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5-11-1984

State of New York Public Employment Relations Board Decisions from May 11, 1984

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from May 11, 1984

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-5/11/84

In the Matter of

SUFFOLK COUNTY BOARD OF COOPERATIVE
EDUCATIONAL SERVICES, SECOND
SUPERVISORY DISTRICT,

Respondent,

-and-

CASE NO. U-6514

BOCES II TEACHERS ASSOCIATION,

Charging Party.

THEALAN ASSOCIATES, INC. (by JOSEPH IGOE), for
Respondent

MARTIN FEINBERG, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Suffolk County Board of Cooperative Educational Services, Second Supervisory District (BOCES) to a decision of the Director of Public Employment Practices and Representation (Director) that it violated §209-a.1(d) of the Taylor Law by refusing to negotiate an "impact demand" made by BOCES II Teachers Association (Association). The Director determined that BOCES had increased the number of students to be assigned to each

8997

teacher in its Occupational Education Program;^{1/} that the Association had demanded, among other things, premium pay for additional students; and that after one meeting, BOCES broke off negotiations on the ground that there had been no change in the number of students actually attending each class.

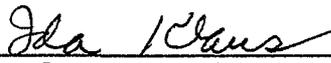
It is acknowledged that an employer must negotiate an impact demand where its unilateral action has, or is likely to have, an impact on the terms and conditions of employment of its employees. Accordingly, the sole issue before us is one of fact: was there a change in class size goals which had or was likely to have an impact upon the terms and conditions of employment of the teachers? The Director found that there was both actual and potential impact and the record supports his finding. Both the Association's and BOCES' witnesses testified that BOCES increased from 25 to 30 the number of students whose admission to each class would be the relevant goal for its officer responsible for forming classes.

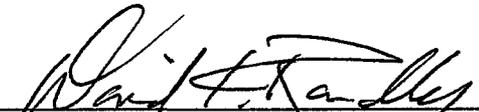
^{1/}In the past, BOCES has set a goal of assigning no more than 25 students to a class. Because of circumstances that are not material to the charge, the actual number of students who attended a class might exceed this goal. BOCES changed that goal from 25 to 30 students per class, but as before, the number of students actually attending a class could exceed the number specified in the goal.

NOW, THEREFORE, WE AFFIRM the decision of the
Director, and
WE ORDER BOCES to negotiate the
Association's premium pay demand in
good faith.

DATED: May 11, 1984
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

SEWANHAKA CENTRAL HIGH SCHOOL
DISTRICT,

Respondent,

-and-

CASE NO. U-6899

SEWANHAKA FEDERATION OF TEACHERS,

Charging Party.

In the Matter of

SEWANHAKA CENTRAL HIGH SCHOOL
DISTRICT,

Respondent,

-and-

CASE NO. U-6943

NASSAU EDUCATIONAL CHAPTER LOCAL 865
OF THE CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME, AFL-CIO,

Charging Party.

DOUGLAS E. LIBBY, ESQ., for Respondents

ROBERT D. CLEARFIELD, ESQ. (HAROLD G. BEYER, JR., ESQ.,
of Counsel), for Charging Party in U-6899

ROEMER AND FEATHERSTONHAUGH, P.C. (DONA S. BULLUCK,
ESQ., of Counsel), for Charging Party in U-6943

BOARD DECISION AND ORDER

The Sewanhaka Central High School District (District)
has a collective bargaining agreement with the Sewanhaka
Federation of Teachers (Federation) which specifies the

terms and conditions of employment of certified teaching personnel from July 1, 1982 through June 30, 1984. It has four collective bargaining agreements with the Nassau Educational Chapter Local 865 of the Civil Service Employees Association, AFSCME, AFL-CIO (CSEA) covering four units of noncertified personnel for the same period of time.

While the five collective bargaining agreements provide group health insurance for employees in the five negotiating units, there is nothing in any of the agreements requiring the provision of group health insurance to retirees. Notwithstanding the absence of any such contractual obligation, the District provided the same group health insurance coverage to retirees that it provided to employees in the five units until July 1, 1983.

At a meeting of the District's Board of Education held on March 12, 1983, that Board voted to reduce its payment of group health insurance premiums on behalf of retirees who had been in the unit of the Federation effective July 1, 1983. During the following month the Federation demanded negotiations regarding the group health insurance benefits of retirees and the District refused. It then filed the charge in U-6899 which alleges that the District violated its duty to negotiate health insurance benefits of persons who retired during the life of an agreement which

would be retroactive to July 1, 1982, the date when the basic collective bargaining agreement took effect.

On April 15, 1983, the District notified retirees who had been in negotiating units represented by CSEA that its payment of health insurance premiums on their behalf would be reduced effective July 1, 1983. CSEA then demanded that the District negotiate the health insurance benefits of its retirees and the impact of the District's unilateral action. When the District refused, CSEA filed the charge in Case U-6943. CSEA's charge complains that the District's refusal to negotiate covers the health insurance benefits of both individuals who have retired or may retire during the term of an agreement that would be retroactive to July 1, 1982 and those who retired previously.

The Administrative Law Judge (ALJ) ruled that the District is under no obligation regarding the health insurance benefits of persons who retired before July 1, 1982 and he dismissed CSEA's charge to the extent that it seeks to negotiate such benefits. He found, however, that the District is required to negotiate health insurance benefits for persons who were employed by it during the term of agreements with the Federation and CSEA and that such agreements could be retroactive to the time when the basic collective bargaining agreement became effective.

The matter now comes to us on the exceptions of the District to the determinations of the ALJ.^{1/} Finding that the issues in the two charges are identical, we have consolidated them for decision.

The District makes three arguments in support of its exceptions. The first is that the demands are not a mandatory subject of negotiation in that they cover employees who retired even before the demands were made. This is not a justification for the District's refusal to negotiate the demands before us. In Old Brookville, 16 PERB ¶3094 (1983), we held that a demand for health benefits of persons in the unit at the time of the effective date of the agreement who retired thereafter but before the agreement was concluded is a mandatory subject of negotiation.

The District's second argument is that the charges merely allege a contract violation and not a violation of the duty to negotiate. The record does not support this argument. While the parties have negotiated agreements which provide health insurance benefits for employees in the units represented by both unions, the agreements do not deal with the right of persons who retire during their terms to receive such benefits after their retirement. The

^{1/}CSEA has filed no exceptions to that part of the ALJ's decision which dismissed part of its charge.

demands are therefore subject to mandatory negotiations.
New Paltz Central School District, 11 PERB ¶3057 (1978).

The District's third argument is the obverse of its second. It asserts that by not demanding a health insurance retirement benefit for the 1982-84 agreement, the unions waived their rights to do so during the term of that agreement. There is no evidence in the record in either case of an express waiver and none can be implied from either union's failure to make a demand for the continuation of an extra contractual benefit that the District had been providing, and which neither had any reason to anticipate that the District would curtail.

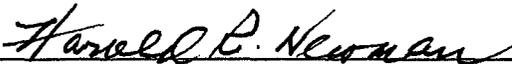
NOW, THEREFORE, WE AFFIRM the decisions of the ALJ, and

WE ORDER the District to negotiate in good faith with the Federation and CSEA with respect to the maintenance of health insurance premiums for employees in negotiating units represented by the two unions who may retire or who may have retired during the term of the existing collective bargaining agreements.

WE FURTHER ORDER the District to post the attached notice in all places customarily used for communication

with employees in the negotiating
units represented by the Federation
and CSEA.

DATED: May 11, 1984
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 units represented by the Sewanhaka Federation of Teachers and the Nassau Educational Chapter Local 865 of the Civil Service Employees Association, AFSCME, AFL-CIO that the Sewanhaka Central High School District:

Will negotiate in good faith with the Federation and CSEA with respect to the maintenance of health insurance premiums for employees in negotiating units represented by the two unions who may retire or who may have retired during the term of the existing collective bargaining agreements.

SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT

.....
(employer)

Dated

By
(Representative) (Title)

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
HAUPPAUGE UNION FREE SCHOOL DISTRICT,
Respondent,

-and-

CASE NO. U-7000

HAUPPAUGE TEACHERS ASSOCIATION,
Charging Party.

RAINS & POGREBIN, P.C. (MONA N. GLANZER, ESQ. and
JOANN M. CALDERONE, ESQ., of Counsel), for
Respondent

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

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Hauppauge Teachers Association (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its charge against the Hauppauge Union Free School District (District). The charge alleges that the District violated §209-a.1(a) and (d) of the Taylor Law by making unilateral changes in its summer school and gifted and talented students programs which altered the terms and conditions of employment of teachers.

The charge contains three specifications complaining that summer school teachers who were not assigned to classes having Regents' examinations were required to proctor such examinations.^{1/} Some of the teachers so assigned would not have had to come to school on the day when the Regents' examinations were given at the end of the 1983 summer school session but for that assignment. A fourth specification of the charge complains that teachers in the gifted and talented students program were required to participate in after-school activities.

The ALJ dismissed all the specifications of the charge on the ground that they were not timely.

The Association argues that the ALJ erred in dismissing the three specifications dealing with the summer school program as untimely. It asserts that the

^{1/}One specification alleged that such teachers should not have been required to proctor Regents' examinations at all, the second was that they should not have been required to proctor examinations given in the afternoon, and the third was that they should not have been required to proctor examinations taken by, among others, students who did not attend the District's summer school program.

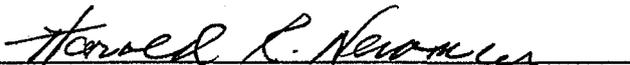
charge was filed within three months of its receipt of a letter from the superintendent rejecting a request it made to negotiate the subject. It argues that the ALJ erred in dismissing the one specification dealing with the gifted and talented students program as untimely in that the charge was filed one day less than four months of its receipt of a letter from the superintendent rejecting its request for a discussion of compensation for those teachers participating in that program.

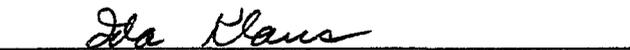
These arguments would be relevant if the Association had alleged a refusal to negotiate. It did not do so. On its face the charge merely complains about unilateral action. Moreover, the Association's presentation of its evidence and its brief to the ALJ focused only upon the alleged unilateral action. A charge complaining of a public employer's unilateral action obviously embraces an allegation that the employer failed to negotiate his action with the employee organization. The time of the alleged violation, however, is that of the employer's unilateral action.

As the ALJ correctly found that the conduct allegedly constituting unilateral action occurred more than four months prior to the filing of the charge, we affirm his decision.

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

DATED: May 11, 1984
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
DUNDEE CENTRAL SCHOOL DISTRICT,
Respondent,

-and-
MARTIN MILLER,

CASE NO. U-6174

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 decision of an Administrative Law Judge (ALJ) dismissing the three specifications of his charge against the Dundee Central School District (District). All three specifications of the charge derive from Miller's statement on questionnaire forms of the District that he had Masters and Doctoral degrees from Columbia University. The District had been informed by Columbia that this was not true, but Columbia would not release a copy of Miller's transcript without Miller's permission.

The first specification of Miller's charge is that the District's Superintendent, Donald J. Averill, denied him the opportunity to be accompanied by his attorney at a meeting allegedly called by Averill to discuss possible disciplinary action against Miller for not making his Columbia transcripts available to the District. Miller contends that this action was a per se denial of his rights under the Act.

The ALJ dismissed this specification on several separate grounds. The ALJ's first ground is based on his finding that the meeting was requested by Miller, and that Averill did not require Miller's attendance. He concluded that Miller had no right to be accompanied by an attorney at a meeting called at his request and which he was not required to attend. Having reviewed the record, we affirm these findings of fact and conclusions of law of the ALJ, and his decision dismissing the first specification of the charge.^{1/}

The second and third specifications of the charge relate to actions initiated by the District allegedly in retaliation for Miller's filing of numerous grievances and his criticism of the recognized bargaining representative, conduct protected by the Taylor Law.

^{1/}It is therefore not necessary for us to consider the other grounds for the ALJ's dismissal of the first specification.

The second specification of the charge is that in an earlier improper practice case involving the same parties (16 PERB ¶3011 [1983]), the District's attorney issued subpoenas to Miller for his college transcripts, information that it allegedly already had, thus indicating that the sole purpose of the subpoena was to harass Miller. The record shows that the District wanted to use the subpoenaed documents to impeach Miller's credibility in that earlier case. As Miller's credibility was a significant issue in that case, there is no question that the issuance of the subpoenas was an appropriate litigation procedure, and, as found by the ALJ, was not improperly motivated. Accordingly, we affirm on this ground the ALJ's decision dismissing the second specification of Miller's charge.

The third specification of Miller's charge is that the District instituted disciplinary proceedings against him under Education Law §3020-a without any valid basis, thereby demonstrating its improper motivation.^{2/} In support of this proposition, he notes that he was exonerated of eight of the nine specifications of the

^{2/}Processing of the instant case was delayed for a year pending the completion of the disciplinary case.

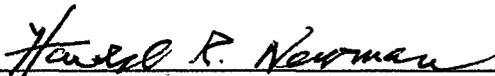
disciplinary charge, most of which related to his alleged graduate degrees from Columbia.

We have before us the decision in the disciplinary proceeding, and those parts of the record therein that the parties deemed relevant. The panel found Miller not guilty of the specifications of that charge dealing with his alleged graduate degrees. In exonerating Miller, the panel concluded that he had not fully understood what was required of him when he provided incorrect information on the questionnaires that he completed. It is clear from that record that there was a reasonable basis for the District to have instituted the disciplinary proceeding. Inasmuch as Miller's claim of improper motivation rests upon his assertion that the District instituted a sham disciplinary proceeding, we find, as did the ALJ, no improper motivation on the part of the District. Accordingly, we affirm on this ground the ALJ's dismissal of this final specification of Miller's charge.^{3/}

^{3/}In his final exception, Miller argues that the ALJ erred in finding that the District had counseled him before it initiated the disciplinary proceeding. The evidence supports the ALJ's finding.

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

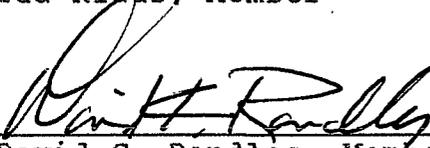
DATED: May 11, 1984
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK and
LOCAL 2, UNITED FEDERATION OF TEACHERS,
AFT,

Respondents,

-and-

CASE NO. U-7113

SAMUEL KIMMEL,

Charging Party.

Samuel Kimmel, pro se

BOARD DECISION AND ORDER

Samuel Kimmel, a special education guidance counselor employed by the Board of Education of the City School District of the City of New York (District), filed the charge herein. It alleges that the District violated §209-a.1(d) of the Taylor Law by refusing to provide him with a transfer list and a vacancy list, both of which are referenced in the District's collective bargaining agreement with the United Federation of Teachers, AFT (UFT), the employee

organization that represents the guidance counselors employed by the District. The Director of Public Employment Practices and Representation (Director) determined that this specification of the charge does not allege a violation of the Taylor Law in that it merely seeks enforcement of the collective bargaining agreement.

Kimmel's charge also complains that UFT violated §209-a.2(a) of the Taylor Law by refusing to support a grievance brought by him to compel the District to give him the two lists. The charge specifies that UFT agreed with the District that the collective bargaining agreement does not entitle special education guidance counselors to the lists which Kimmel seeks, and that this information was communicated to the special education guidance counselors as a group. The Director dismissed this specification of the charge on the ground that as UFT was free to reach an agreement with the District treating special education guidance counselors differently from other guidance counselors, its interpretation of the collective bargaining agreement did not violate the Taylor Law.

The matter now comes to us on Kimmel's exceptions, which deal only with his complaint against UFT. Kimmel

alleges that "it has just come to my attention" that UFT is supporting the grievance of another special education guidance counselor who is also seeking access to transfer and vacancy lists.

Assuming the accuracy of this information, it suggests that UFT may have changed its position regarding the rights of special education guidance counselors under its agreement. If this is so, Kimmel can again request UFT to support a new grievance or await the results of the grievance of the other counselor. Alternatively, the new information might now support a charge against UFT that it has discriminated among special education guidance counselors. In our view, this would be an entirely different charge from that brought by Kimmel herein, which alleges a consistent UFT position that special education guidance counselors as a group have no right to transfer and vacancy lists. The new information is therefore not encompassed by the charge herein and may not be considered by us when offered for the first time in Kimmel's exceptions.

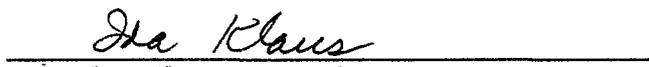
Nothing else in Kimmel's exceptions raises any question regarding the correctness of the decision of the Director. Accordingly, we affirm that decision.

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

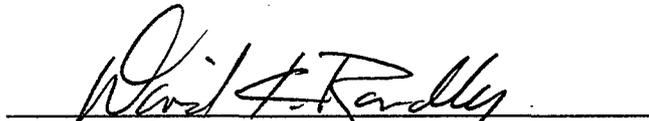
DATED: May 11, 1984
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2F-5/11/84

In the Matter of

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

Respondent,

-and-

CASE NO. U-6089

DONALD J. BARNETT,

Charging Party.

JERRY ROTHMAN, ESQ., for Respondent

DONALD J. BARNETT, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Donald J. Barnett to a decision of an Administrative Law Judge (ALJ) dismissing his charge against the Board of Education of the City School District of the City of New York (District).

The charge alleges four violations by the District. The first is that the District placed a number of documents relating to Barnett's grievances and improper practice charges in his personnel file. The ALJ dismissed this specification on the ground that there is no record evidence of improper use of any of those documents, and it is not a per se violation of the Taylor Law for a public employer to place documents that refer to grievances or improper practice cases in the personnel file of an employee.

Barnett next complains that the District denied him leave with pay to attend conferences and hearings on prior improper practice charges. The ALJ dismissed this specification on the ground that the Taylor Law does not require a public employer to give its employees leave with pay to attend PERB hearings and that there is no allegation or evidence that the denial was discriminatory.

The third specification of the charge is that the District denied Barnett leave without pay to attend conferences and hearings in prior improper practice charges. The ALJ dismissed this specification on the ground that the evidence does not support the allegation.

Finally, Barnett complains that the District refused to process a grievance he filed in his own behalf, referring him instead to a contract provision which provides for the initiation of certain grievances only by the United Federation of Teachers, Barnett's negotiating representative. The ALJ dismissed this specification on the ground that it was not improper for the District to refer Barnett to the contract provision relating to the initiation of a grievance.

Having reviewed the record and considered the arguments of the parties, we affirm the findings of fact and conclusions of law of the ALJ dismissing the last three specifications of the charge.

With regard to the first specification of the charge, we do not agree with the view that it can never be a per se violation of the Act for an employer to place into an employee's official personnel file documents referencing grievances or improper practice charges. Matters placed into a permanent personnel file may well have an effect upon an employee's future advancement, outside employment and career prospects.^{1/} Therefore, the placement into such file of certain documents which directly and materially reference and pertain to an employee's exercise of protected Taylor Law activities, is likely to have a chilling effect upon the employee's exercise of those activities. This, therefore, would constitute prohibited interference irrespective of the employer's motivation.

On the record of the instant case, however, we do not discern a basis for a per se violation of the Act. Even were we to assume that all the documents annexed to the charge were actually in Barnett's file, a fact not clear from the record, neither these, nor those few documents which were formally introduced into the record, have anything but incidental relevance to his exercise of

^{1/}Holt v. Board of Education, 52 NY2d 625, 633, 635-36 (1981)

protected activities. The documents consist primarily of letters or standardized forms by which Barnett requested leaves of absence, and letters from the school principal responding to those requests. The fact that Barnett listed the need to attend PERB conferences or hearings as the reason for his leave requests does not affect the essential nature of these documents, which simply pertain to Barnett's attendance.^{2/} In these circumstances, proof of improper motivation is necessary. Since Barnett did not establish that leave requests involving grievances or PERB proceedings were the only such requests placed into his file, and since he did not present any other evidence from which even an inference of improper motivation might be drawn, this aspect of his charge must also be dismissed.^{3/}

^{2/}A charge presenting a related fact pattern was dismissed by the NLRB in Dayton Tire and Rubber Co., 216 NLRB No. 173, 89 LRRM 1124, 1974-75 CCHNLRB ¶15564 at 25865.

^{3/}Barnett's exceptions also contain various allegations of procedural error on the part of the ALJ. We have reviewed these allegations in light of the record and find them to be completely without merit. We have similarly examined the rest of the allegations in the exceptions and find them to be neither supported by the record nor relevant to the issues before us.

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

DATED: May 11, 1984
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

WHITNEY POINT CENTRAL SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-7080

WHITNEY POINT TEACHERS ASSOCIATION,
LOCAL 3122, NYSUT/AFT,

Charging Party.

HOGAN & SARZYNSKI, ESQS. (JOSEPH WALLEN, ESQ., of
Counsel), for Respondent

WILLIAM FINGER, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Whitney Point Teachers Association, Local 3122, NYSUT/AFT (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Whitney Point Central School District (District) violated §209-a.1(a) and (d) of the Taylor Law by requiring probationary teachers already in its employ who hold provisional certifications to complete a six-hour course in remedial or diagnostic reading.

The ALJ found that the Association and the District were parties to an agreement, a reasonable construction of which permitted the District to act as it did. Accordingly, he determined that the question presented by the charge was whether the District had acted in accordance with the agreement, a question which is not subject to this Board's jurisdiction. The ALJ also dismissed the charge on the ground that the alleged unilateral action of the District involves qualifications for employment and is therefore not a mandatory subject of negotiation.

The Association argues that the ALJ's jurisdictional determination is in error and his dismissal of the charge on the merits was issued prematurely.

The pleadings indicate that there was an explicit provision in the parties' 1981-82 agreement authorizing the District to require teachers with provisional certifications to complete a minimum of six hours work in diagnostic or remedial reading. This clause was deleted from the parties' 1982-84 agreement. In its place the parties executed a side agreement which authorized the District to act in accordance with a specified opinion of the Education Commissioner. That opinion authorizes the District, acting pursuant to the resolution of its Board of Education, to impose requirements upon provisionally

certified teachers which exceed the requirements imposed by the Commissioner himself.

According to the Association, at the pre-hearing conference, the ALJ inquired whether the charge alleges more than a contract violation. He asked the parties to brief this question and indicated that he would dismiss the charge for lack of jurisdiction if only a contract violation were alleged. The Association's brief to the ALJ merely addressed the question of jurisdiction and the District submitted no brief at all. The ALJ then dismissed the charge both on jurisdictional grounds and on the merits.

We disagree with the ALJ's decision that the charge should be dismissed on jurisdictional grounds. The jurisdictional test articulated in St. Lawrence County, 10 PERB ¶3058, at 3103 (1977), is that the Board will not enforce an agreement but it will interpret agreements

to the limited extent of determining whether there has been a statutory violation, for example, to determine whether an employee organization has waived its right to negotiate on a particular subject so as to permit unilateral action by an employer.

This decision is based upon the dissenting opinion in Town of Orangetown, 8 PERB ¶3042, at 3072 (1975), which says:

I would find that in situations where an employer unilaterally institutes or establishes a term of employment not expressly provided for in the agreement or

withdraws a benefit not provided for in the contract without negotiating about it with the representative organization, this Board will take jurisdiction of a charge even though the employer relies upon a provision in the contract claiming either a right so to do or as constituting a waiver by the employee organization of its right to negotiate re same.

Here the Association is claiming no contract right. The only contract issue appears to be whether the contract constitutes a waiver of the Association's right to negotiate the course requirement by sanctioning unilateral action by the District. Such a question is subject to this Board's jurisdiction.

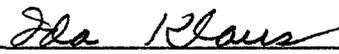
The Association argues that the ALJ did not merely decide the jurisdictional question wrongly, but that he also interpreted the agreement by deciding the waiver issue on the merits and reached the scope of negotiation issue without first holding a hearing. There is no basis in the record for disputing the assertions made by the Association in its exceptions regarding the intended scope of the ALJ's decision discussed at the pre-hearing conference. It is clear to us that there was a misunderstanding between the ALJ and the Association as to what the Association should address in its brief. The Association believed that the sole issue to be addressed was the jurisdiction question and it did not address the merits of the charge. We therefore remand this matter to the ALJ for further consideration of those merits.

NOW, THEREFORE, WE ORDER that the charge herein be remanded to the ALJ for further proceedings consistent with this decision.

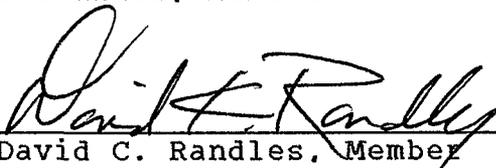
DATED: May 11, 1984
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF AMSTERDAM,

Employer/Petitioner,

-and-

CASE NO. C-2626

AMSTERDAM CITY EMPLOYEES LOCAL UNION
NO. 1614 & COUNCIL 66, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO, and
AMSTERDAM WASTEWATER FACILITY LOCAL
065 OF THE CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC., LOCAL 1000, AFSCME,

Intervenor.

JOSEPH JACOBS, ESQ., for Employer/Petitioner

MICHAEL A. TREMONT, ESQ., for AFSCME

ROEMER & FEATHERSTONHAUGH, ESQS. (RICHARD L.
BURSTEIN, ESQ., of Counsel), for CSEA

BOARD DECISION AND ORDER

On May 20, 1983, the City of Amsterdam (City) filed a petition seeking to establish a negotiating unit consisting of 32 employees of its Department of Water and Sanitary Sewers. Nineteen of these employees perform water related operations for the Department and have been

represented by the Amsterdam City Employees Local Union No. 1614 & Council 66, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME). The remaining 13 employees work at the Department's sewage treatment plant and are in a unit represented by the Amsterdam Wastewater Facility Local 065 of the Civil Service Employees Association, Inc., Local 1000, AFSCME (CSEA).

The water employees had worked for the City from 1967 to 1980, at which time their negotiating unit included other City employees. A 1980 charter amendment created a separate Water Board with the power to hire and fire employees. Thereafter AFSCME negotiated a collective bargaining agreement which covered both the water employees and the other employees of the City who had been in the same negotiating unit. That agreement was executed on behalf of management by both the City and the Board of Water Commissioners.^{1/}

^{1/}The City asserts that the effect of the charter amendment was to create two negotiating units, while AFSCME asserts that it continued to represent blue-collar employees in a single unit. The difference between them is not significant here. It appears, however, that there was a single unit of the employees of two distinct employers who negotiated with AFSCME as an employer association.

When CSEA came to represent the sewage employees in 1975, the sewage plant was a State facility. That facility was transferred to the City on July 1, 1982, and the City continued to deal with CSEA.

In November 1982, the voters of the City approved a referendum which eliminated the Water Board and returned the water operations to the City. It also established the Water and Sanitary Sewer Department. The City argues that the creation of this new department combining water and sewage operations perforce requires the placement of the employees performing these operations into a single unit. The Director of Public Employment Practices and Representation (Director) rejected this argument and determined that both the AFSCME and CSEA units should be continued because of an undisputed history of effective representation of the employees in both units over an extended period of time.

This matter now comes to us on the City's exceptions to the decision of the Director.

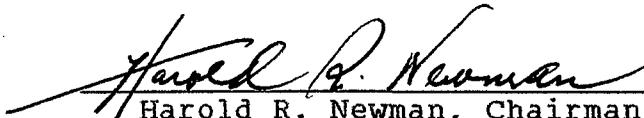
In its exceptions, it reasserts the proposition that the mere creation of the Water and Sewer Department by a referendum compels the placement of the water and sewage employees in a single unit. We do not agree.

Nothing in the Taylor Law precludes the representation of employees of a single department in more than one negotiating unit. The City's argument must be understood as an allegation that its administrative convenience would be served if the two groups of employees were placed in a single unit. This is relevant to the second standard for unit determination set forth in §207.1 of the Taylor Law. On the other hand, the undisputed long history of effective representation in both negotiating units, as correctly found by the Director, is indicative of separate communities of interest.^{2/} This is relevant under the first standard set forth in §207.1. The Director considered both of these factors and gave them appropriate weight. Accordingly, we affirm his decision.

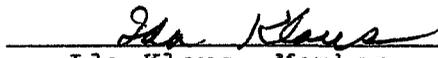
^{2/}The fact that this representation occurred while the two groups of employees each worked for an employer other than the City does not alter this proposition. The City is the successor employer of the Water Board and the State agency which operated the sewage plant. As such, it is required to deal with the unions that represented the employees of its two predecessors in the preexisting negotiating units, unless those negotiating units can otherwise be found to be inappropriate. Compare Burns International Detective Agency, 406 U.S. 277, 80 LRRM 2225 (1972), and Howard Johnson, 417 U.S. 249, 86 LRRM 2449 (1974).

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

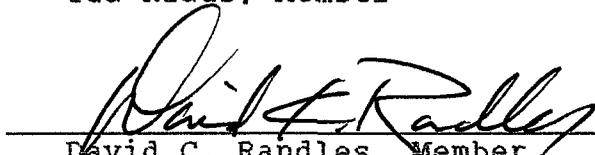
DATED: May 11, 1984
Albany, New York



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 Doctors Council 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.

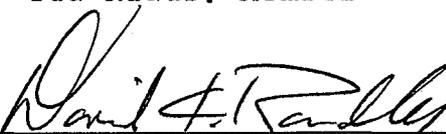
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