse of the negotiation process in that:

The Union has blatantly attempted to procure a result in the forum of arbitration identical to one it could not achieve in the forum of contract negotiations. The Union seeks to have two bites (or, apparently, as many as it can get) of the apple.

We affirm the decision of the Director that the pursuit of the grievances is not a violation of Local 222's duty to negotiate in good faith, notwithstanding its prior withdrawal of a related demand. We determine that an employee organization may assert that it has a right to a particular benefit even though it has withdrawn a demand during negotiations that would have made that right explicit.

OTB also makes an argument in support of its charge not previously made to the Director. It contends that Local 222's attempt to revive the lottery ticket demand before the fact finder on December 9 was improper. In essence, this is a new charge.

We find that OTB's charge, as originally filed, did not complain that the raising of the lottery ticket issue before the fact finder was improper. The language of the charge establishes that the sole improprieties complained about were the filing of the two grievances. The reference to Local 222's efforts to submit the demand to the fact finder was merely designed to illustrate the failure of that attempt so as to further prove that the demand had already been withdrawn. The violation now alleged was not specified in the original charge or in a timely amendment thereof. Accordingly, we will not entertain it. As the time to file a new charge relating to the presentation to the fact finder has passed, OTB may not now amend its charge to complain about that presentation.<sup>2/</sup>

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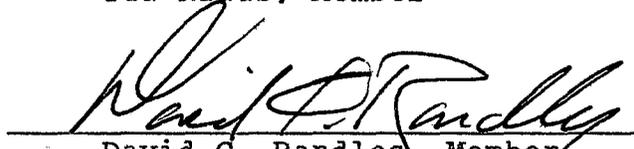
<sup>2/</sup>See City of Mount Vernon, 14 PERB ¶3037 (1981), and East Moriches Teachers Association, 14 PERB ¶3056 (1981), in which we said that we would "not find an improper practice which is not alleged in a charge or a timely amendment thereto."

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

DATED: June 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

#2D-6/28/83

STATE OF NEW YORK (UNIFIED COURT  
SYSTEM),

Respondent,

-and-

CASE NO. U-6064

ROBERT A. FERRETTE,

Charging Party.

---

HOWARD A. RUBENSTEIN, ESQ., for Respondent

ROBERT A. FERRETTE, pro se

BOARD DECISION ON MOTION

On April 29, 1983, we dismissed the charge made by Robert A. Ferrette against the State of New York (Unified Court System) on the ground that Ferrette failed to exercise his responsibility to prosecute his charge. The matter comes to us again on Ferrette's motion for reconsideration. The papers supporting that motion, however, contain no further allegations of fact and show no other basis for reconsideration.

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

DATED: June 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

#2E-6/28/83

UNITED FEDERATION OF TEACHERS,  
LOCAL 2,

Respondent,

-and-

CASE NO. U-6620

---

BERTHA M. FOGLE,

Charging Party.

---

SILVERA, BROOKS & LATIMER, ESQS. (TREVOR L.  
BROOKS, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Bertha Fogle to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her charge that the United Federation of Teachers, Local 2 (UFT) violated §209-a.2(a) of the Taylor Law by refusing to represent her adequately in connection with a grievance that she filed against the City School District of the City of New York (District).<sup>1/</sup>

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<sup>1/</sup>In accordance with our Rules of Procedure, UFT was not formally served with this charge and is not a party to this proceeding at this stage.

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Fogle is employed by the District as a teacher and is in a negotiating unit represented by UFT. In September 1982, she filed a grievance complaining that the District improperly denied her a class assignment which she had sought. More particularly, she complained that less qualified and less senior Caucasian teachers were given class assignments of their choice while she, a black, was not. When the grievance was denied at Step I, Fogle sought representation by the attorney of her choice at Step II, but the District rejected this request. UFT did not protest the denial of her request and it represented her at this step of the grievance proceeding. The grievance was denied at Step II and UFT refused to take it to Step III. Fogle then filed the charge herein against UFT.

Fogle's grievance against the District expressly complained that the District was guilty of racial discrimination and alleged facts to support that complaint. The charge before us does not complain that UFT's handling of the grievance was motivated by any such discrimination. While such a complaint might be implied, no facts are alleged in the charge which would support such a complaint. The Director therefore determined that the charge alleged no improper motivation for UFT's conduct with respect to the grievance. We affirm this determination.

Other than Fogle's suggestion of improper motivation on the part of UFT, she complains that UFT failed to oppose the District's denial of her request to obtain her own counsel and that it failed to investigate and advise her of her ~~rights with respect to the alleged racial discrimination of~~ the District.

In rejecting Fogle's complaint relating to UFT's failure to protest the denial of her own counsel, the Director reasoned that an employee organization is under no Taylor Law obligation to permit an individual grievant to have his own representative. In rejecting Fogle's complaint against the UFT relating to the lack of investigation and advice concerning alleged racial discrimination, the Director also noted that the grievance dealt with rights that do not derive from the Taylor Law. He ruled that UFT need not therefore investigate and advise unit employees with respect to such rights so long as its refusal to do so is not improperly motivated. As he had already found no improper motivation on the part of UFT, he dismissed the charge.

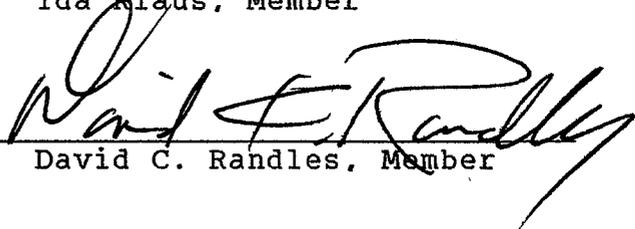
We affirm the determination of the Director that the charge does not allege facts which, as a matter of law, constitute a violation of the Taylor Law.

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

DATED: June 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  
CHESTER UNION FREE SCHOOL DISTRICT,  
Employer.

#3A-6/28/83

-and-

CASE NO. C-2585

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CHESTER ADMINISTRATORS ASSOCIATION,  
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,

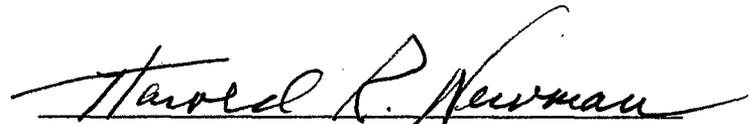
IT IS HEREBY CERTIFIED that the Chester Administrators Association has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:      Included:      Elementary Principal and  
   Assistant Elementary Principal.  
                 Excluded:      All other employees.

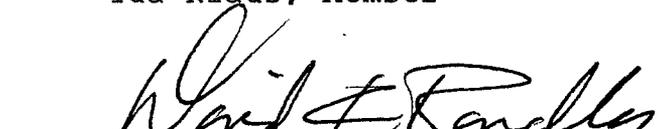
8379

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Chester Administrators Association and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: June 28, 1983  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member