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State of New York Public Employment Relations Board Decisions from January 11, 1985

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from January 11, 1985

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE OF NEW YORK and THE UNION OF FEDERATED
CORRECTION OFFICERS,

Respondents,

-and-

CASE NO. U-7375

NEW YORK STATE INSPECTION, SECURITY AND LAW
ENFORCEMENT EMPLOYEES, DISTRICT COUNCIL 82,
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO,

Charging Party.

In the Matter of

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL
SERVICES and OFFICE OF EMPLOYEE RELATIONS),

Respondent,

-and-

CASE NO. U-7385

THE UNION OF FEDERATED CORRECTION OFFICERS,

Charging Party,

-and-

NEW YORK STATE INSPECTION, SECURITY AND LAW
ENFORCEMENT EMPLOYEES, DISTRICT COUNCIL 82,
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO,

Intervenor.

JOSEPH M. BRESS, ESQ. (Richard J. Dautner, Esq., of counsel),
for Respondent State of New York, Governor's Office of
Employee Relations

JEFFREY H. BROZYNA, ESQ., for Charging Party The Union of
Federated Correction Officers

ROWLEY, FORREST AND O'DONNELL, P.C. (Brian J. O'Donnell, Esq.,
of counsel), for Charging Party/Intervenor Council 82

BOARD DECISION AND ORDER

The two improper practice charges herein grow out of the same series of incidents and they were consolidated for hearing and decision.^{1/} The incidents involve actions by The Union of Federated Correction Officers (TUFCO) to solicit employees of New York State in the Security Services Unit at the Fishkill Correctional Facility and at other correctional facilities in violation of a rule of the State on organizational activities. That rule provides for equal access to State premises among competing employee organizations for the purpose of soliciting employee support during the campaign period. Defining this period, it further provides:

... the campaign period shall begin no earlier than 90 days prior to the date upon which the incumbent organization's representation status is subject to challenge under Section 208 of the Taylor Law.

The incidents also involve the State's reaction to TUFCO's actions by, among other things, confiscating designation cards collected by TUFCO at Fishkill on March 4, 1984.

^{1/}There was a third related charge that was covered by the consolidated decision. The Administrative Law Judge dismissed that charge on the ground that the record did not support its allegations of fact. The charging party has not filed any exceptions to that dismissal. Accordingly, that charge is not before us.

The first charge was by New York State Inspection, Security and Law Enforcement Employees, District Council 82, American Federation of State, County and Municipal Employees, AFL-CIO (DC 82). It alleges that TUFCO violated §209-a.2(a) of the Taylor Law by interfering with its right of quiet enjoyment of its status as the certified representative of the Security Services Unit by soliciting support for a challenge to its right of representation in violation of the State's rule. The Administrative Law Judge (ALJ) dismissed this charge on the ground that TUFCO has no Taylor Law obligation to comply with the State's rule. DC 82 has filed exceptions to that decision.^{2/}

The second charge was filed by TUFCO. It complains that the State violated §209-a.1(a) of the Taylor Law by confiscating designation cards which it had solicited in violation of the State's rule. The ALJ determined that the confiscation of the cards was a violation of the statute; he ordered the State to cease and desist from such activities and to return the confiscated cards. Both the State and DC 82, which was permitted to intervene in the matter, have filed exceptions to the ALJ's finding of

^{2/}This charge also alleged that the State improperly failed to enforce its own rule, but the exceptions do not address the ALJ's dismissal of this specification.

a violation.^{3/} TUFECO, in turn, filed exceptions in which it argues that the ALJ's remedy is inadequate.

The sole issue presented by DC 82's exceptions to the ALJ's dismissal of the first charge is whether TUFECO had a Taylor Law obligation to comply with the State's rule.

TUFECO violated this rule by entering upon the State premises for the purpose of soliciting support as early as 150 days prior to the expiration of DC 82's period of unchallenged representation.

The ALJ ruled that TUFECO's violation of the State's unilaterally established access rules is not a violation of the Taylor Law. We agree. In State of New York, 10 PERB ¶3108 (1977), we held that the State's denial of access to a challenging employee organization within 90 days of the expiration of the incumbent organization's period of unchallenged representation was a violation of the Taylor Law. In doing so, we noted that this conduct was also violative of the State's own manual.

^{3/}This charge also alleged that the State acted improperly by threatening the offending employees with discipline and otherwise coercing them because of their violations of the rule. The ALJ dismissed these specifications of the charge and no exceptions were filed to that part of the decision.

DC 82 reads that decision as an endorsement of the State's manual. This indeed may be correct, but only to the extent that we held that the State's manual correctly reflected its obligation to permit equal access for solicitation at a time reasonably proximate to when a petition could be filed.^{4/} It does not follow that an employee organization seeking to supplant the incumbent violates any Taylor Law right of the incumbent union to quiet enjoyment of its representative status by soliciting a showing of interest on the employer's premises prior to the 90-day period. Neither does it follow that the State owed a Taylor Law duty to the incumbent employee organization to prevent a challenger from entering upon its premises prior to that 90-day period.

DC 82's reliance upon Gates-Chili CSD, 13 PERB ¶3028 (1980), is misplaced. It merely holds that a public employer is under no Taylor Law duty to permit equal access to a challenging organization except at times proximate to an election and that the grant of access privileges to such an organization at other times would interfere with employees' rights to be represented by the organization of their choice. Thus, whatever merits DC 82's argument

^{4/}Cheektowaga-Maryvale UFSD, 11 PERB ¶3080, 1978, Affd. Maryvale Education Association v. Newman, 70 AD2d 758, 12 PERB ¶7009 (3d Dept., 1979), Lv. to App. Den. 48 NY2d 605, 12 PERB ¶7018 (1979); Board of Education, Kenmore-Town of Tonawanda, 12 PERB ¶3055 (1979).

concerning its statutory right of quiet enjoyment might have at other times, it clearly has no application during the six-month period during which showing of interest designation cards must be signed and dated.^{5/} Accordingly, while TUFCO may have violated a rule of the State, that alleged violation did not violate the Taylor Law.

In their argument in support of their exceptions in the second case, the State and DC 82 assert that the State acted properly in confiscating the designation cards that had been obtained in violation of the State's rule. They contend that confiscation was reasonably necessary to deter further violations and to deny TUFCO the fruit of its wrongful conduct.

The ALJ rejected the argument on the ground that there was a more pressing reason for the State not to confiscate the designation cards. That reason was the maintenance of the confidentiality of those cards. Citing with approval an opinion of the Ninth Circuit in NLRB V. Essex Wire Company, 245 F2d 589, 39 LRRM 2633 (1957), the ALJ ruled

^{5/}See §201.4(b) of our Rules of Procedure. See also Great Neck UFSD, 11 PERB ¶4517 (1978) at p. 4535-36, affirmed on other grounds at 11 PERB ¶3079 (1978). The statutory rights of public employees during this period are set forth in County of Erie, 13 PERB ¶4605 (1980), affd. 13 PERB ¶3105 (1980).

that maintenance of the confidentiality of the names of persons who signed the designation cards is an important protection under the labor relations statutes, including the Taylor Law.

DC 82 contends that the ALJ erred in relying upon the Essex decision because §209-a.3 of the Taylor Law declares that private sector decisions shall not be regarded as binding precedent and maintenance of discipline by public employers is more important than maintenance of the confidentiality of designation cards.

We find that the ALJ gave appropriate weight to Essex as well as to what may be special public sector considerations. He did not rule that a public employer was prohibited under all circumstances from seizing designation cards. On the contrary, he indicated that the State had a legitimate interest in enforcing its solicitation rules and that it might be justified in confiscating cards if they were necessary evidence in a disciplinary proceeding for violation of that rule. On the record before him, however, the ALJ determined that there was no such necessity because TUFCA admitted it solicited the cards on State property. Applying a balancing test, he therefore ruled that the confiscation of the cards at Fishkill constituted an improper practice. We affirm this determination.

DC 82 asserts that even if the State erred in confiscating the cards, it should not be required to return

them now. Instead, it should be directed to destroy them so that TUFECO cannot benefit from the action it took in violation of the State's order.

There may be circumstances when a public employer might properly destroy designation cards without looking at them because the cards were obtained in violation of lawful rules. On the other hand, there may be circumstances when such cards can be used as part of a showing of interest, notwithstanding the manner in which they are obtained.^{6/} Noting that the issue was not presented by any of the charges before him, the ALJ declined to rule on whether the State could have properly destroyed TUFECO's cards instead of confiscating them.

The exceptions relating to the remedy do not make this issue any more material. TUFECO has submitted a sufficient showing of interest in support of its current petition even without the designation cards that the State has been directed to return to it. Accordingly, DC 82's concern that TUFECO will use those cards for a purpose it considers improper is academic. Thus, there is no reason why we need consider DC 82's contention that the State should not return the cards which are TUFECO's property.

^{6/}Compare State of New York, 15 PERB ¶3014 (1982)

In part, TUF^{CO}'s complaint about the inadequacy of the ALJ's remedial order is the mirror image of DC 82's last exception. It argues that the order should have provided not only for the return of those designation cards, but for their being counted as part of its showing of interest.

As we have said, however, the matter has become academic.^{7/}

TUF^{CO} also argues that the remedial order is inadequate in that it should have provided "more meaningful sanctions" against the State and for attorneys' fees. We reject this argument. Section 205.5(d) of the Taylor Law permits this Board to remedy improper practices by ordering appropriate relief, "but not to assess exemplary damages." TUF^{CO}'s request for "meaningful sanctions" is a request for exemplary damages. We also find no such unusual circumstances as would require the awarding of attorneys' fees in the instant proceeding.^{8/}

NOW, THEREFORE, WE AFFIRM the decision of the ALJ and WE ORDER the State:

^{7/}We also note that TUF^{CO} did not make this argument before the ALJ.

^{8/}See Westbury Teachers Assn., 14 PERB ¶3063 (1981)

1. To cease and desist from confiscating TUFCO designation cards,
2. To immediately return to TUFCO the designation cards confiscated at Fishkill Correctional Facility on March 4, 1984, and
3. To post a notice in the form attached at all locations normally used for communication with employees at the Fishkill Correctional Facility.

DATED: January 11, 1985
Albany, New York


Harold R. Newman, Chairman


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 employees in the Security Services Unit at the Fishkill Correctional Facility that the State of New York:

1. Will not confiscate TUFCO designation cards.
2. Will immediately return to TUFCO the designation cards confiscated on March 4, 1984.

STATE OF NEW YORK

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.

9464

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CITY OF SARATOGA SPRINGS,
Respondent,

-and-

CASE NOS.
U-7302 & U-7422

CITY OF SARATOGA SPRINGS FIRE
FIGHTERS UNION, LOCAL 343, IAFF, AFL-CIO,
Charging Party.

THEALAN ASSOCIATES (JOSEPH T. KELLY), for
Respondent

GRASSO & GRASSO, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Saratoga Springs Fire Fighters Union, Local 343, IAFF, AFL-CIO, (Local 343) to the decision of an Administrative Law Judge (ALJ) dismissing two charges that it had filed against the City of Saratoga Springs (City). The charges had been consolidated for hearing and decision.

The first charge alleges that the City violated §209-a.1(d) and (e) of the Taylor Law by reducing the number of fire fighters at its West Side Fire Station from four to three. It also alleges a violation of §209-a.1(c) in that the City disciplined Jack Dejnozka in retaliation

for his having protested the cut in minimum manning and engaged in other protected activities.

Dejnozka was serving as Acting Lieutenant at the West Side station on January 21, 1984, when the staff reduction went into effect. In that capacity, he closed the station on the ground that for purposes of safety it was inadequately staffed. When the City directed that the station be reopened, Dejnozka declined to continue to serve as Acting Lieutenant and the other two fire fighters on duty there declined to assume that assignment. An off-duty fire fighter was called in to serve as Acting Lieutenant, and Dejnozka, the junior man at the West Side Station, was sent to the main station. He in turn bumped Gerald Ruhle, who was working at the main station in accordance with his normal schedule. Ruhle was told to take compensatory time off for overtime previously worked. Such a compensatory day off is called a Kelly Day.

This precipitated Local 343's second charge. It alleges that the City violated §209-a.1(d) and (e) in that there had been a past practice of Kelly Days being taken only at the employee's convenience. It also alleges a violation of §209-a.1(c) in that the imposition of the Kelly Day upon Ruhle was discriminatorily motivated. The basis of this specification is not any independent improper motivation with respect to Ruhle, but rather that it was a

consequence of the improper motivation involved in the transfer of Dejnozka.

All the actions complained of occurred after December 31, 1982, which is when the stated time frame of the parties' prior collective bargaining agreement had ended. Dejnozka was a vice-president of Local 343 and a member of its team then negotiating a successor agreement. He also had an unspecified "personal involvement" in grievances and improper practices filed against the City.

After closing the West Side Fire Station, Dejnozka complained about the unsafe working conditions to the news media. Local 343 asserts that these complaints were made in Dejnozka's capacity as a union officer and were, therefore, protected. It also alleges that the City brought disciplinary action against Dejnozka and suspended him without pay for 30 days by reason of his having engaged in protected activities. The protected activities that allegedly provoked the disciplinary action included Dejnozka's closing of the West Side station, his complaints to the media, his office in the union, his service on the union's negotiating team and his undisclosed role in grievances and improper practice cases.

The record shows that Dejnozka's action in closing the West Side station was taken in his capacity of Acting Lieutenant. As such it was not protected by the Taylor

Law.^{1/} The record also shows that in complaining to the media about the allegedly unsafe conditions at the West Side Station, Dejnozka identified himself, not as a spokesman for Local 343, but as the Acting Lieutenant. Indeed, when the Fire Captain told the press that the station closing grew out of a union/management problem, Dejnozka denied this and said that he had closed the station because:

I was the officer in charge, I was the one that closed that West Side station, and I closed it due to unsafe working conditions and not union business. (emphasis supplied)

On this evidence, the ALJ found that Dejnozka's statements to the media were not protected. We affirm this finding.

On the record before us, we conclude that the City's initiation of disciplinary proceedings was motivated by these two unprotected actions of Dejnozka and not by his membership on Local 343's negotiating committee, his office in that union or any involvement he may have had in prior grievances or improper practices. This conclusion is supported by the absence of any prior indication of animus borne by the City toward Local 343.

^{1/}This is not to suggest that such action would be protected if taken by a union representative. On the contrary, it might constitute a violation of §210.1 of the Taylor Law. See Penn Yan CSD, 13 PERB ¶3046 (1980)

There is, however, an indication in the record that McGourty, the City's Commissioner of Public Safety, bore a personal animus toward Dejnozka. Dejnozka had campaigned "very hard" against McGourty's political election on two occasions. He had also filed a charge alleging a Human Rights Law violation against McGourty. Neither of these actions of Dejnozka's is protected by the Taylor Law.^{2/} Thus, if McGourty's conduct were motivated by animus, the more reasonable likelihood is that the animus was personal rather than directed at Local 343, and, as such, it was not related to Dejnozka's exercise of activities protected by the Taylor Law.

Much of Local 343's argument in support of the §209-a.1(c) specification in the first charge is that there were improprieties in Dejnozka's disciplinary proceeding. To the extent that the charge complains about the alleged improprieties per se, the ALJ properly ruled that this Board has no jurisdiction over them. To the extent that the alleged improprieties might indicate an attempt to "get" Dejnozka, they do not establish animus toward Local 343. On the contrary, they would reflect McGourty's personal animus toward Dejnozka, unrelated to protected matters.

^{2/}Town of Lake Luzerne, 11 PERB ¶3094 (1978); Town of Oyster Bay, 14 PERB ¶3002 (1980) affirming in pertinent part 13 PERB ¶4596 (1979); New York State Public Employees Federation (Farkas), 15 PERB ¶3134 (1982), aff'd Farkas v. PERB, 97 AD2d 569, 16 PERB ¶7024 (3d Dep't 1983) Mot for Lv to App, Den 61 NY2d 601, 16 PERB ¶7031 (1983).

The §209-a.1(c) specification in the second charge is also without merit. Were we to find the City's transfer of Dejnozka to the main fire station to have been improper, the remedy would extend to the ripple effects of this impropriety, including its impact upon Ruhle. There is no basis, however, for such a finding. Dejnozka's transfer to the main station was directly attributable to the West Side Station being overstaffed when a new Acting Lieutenant had to be called in. There is also no basis for a finding of any independent improper motivation involving Ruhle.

The §209-a.1(d) and (e) specifications of the first charge relate to the parties' prior collective bargaining agreement. Minimum manning was not expressly dealt with in it, but it had a past practices clause. According to Local 343, minimum manning was a past practice that had been incorporated into the contract under that clause.

As minimum manning is not a mandatory subject of negotiation, the §209-a.1(d) specification must fall. This is because a public employer's unilateral change of a nonmandatory subject of negotiation does not violate §209-a.1(d) of the Taylor Law.^{3/} The alleged §209-a.1(e) violation was dismissed by the ALJ because the agreement had an extension of benefits clause which provides:

^{3/}Board of Education of the City of New York, 5 PERB ¶3054 (1972).

If the parties hereto have failed to agree upon a new contract on or before December 31, 1982, all of the terms and conditions set forth in this agreement and any supplements or modifications thereof shall continue in full force and effect until the date of execution of a new agreement.

Thus, according to the ALJ, the contract is still in effect.

Section 209-a.1(e) requires maintenance of the status quo after the expiration of an agreement. It is therefore inapplicable here, Local 343 being relegated to its remedy under the extended agreement. We affirm this conclusion.

The §209-a.1(d) and (e) specifications of the second charge relate to another alleged past practice not specifically dealt with in the parties' agreement, that Kelly Days may be taken only at the convenience of the employee and cannot be imposed by the employer. The §209-a.1(e) specification falls for the same reason that it does in the first charge; pursuant to its own terms, the parties were still covered by their contract.

The §209-a.1(d) specification presents a different problem because the alleged unilateral charge involves a mandatory subject of negotiation. The ALJ dismissed the charge on the ground that it alleges nothing more than a contract violation, a matter over which this Board has no jurisdiction.^{4/} He acknowledges, however, in footnote 6 of his decision, that we may have held otherwise in City of Buffalo, 17 PERB ¶3090 (1984).

^{4/}See CSL §205.5 and St. Lawrence County, 10 PERB ¶3058 (1977).

In Buffalo, we held that a unilateral change of a past practice during the life of an agreement might violate §209-a.1(d) if the contract did not deal with the matter explicitly, even if the contract covered it indirectly in a general past practices clause. This would be so when the charge was not based upon any alleged breach of contract but merely relied upon the alleged unilateral action. Thus, our jurisdiction was not affected by the existence of a relevant past practices clause which was not relied upon in the charge but disclosed during the processing of the proceeding.

Such is the case here. The facts alleged in the charge assert the breach of an obligation flowing from the Taylor Law. Local 343 did not plead a breach of any contractual entitlement. Although, as noted by the ALJ, it did refer to the alleged breach in its post hearing brief, we do not read that reference as a reliance upon the contract as a basis for its charge herein.

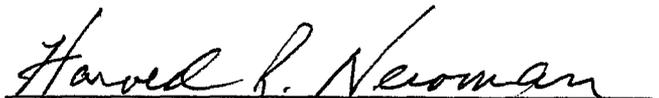
As in Buffalo, we nevertheless decline to entertain this specification of the charge because the parties' agreement has a procedure for resolving the parallel contract dispute by arbitration. Accordingly, we defer to that procedure and dismiss this specification subject to its reinstatement should the City interpose objections to arbitrability or should an arbitration award not satisfy the standards for deferral which we delineated

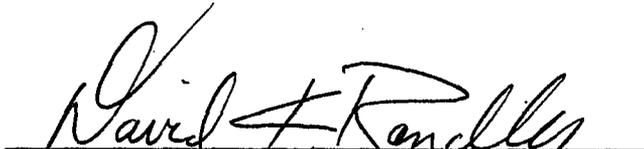
in New York City Transit Authority (Bordansky), 4 PERB

¶3031(1971).^{5/}

NOW THEREFORE WE ORDER that the charges herein be and
they hereby are, dismissed.

DATED: January 11, 1985
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

^{5/}In that case we said (at p. 3670):
[I]n order for this Board in an improper
practice proceeding to defer to an
arbitration award it must be satisfied that
the issues raised by the improper practice
charge were fully litigated in the
arbitration proceeding, that arbitral
proceedings were not tainted by unfairness
or serious procedural irregularities and
that the determination of the arbitrator was
not clearly repugnant to the purposes and
policies of the Public Employees Fair
Employment Act.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
PUBLIC EMPLOYEES FEDERATION, AFL-CIO,
Respondent,

-and-

CASE NO. U-7657

LOUIS C. ST. GEORGE,
Charging Party.

DOUGLAS L. WINOKUR, ESQ., for Charging Party

DECISION AND ORDER

The charge herein alleges that the Public Employees Federation, AFL-CIO violated its duty of fair representation in that it refused to appeal the denial of Louis C. St. George's grievance to Court. The grievance complained that by reason of his job assignments, St. George, an Unemployment Insurance Claims Examiner (salary grade 14), was entitled to the position of Senior Unemployment Insurance Claims Examiner (salary grade 18).

The Director of Public Employment Practices and Representation dismissed the charge on the ground that it did

not set forth a violation of the duty of fair representation and the matter now comes to us on St. George's exceptions.

Those exceptions make two arguments: (1) PEF did not investigate the grievance sufficiently before deciding not to appeal to Court, and (2) PEF failed to notify St. George with sufficient expedition of its reasons for not taking the appeal.

With respect to the first argument, St. George asserts that PEF erred in not verifying his allegations of out-of-title work by consulting with him and his supervisor. There is no indication, however, that PEF did not accept St. George's allegations of fact. On the face of the documents submitted by St. George, it appears that PEF concluded that his grievance was correctly denied notwithstanding his assignment of duties normally performed by a Senior Unemployment Insurance Claims Examiner. Its reason for this conclusion was that St. George's office did not have a Senior Unemployment Insurance Claims Examiner and was not entitled to one because of the small number of employees in that office. Thus, according to PEF, the only promotion at his office to which St. George could aspire was Office Manager, and the grievance did not make such a claim nor would the facts asserted by St. George support it.

The question of the timing of PEF's refusal to appeal and of its notice to St. George raises some concern, as shown by the following timetable:

3/22/84	The employer denied the grievance.
3/27/84	PEF so informed St. George.
4/27/84	St. George requested PEF to take an appeal to Court.
5/14/84	PEF acknowledged receipt of St. George's request and informed him that a decision would be made within four weeks.
6/18/84	PEF informed St. George that it had decided not to appeal the grievance, but told him that he could appeal this decision to its Executive Director.
6/22/84	St. George appealed PEF's decision to its Executive Director.
7/13/84	PEF's Executive Director informed St. George that it would not take an appeal because there was "no substantial right to appeal." The Executive Director also told St. George that he could appeal on his own but that his time to do so would expire on July 22.
7/20/84	St. George asked for a more detailed explanation of why PEF was not taking the appeal. It is alleged in the exceptions but not in the charge that St. George had consulted with a private attorney. The private attorney had told him that without knowing PEF's reasons for deciding not to appeal, he could not make an informed judgment as to the likelihood of a successful court proceeding within the short time remaining in which to appeal.
7/30/84	PEF gave charging party a detailed explanation of why it was not taking the appeal.

This Board has held, in Social Service Employees Union, Local 371, 11 PERB ¶3004 (1978) and Nassau Educational Chapter, 11 PERB ¶3010 (1978), that, to satisfy its duty of fair representation, a union refusing to process a grievance must communicate its reason for declining. This duty does not, however, contemplate a detailed statement such as PEF gave to St. George on July 30, 1984. For the purpose of meeting its duty, it was sufficient for PEF to have informed St. George, as it did on July 13, 1984, of its conclusion that the grievance was without merit.

The timing of PEF's notification of St. George that it considered the grievance without merit raises yet another question. PEF can be fairly criticized for the 52 days it took to decide not to appeal St. George's grievance after St. George made his request on April 27, 1984. We do not find, however, that this delay rises to the level of a violation of PEF's duty of fair representation.

As we stated in Nassau Educational Chapter, supra, at p.3020, a union violates its duty of fair representation if it fails to evaluate a unit employee's grievance and to notify him of such evaluation within a reasonable time "by reason of improper motives or of grossly negligent or irresponsible conduct" There is no evidence of improper motivation in the instant case and we do not find that the delay in

notification herein amounts to gross negligence or irresponsible conduct.^{1/}

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

DATED: January 11, 1985
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

^{1/}See also Brighton Transportation Association, 10 PERB 3090 (1977), in which we said at p. 3155:

"We believe that the procedures followed by BTA in deciding not to take the grievance to arbitration were more casual than they should have been. . . . However, the evidence does not indicate that BTA's conduct was improperly motivated or so negligent or irresponsible as to constitute a breach of the duty of fair representation."

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
TOWN OF EVANS,

Respondent,

-and-

CASE NO. U-7344

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 41,

Charging Party.

EARL C. KNIGHT, for Respondent

MILLER, FARMELO, CANE & GREENE (Craig L. Miller, Esq.,
of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of both the Town of Evans (Town) and the International Brotherhood of Electrical Workers, Local 41, (IBEW) to the decision of an Administrative Law Judge (ALJ) finding that the Town refused to negotiate with IBEW and that it unilaterally replaced employees in IBEW's negotiating unit with nonunit employees who were assigned the same work.^{1/} The ALJ ordered the

^{1/}The charge also complained that the Town fired some unit employees and reassigned others in retaliation for their having sought to organize. The ALJ determined that the record evidence did not support these specifications of the charge and IBEW did not file exceptions to this part of her decision.

Town to reinstate two replaced employees (Marchant and Rosenlund) on the ground that they were fired merely because their work was reassigned. She did not order the reinstatement of seven other replaced employees (Forge, Zoda, Cafferty, Austin, Basher, McNeal, and Kiefer) on the ground that

[t]hey were terminated for political or personal reasons apart from any decision to reassign their work to nonunit employees and they would not be employed even if their duties were not transferred out of the unit.

She therefore ordered only that their work be reassigned to other unit employees.

The Town argues that it was under no duty to negotiate with IBEW because IBEW had never been recognized or certified.^{2/} Thus, according to the Town, its unilateral action could not constitute a violation of any obligation to negotiate. It also argues that the ALJ erred in ordering the reinstatement of Rosenlund. Its reason is that his work was reassigned to Galfo, who replaced him as a unit employee. IBEW argues that the ALJ erred in not ordering the reinstatement of the seven unit employees who were

^{2/} IBEW acknowledges that it was not certified.

replaced.^{3/} It also argues that the ALJ erred in not finding a separate violation by the Town in that it did not negotiate the impact of its unilateral transfers of unit work.

The Town's defense to IBEW's allegations of refusal to negotiate its unilateral action focuses attention upon a meeting of the lame duck Town Board held on December 29, 1983, at which a majority voted to recognize IBEW. That meeting was not regularly scheduled and has been variously characterized as an adjourned meeting and a special meeting by the Town and IBEW respectively.

The prior regular meeting had been held on December 21, 1983. A proposal to recognize IBEW was made at that meeting, but as it had not been on the agenda, a four/fifth's vote was necessary to suspend the Town Board's rules of order in order to permit a vote on the proposal. Only three of the five Board members voted to suspend the rules and the proposal was not considered.

At the end of the meeting, by a vote of three to two, the Town Board voted to:

Adjourn to Thursday, December 29, 1983 at 4:00 p.m. for the purpose of discussing and taking action on union recognition and any other Town business that needs action.

^{3/}It does not contest the determination of the ALJ that three other replaced employees (Herman, Rammacher and Johnston) should not be reinstated. The ALJ ordered the reassignment of Herman's work to unit employees but not that of Rammacher and Johnston, there being no showing that their work had been given to nonunit personnel.

The Town argues that the meeting of December 29 was therefore an adjourned meeting, which means a continuation of the December 21 meeting. Thus, according to the Town, it was subject to the same agenda limitations, and the Town Board could not recognize IBEW on December 29 because there had not been a four/fifth's vote in favor of a waiver of the rules which would have permitted an expansion of the agenda.

IBEW argues that the adjourned meeting of December 29, 1983, was a special meeting and not merely a continuation of the meeting of December 21, 1983. Among other things, it points out that the notice of the December 29 meeting posted by the Town Clerk designated it "a special meeting" as do the Town Clerk's minutes of that meeting. Scaglione, one of the Town Board members who voted to recognize IBEW, testified that any meeting of the Town Board other than those regularly scheduled on the first and third Wednesdays of each month had been considered special meetings. More importantly, Cook, the Town Supervisor and one of the two members of the Board who voted against recognition, confirmed Scaglione's testimony.^{4/} We therefore conclude that pursuant to the practices of the Town Board, the meeting of December 29,

^{4/}See record, page 841.

1983, was a special meeting and not merely a continuation of the meeting of December 21, 1983. Accordingly, consideration of the recognition of IBEW was not barred.

The Town next argues that if the meeting of December 29, 1983 were a special meeting, it had been called improperly and was, therefore, a nullity. The basis of this argument is Town Law §62 which provides:

The supervisor of any town may, and upon written request of two members of the board, shall within ten days, call a special meeting of the town board by giving at least two days' notice in writing to members of the board of the time when and the place where the meeting is to be held.

The special meeting of December 29, 1983, was not called by the Town Supervisor. On the contrary, she was one of the two members of the Town Board who voted against calling the meeting.

We do not, however, find that the recognition of IBEW at that meeting was a nullity. The Attorney General has written that the purpose of the requirements in §62 is to assure notice of special meetings to all Town Board members and "[t]he presence of all members of your Town Board at the meeting in question seems to me to satisfy that requirement."^{5/} Thus, according to the Attorney

^{5/}1950 Informal Opinions of the Attorney General, page 117.

General, an appointment made at a special meeting not called in the manner required by Town Law §62 was nevertheless proper where all the Board Members had notice of the meeting and attended. That reasoning is applicable here. Here too, all the members of the Town Board had notice of the meeting of December 29, 1983, and attended.

Even if the action of the Town Board on December 29, 1983 recognizing IBEW were not sufficient to satisfy the Town Law or the Town Board's rules of procedure, we would nevertheless affirm the determination of the ALJ that it was sufficient to constitute a recognition under the Taylor Law. While a failure to comply with the technical provisions of the Town Law and the Town Board's rules might lead to the conclusion that there had been no formal legislative act of recognition, we would find an informal expression of the Town Board sufficient for recognition pursuant to the Taylor Law. The Appellate Division has stated that "[b]efore there can be recognition there must be some objective evidence of acceptance by the authority empowered to extend recognition."^{6/} The majority vote of the Town Board satisfies this requirement.

We affirm the determination of the ALJ that the Town's failure to negotiate the impact of its unilateral transfers

^{6/}Town of Clay v. Helsby, 45 AD2d 292, 7 PERB ¶7012, at p. 7020, (4th Dep't. 1974).

of unit work did not constitute an independent violation of the Taylor Law. IBEW argues that the ALJ erred in finding that its failure to make impact demands precluded a finding of a separate violation. It contends that, given the Town's refusal to negotiate with it at all, such a demand would have been futile. It further contends that the Taylor Law does not require the making of a futile demand as a condition for establishing a duty to negotiate.

Underlying the decision of the ALJ is an awareness that the impact demands that IBEW could have made might have included nonmandatory subjects of negotiation, in which event the Town would not have had to negotiate them. She therefore found no separate violation by reason of the Town's failure to negotiate impact demands that were never made.

The ALJ's reasoning was particularly appropriate here, the ALJ having determined that, on January 6, 1984, the Town refused to meet with IBEW for the purpose of engaging in negotiations. That refusal, which the ALJ found to constitute a violation of the Taylor Law, extended to all negotiations. The finding of a violation therefore encompasses all mandatory subjects of negotiation, including proper impact demands.

We affirm the determination of the ALJ that Rosenlund should be reinstated because his work was transferred to a nonunit employee. Galfo, Rosenlund's replacement as water foreman, was appointed temporary water foreman at a meeting

of the Town Board held on January 1, 1984. At that meeting, Town Supervisor Cook took the position that Galfo was not in the unit. Moreover, within a month all doubt was removed when Galfo was given a new nonunit title for doing the same work. On these facts we conclude that the Town had never intended Rosenlund's work to be performed by a unit employee.

Having reviewed the record we affirm the ALJ's determination that Forge, Zoda, Cafferty, Austin, Basher, McNeal and Kiefer were all fired because of political reasons or personal reasons unrelated to the transfer of their work to nonunit employees. Accordingly, we affirm her determination not to order their reinstatement.

NOW, THEREFORE, WE ORDER the Town of Evans to:

1. Offer to reinstate immediately Edwin Marchant and Herman Rosenlund under their prior terms and conditions of employment and make them whole for any loss of wages and benefits sustained as the result of their termination, with interest at the legal rate;
2. Restore immediately to unit employees the duties which had been performed by Norma Forge, Deanna Zoda, Diana Cafferty, Vieva Austin, Karen Basher, Mary McNeal, Elmer Kiefer and Kenneth

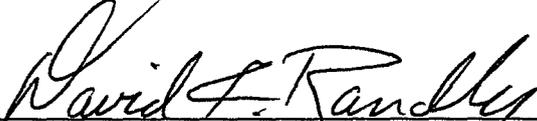
Herman, and which were transferred to nonunit employees;

3. Negotiate in good faith with the International Brotherhood of Electrical Workers, Local 41;
4. Cease and desist from the assignment of unit work to nonunit employees.
5. Post the attached notice at all places normally used to communicate with unit employees.

DATED: January 11, 1985
Albany, New York



Harold R. Newman, Chairman



David C. Randles, Member

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 employees within the unit represented by the International Brotherhood of Electrical Workers, Local 41, that the Town of Evans will:

- (1) Offer to reinstate immediately Edwin Marchant and Herman Rosenlund under their prior terms and conditions of employment and make them whole for any loss of wages and benefits sustained as the result of their termination, with interest at the legal rate;
- (2) Restore immediately to unit employees the duties which had been performed by Norma Forge, Deanna Zoda, Diana Cafferty, Vieve Austin, Karen Basher, Mary McNeal, Elmer Kiefer and Kenneth Herman, and which were transferred to nonunit employees.
- (3) Negotiate in good faith with the International Brotherhood of Electrical Workers, Local 41;
- (4) Not assign unit work to nonunit employees.

TOWN OF EVANS

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

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

Respondent,

-and-

CASE NO. U-7479

ORGANIZATION OF STAFF ANALYSTS,

Charging Party.

BOARD DECISION ON MOTION

This matter comes to us on a motion made by the Board of Education of the City School District of the City of New York (District) for permission to file exceptions to an interlocutory order of an Administrative Law Judge.^{1/}

During the course of a hearing held on September 14, 1984, on the charge herein brought by the Organization of Staff Analysts (OSA) against the District, the District had moved to suppress testimony on the ground that it related to confidential communications between a client and her attorney and was thereby privileged under CPLR §4503. Before ruling

^{1/}Section 204.7(h) of PERB's Rules of Procedure provides:

All motions and rulings made at the hearing shall be part of the record of the proceeding and, unless expressly authorized by the Board, shall not be appealed directly to the Board but shall be considered by the Board whenever the case is submitted to it for decision. (emphasis supplied)

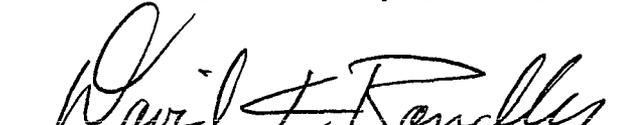
on that motion the ALJ recessed the hearing and invited the parties to submit memoranda of law addressing the question whether the testimony sought involved confidential communications. Both parties submitted such memoranda and, on November 27, 1984, the ALJ issued his decision concluding that the communications were not confidential and therefore not privileged. A continuation of the hearing was then scheduled for January 15, 1985.^{2/}

The motion herein is undated and was delivered to us some six weeks later, on January 9, 1985. As a consequence, OSA has not been afforded an opportunity to submit papers responding to the motion that could be considered by us before the scheduled date of the resumption of the hearing. Under these circumstances we determine that it would be inappropriate to grant the District's motion.

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

DATED: January 11, 1985
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

^{2/}The District's motion also seeks a stay of that hearing.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
LEVITTOWN UNION FREE SCHOOL DISTRICT,
Employer,

-and-

CASE NO. C-2756

LEVITTOWN UNITED TEACHERS, LOCAL 1383,
NYSUT, AFT,
Petitioner.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

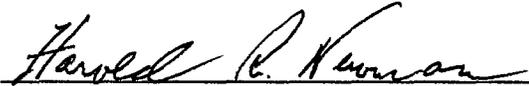
IT IS HEREBY CERTIFIED that the Levittown United Teachers, Local 1383, NYSUT, AFT has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All per diem substitute teachers who in the immediately preceding school year have received a reasonable assurance of continuing employment as referenced in Civil Service Law Section 201.7(d).

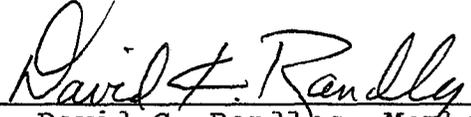
Excluded: All other employees of the employer.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Levittown United Teachers, Local 1383, NYSUT, AFT and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: January 11, 1985
Albany, New York



Harold R. Newman, Chairman



David C. Randles, Member