12-9-1983

State of New York Public Employment Relations Board Decisions from December 9, 1983

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from December 9, 1983

Keywords

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2A-12/9/83

TOWN OF NEWARK VALLEY and LAWRENCE KASMARCIK, HIGHWAY SUPERINTENDENT,

Respondents,

-and-

CASE NO. U-6425

UNION OF THE TOWN OF NEWARK VALLEY HIGHWAY DEPARTMENT EMPLOYEES and ARTHUR WAKEMAN, et al.,

Charging Parties.

CHARLES P. AYRES, JR., ESQ., for Respondents.

THOMAS, COLLISON & PLACE (STEPHEN B. ATKINSON, of Counsel), for Charging Parties.

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Town of Newark Valley (Town) and Lawrence Kasmarcik, its Highway Superintendent (Superintendent), to the affirmative relief ordered by a hearing officer to remedy a violation of Section 209-a.1(a) and (c) of the Taylor Law which he found that the Superintendent committed.[1/] The violation consisted of

---

1/The Town and the Superintendent did not except to the hearing officer's finding that the Superintendent committed the violation. Neither did the charging parties except to the hearing officer's determination that the Town was not involved in the layoff decision and that the Superintendent did not act as an agent of the Town when he committed the violation.

laying off Charles Toft and David Henson, two highway employees, and threatening to lay off others because they were asserting rights protected by the Taylor Law. The provisions of the remedial order to which the Town and the Superintendent object direct the Superintendent to offer the two laid off employees immediate reinstatement to their former positions, and to make them whole for any losses they may have suffered by reason of the layoffs.

The exceptions argue that the Town cannot be directed to provide funds to satisfy the order because it was not responsible for the violation, and that the Superintendent, having no independent source of income, cannot be directed to pay more than $1,600 surplus available from past appropriations from the Town. They also assert that the Highway Department needs no more than the six employees it now has, all of whom are senior to Toft and Henson, and it argues that this Board cannot require the hiring of redundant employees.

We find no merit in the exceptions. Having laid off Toft and Henson improperly, the Superintendent can be ordered to offer them reinstatement and to make them whole for their losses. The duty of a public employer to satisfy a Taylor Law obligation may require it to curtail some nonmandated programs if additional funds are not otherwise available to

it.[2/]. Moreover, if a public employer still lacks sufficient funds to satisfy a valid Taylor Law obligation, it may have to resort to procedures generally available to insolvent obligors.[3/] Thus, in NLRB v. R. J. Smith Construction Co., 545 F 2d, 187 (D.C. cir., 1976), 93 LRRM 2609, the Court rejected an employer's argument that it need not comply with a make-whole remedy issued by the NLRB because compliance would force it into bankruptcy. The Court said:

> We are aware of no authority which would exalt the Company's alleged precarious financial condition over the employees' right to an award of back pay. Manifestly, the remedial provisions of the Act should prevail over this claim, especially when the Company has enjoyed the fruits of its violation.

The obligation of the Superintendent to reinstate the two employees whom he laid off improperly and to make them whole for losses suffered does not, of course, require him to continue to employ them indefinitely. Once he offers them reinstatement, and they accept, he is not thereafter precluded from laying them off for good and sufficient reason that is

---

[2/]See City of Buffalo v. Rinaldo, 41 NY2d 764 (1977), 10 PERB ¶7014, and Buffalo Board of Education, 4 PERB ¶3090 (1971).

[3/]See Board of Education of Yonkers, 40 NY2d 268 (1976), 9 PERB ¶7519.

not improperly motivated.[4/]

NOW, THEREFORE, WE ORDER the Superintendent:

1. To offer Toft and Hensen immediate reinstatement to their former positions.

2. To compensate Toft and Henson for any loss of pay and benefits they may have suffered by reason of being laid off, from the date of such layoff to the date of the offer of reinstatement, with interest on lost wages at the annual rate of 3% from October 23 to December 31, 1982 and the annual rate of 9% thereafter, less any earnings derived from other employment.

3. To cease and desist from interfering with, restraining, coercing, or discriminating against its employees for the exercise of rights protected by the Taylor Law and

4. To conspicuously post a notice in the form attached at all locations throughout

---

[4/] See City of North Tonawanda Housing Authority, 16 PERB ¶3073 (1983).

the Highway Department ordinarily used to communicate information to unit employees.

DATED: December 9, 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

I hereby notify employees of the Town of Newark Valley Highway Department that the Highway Superintendent:

1. Will offer Charles Toft and David Henson immediate reinstatement to their former positions;

2. Will compensate Toft and Henson for any loss of pay and benefits suffered by reason of being laid off from the date of such layoff to the date of the offer of reinstatement, with interest on lost wages at the annual rate of 3 percent per annum from October 23 to December 31, 1982, and at the rate of 9 percent per annum thereafter, less any earnings derived from other employment;

3. Will not interfere with, restrain, coerce or discriminate against its employees for the exercise of rights protected by the Taylor Law.

.....Highway Superintendent.....

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.

8663

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2B-12/9/83

CHURCHVILLE-CHILI CENTRAL SCHOOL DISTRICT

Respondent,

-and-

CASE NO. U-6728

CHURCHVILLE-CHILI CLERICAL ASSOCIATION,

Charging Party.

THEALAN ASSOCIATES, INC. (ANTHONY P. DI ROCCO, of Counsel), for Respondent

CHRISTOPHER KELLY, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Churchville-Chili Central School District (District) to a hearing officer's decision that it violated §209-a.1(d) of the Act by refusing to negotiate with respect to the following proposal made by the Churchville-Chili Clerical Association (Association):

Retirement

1. The District shall provide to all unit members who are eligible the non-contributory New Career Plan, commonly called Section 75-i.

2. For all unit members not eligible for #1 above, the following shall be in effect:

> The District shall provide each bargaining unit member with an earned income of $2,000, which is to be a supplement to any money earned pursuant to the salary schedule and other economic provisions of the collective bargaining agreement. The supplemental income shall be utilized solely for the purpose of setting up individual retirement accounts (IRA's) for unit members.
>
> The supplemental income shall be paid to the individual and subsequently deducted from the individual's paycheck. Such deduction shall be by payroll deduction, and shall be forwarded to an individual retirement account of the unit member's choosing.
>
> The additional income shall be provided to each unit member on an annual basis.

The District admitted that it refused to negotiate this proposal. It took the position that the second section of the proposal encompasses a nonmandatory subject because it falls within the provision of §201.4 of the Civil Service Law which prohibits the negotiation of retirement benefits.[1/]

[1/] §201.4 provides:

> The term "terms and conditions of employment" means salaries, wages, hours, agency shop fee deduction and other terms and conditions of employment provided, however, that such term shall not include agency shop fee deduction for negotiating units comprised of employees of the state or any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

The demand in the first section is for a mandatory subject of negotiation because L. 1975, c. 625, as last extended by L. 1983, c. 413 provides for the negotiation of retirement benefits made available under state statutes.

The hearing officer held that the District's acceptance of the proposal to fund employee individual retirement accounts (IRA)[2/] is not prohibited by the language of the statute because it is neither a benefit provided by a retirement system nor a payment to retirees or their beneficiaries. He noted that IRA's are not limited to providing a source of income for retirees, as the tax-deferred distributions are available at a fixed age regardless of whether the employee at that time remains employed, has retired, or has terminated his employment for a reason other than retirement. Furthermore, the assets of an IRA vest immediately and are available at all times to the employee. The hearing officer also determined that the Association's demand fell outside the scope of a retirement benefit prohibited by §201.4 because the District's obligation would be fixed and payable only during the period of the employee's employment.

[2/]An IRA is a savings trust created for the benefit of an individual wage earner. A tax-deductible contribution of up to $2,000 may be made annually to an IRA. All earnings on contributions to an IRA accumulate on a tax deferred basis. Distributions from an account may begin at age 59 1/2 and do not depend upon the retirement status of the individual. Earlier distributions may be taken, subject to a penalty tax. §§219, 408 Internal Revenue Service, Publication 590, November 1982.

The District also argued that the demand was a nonmandatory subject of negotiation because an employer contribution to an IRA contravenes Federal public policy. The hearing officer rejected this argument, noting that the Internal Revenue Code (IRC) anticipates employer contributions to an IRA.[3/]

We affirm the decision of the hearing officer. He properly found that the Association's proposal represents compensation to current employees for services actually rendered and does not create a retirement benefit within the meaning of §201.4 of the Civil Service Law. Its salient features do not reflect any continuing open-ended obligation of a pension system, prohibited by §201.4.[4/] The IRA plan more closely resembles the annuity described in New York Public Interest Research Group, Inc. v. City of New York, supra, which was held not to constitute a retirement plan. As in this case, the payments on behalf of each covered employee vest in the employee immediately, the employee is entitled to receive the funds even if not retired, and the District's

---

[3/]26 U.S.C. §§219, 408.

[4/]Village of Lynbrook v. PERB, 48 NY2d 398 (1979), 12 PERB 7021; New York Public Interest Research Group, Inc. v. City of New York, 89 Misc. 2d 262 (Sup. Ct., N.Y. Co., 1976), aff'd on the opinion below, 63 AD2d 926 (1st Dept., 1978), aff'd on opinion below, 48 NY2d 917 (1979).

obligation is fixed and its payment on behalf of each employee is certain with respect to its monetary commitment. In our view, the Association's proposal is no different from a request for additional wages, and the IRA is in the nature of a tax deferred savings plan.

The District argues that in concluding that the proposal does not violate Federal public policy, the hearing officer did not consider that it creates a Simplified Employee Pension Plan (SEP). A SEP plan is a retirement income arrangement under which an employer may contribute directly to an employee's IRA.[5/] That plan, the District asserts, is not available under the IRC to employees covered by a collective bargaining agreement if retirement benefits had been the subject of good faith bargaining between the employer and the employee representative[6/] and, therefore, the demand herein for a SEP is a prohibited subject of bargaining.

Contrary to the District's assertion, a SEP plan permits, but does not require, the exclusion of employees covered by a collective bargaining agreement if retirement benefits were the subject of good faith bargaining between the employer and

---

5/IRC §§219, 408; Department of the Treasury, Internal Revenue Service (IRS), Publication 590, Nov. 1982; IRS Notice 81-1; IRS Form 5305-SEP, April 1983.

6/See IRC §410(b) (3) (A). The District had not asserted, before the hearing officer, that the proposal created a SEP.

the employee representative.[7/] Accordingly, in our view, the District's argument that the employees herein may not, as a matter of Federal public policy, participate in an IRA plan is not supported by our reading of IRC §408 and §410 or by any other convincing evidence before us.

We note, moreover, that an employer may contribute directly to an employee's IRA without creating a SEP plan. In fact, unless the employer deliberately sets up a SEP plan which meets all of the requirements of the IRC, no SEP can be established. The proposal herein would not create a SEP; there is nothing in the language of the proposal which mentions the establishment of a SEP and there is no provision in the Association demand for a written SEP plan document.

Accordingly, we affirm the ruling of the hearing officer that the District is found to have violated §209-a.1(d) of the Act by refusing to negotiate with respect to the Association's proposal.

NOW, THEREFORE, WE ORDER the Churchville-Chili Central School District to:

1. Negotiate in good faith with the Churchville-Chili Clerical Association concerning the second section of the Retirement demand;

[7/] IRS Notice 81-1; IRS Form 5305-SEP, April 1983.

2. Sign and post a notice in the form attached at all locations normally used for communications to unit employees.

DATED: December 9, 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 in the unit represented by the Churchville-Chili Clerical Association that the Churchville-Chili Central School District:

Will negotiate in good faith with the Association concerning the second section of the Retirement demand.

CHURCHVILLE-CHILI CENTRAL 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.

8671

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#3A-12/9/83

MOUNT PLEASANT CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-2584

MOUNT PLEASANT TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Petitioner,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

Unit:	Included:	All per diem substitute specialists
	Excluded:	All other employees employed by the Mount Pleasant Central School District.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Mount Pleasant Teachers Association, NYSUT, AFT, AFL-CIO 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: December 9, 1983
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member