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State of New York Public Employment Relations Board Decisions from May 8, 1985

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from May 8, 1985

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF WHITE PLAINS,

Respondent,

-and-

CASE NO. U-7326

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., WHITE PLAINS UNIT, LOCAL 860,

Charging Party.

RAINS & POGREBIN, P.C. (BERTRAND B. POGREBIN, ESQ.
and JOHN A. RENO, ESQ., of Counsel), for Respondent

ROEMER & FEATHERSTONHAUGH, P.C. (WILLIAM M. WALLENS,
ESQ. and JOHN R. MINEAUX, ESQ., of Counsel), for
Charging Party

BOARD DECISION AND ORDER

The charge herein was filed by the Civil Service Employees Association, Inc., White Plains Unit, Local 860, (CSEA). It alleges that the City of White Plains (City) committed an improper practice by unilaterally designating Mehrman, a Principal Stenographer - Department of Law, as a confidential employee.

In 1981, the Director of Public Employment Practices and Representation (Director) had designated Marcionni, an Administrative Assistant, as confidential on the ground

that she worked for Grant, the Senior Assistant Corporation Counsel, who was a member of the City's team in collective negotiations, and was privy to the City's conduct of negotiations. When Marcionni retired, Mehrman, a senior legal stenographer, was promoted to Marcionni's position, the title of which was changed to Principal Stenographer - Department of Law.

The record establishes that the City designated Mehrman confidential unilaterally rather than seeking such a designation by PERB. It further establishes that principal stenographers are in the negotiating unit, and "Mehrman performs the identical duties as were previously performed by Marcionni and were found by the Director to be confidential".

On these facts, the Administrative Law Judge (ALJ) concluded that the City violated §209-a.1(a) and (d) of the Taylor Law and she ordered the City, inter alia, to negotiate with CSEA regarding Mehrman's terms and conditions of employment. In doing so, she said:

The conclusion sought by the City might be obtained if Merhrman had replaced Marcionni as Administrative Assistant, or if Marcionni's title had changed to Principal Stenographer, all while performing the same duties; here, however, there have been two changes: a different employee and the establishment of a new position, not a civil service reclassification of the old position.
(footnote omitted)

The matter now comes to us on the exceptions of the City. It argues that the decision "glorifies form over substance" because, on the record evidence, Mehrman is a confidential employee.

The issues raised by this matter are new. We have had occasion to determine that it is the actual responsibilities of employees rather than their job titles which determine whether they should be designated managerial or confidential.^{1/} This supports the proposition, articulated by the ALJ, that the change in the job title from Administrative Assistant to Principal Stenographer - Department of Law, does not vacate the designation of that position as confidential. We have not, however, had occasion to consider whether the designation of an individual as managerial or confidential expires when the person so designated leaves that position, or whether it applies to successor employees who perform the identical duties. Confronting that question for the first time, we conclude that the designation applies to such successor employees.

The logic of our decision in City of Binghamton, supra, dictates that it is the nature of the duties and

^{1/}City of Binghamton, 10 PERB ¶3038 (1977).

responsibilities performed, or to be performed, which determines whether a managerial or confidential designation should be made. It follows that the identity of the person performing those duties is no more the determinative factor than is the particular title of the person performing those duties.

The ALJ, too, has ruled that the identity of the employee performing the relevant responsibilities is not dispositive of the issue. However, while she ruled that neither a change in the identity of the employee or of the job title would separately terminate a designation, she held that the two changes made simultaneously would do so.

Section 201.7(a) of the Taylor Law speaks of the designation of employees as managerial or confidential and not of titles or of responsibilities. It may, therefore, be argued that only the individual so designated is managerial or confidential, and that each time a designated employee leaves his position a new application must be made for the designation of his successor. This would impose an unduly onerous burden upon public employers. Not only would it require repetitive litigation, but it would also unreasonably compel public employers to deal periodically with employee organizations with respect to the terms and conditions of employment of employees performing the same managerial or

confidential functions. Each time a managerial or confidential employee is replaced, the public employer would have to await the appropriate opportunity to file an application for the designation of his successor.^{2/}

Thereafter, the designation, once made, would not take effect until the period of unchallenged representation of the employee organization expires.^{3/}

We find that the language of §201.7(a) of the Taylor Law which refers to the designation of "employees" as managerial or confidential does not preclude the continuing application of such designations to the successors of the designated "employees" who perform the same responsibilities. The statutory language providing for the designation of "employees" flows from the provisions of §202 and §203 of the Taylor Law which gives rights of organization and representation to "employees". It is, therefore, natural that preclusion from those rights by virtue of managerial or confidential status should be articulated in terms of "employees".

^{2/}Section 210.10(b) of the Rules of this Board permits such applications during the fourth and fifth months of the fiscal year of the public employer.

^{3/}Section 201.7(a) of the Taylor Law. See, for example, Wappinger CSD, 16 PERB ¶13029 (1983), in which a public employer committed an improper practice by acting unilaterally with respect to an employee who had been designated confidential instead of waiting 25 months until the end of the employee organization's period of unchallenged representation.

Accordingly, we hold that such a designation, once made, applies thereafter to managerial or confidential employees who perform those duties which were the basis of the original designation.

Of course, nothing herein is intended to suggest that where a designation is based on a variety of duties which, taken together, constitute managerial or confidential work, the assignment of some of those duties to a successor employee would be sufficient for an automatic extension of the designation to such a successor. Here, however, the record establishes that the duties of Merhman were identical with those of Marcionni which were found to be confidential. We further note that nothing here indicates that the title, Principal Stenographer, is a confidential position. There are principal stenographers other than Merhman in the negotiating unit and they continue to be in that unit. There is no claim here that the City is not negotiating with CSEA concerning those positions. However, notwithstanding her title, Merhman has responsibilities that are unique to her, and it is by reason of those unique responsibilities that she is a confidential employee.^{4/}

^{4/}Accord, Ellenville CSD, 16 PERB ¶3066 (1983).

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

DATED: May 8, 1985
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
COUNTY OF NASSAU,

Respondent,

-and-

CASE NO. U-7455

NASSAU CHAPTER, CIVIL SERVICE
EMPLOYEES ASSOCIATION, LOCAL 830,
AFSCME, LOCAL 1000, AFL-CIO,

Charging Party.

EDWARD G. McCABE, ESQ. (BEE & DE ANGELIS, ESQS., of
Counsel), for Respondent

ROEMER AND FEATHERSTONHAUGH, P.C. (CLAUDIA R.
McKENNA, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of both the Nassau Chapter, Civil Service Employees Association, Local 830, AFSCME, Local 1000, AFL-CIO (CSEA) and the County of Nassau (County) to a decision of an Administrative Law Judge (ALJ). The decision dismissed a charge of CSEA alleging that the County unilaterally imposed a requirement upon "employees who call in 'sick' on Saturday and/or Sunday . . . that they . . . make up the missed day or days on another weekend." The employees involved work at the County's A. Holly Patterson Home for the aged and infirm. These employees are normally scheduled to work on alternate weekends.

CSEA and the County were parties to a collective bargaining agreement for the period from January 1, 1982 through December 31, 1984, which provided for paid sick leave. The County was concerned about a perceived abuse of sick leave on weekends. It therefore instituted a procedure whereby an employee taking sick leave over a weekend would be required to make up the time on a subsequent weekend when he was not scheduled to work. However, since the employee was contractually entitled to sick leave, he would be given compensatory time off on week days. CSEA complained that the unilateral institution of this procedure violated §209-a.1(d) of the Taylor Law.^{1/}

The ALJ dismissed the charge on the ground that the parties agreement authorized the County "to regulate work schedules". She ruled that this clause constituted a waiver of CSEA's right to negotiate the rescheduling of the work.

CSEA excepts to this decision. It contends that the ALJ misconstrued the change as one primarily involving scheduling, instead of considering its essence as being a change in sick leave procedures. In this connection it

^{1/}The charge also complained that the County refused to negotiate the impact of its unilateral action. The ALJ dismissed this specification of the charge on the basis of her finding that the County had indicated its willingness and availability to engage in such negotiations, and that the CSEA had never submitted any impact demands. There are no exceptions to this part of the ALJ's decision.

asserts that the scheduling clause relied upon by the ALJ referred to permanent changes in schedules or shifts. Thus, according to CSEA, the above-quoted language of the collective bargaining agreement is not relevant to its charge. It further contends that, in any event, the contract provisions do not constitute an intentional relinquishment of a known right, and therefore are not a waiver within the meaning of CSEA v. Newman, et al., 88 A.D.2d 685, 686, 15 PERB ¶7011 (3d Dept. 1982), app. dismiss'd, 57 N.Y.2d 775, 15 PERB ¶7020 (1982).

We reject CSEA's arguments. While the change instituted by the County was designed to curtail sick leave abuse, the manner in which it did so was through the regulation of work schedules, a matter reserved to the County by contract. The fact that the scheduling changes were temporary does not weaken this conclusion. The collective bargaining agreement provides: "No employee shall be required to work a shift which differs from his assigned shift, without two weeks written notice prior to the change, except in case of emergency". This provision indicates that, having satisfied the two-week notice requirement, the County could make both temporary and permanent changes in the employees' schedules.^{2/}

^{2/}Having so found, we do not reach the County's argument that the collective bargaining agreement's coverage of sick leave was so thorough as to constitute complete satisfaction of its duty to negotiate that subject.

We also affirm the ALJ's conclusion that CSEA v. Newman, supra, does not preclude a finding of waiver. In addition to her stated reasons, which we endorse, we note that CSEA v. Newman deals with the situation in which a union arguably waives its right to negotiate a subject by agreeing not to negotiate that subject. This is distinguishable from the instant case which involves a situation where a union waives its right to negotiate a subject further because it has already negotiated that subject.

In its cross-exceptions, the County, albeit not seeking any change in the outcome of the case, argues that its unilateral action involved a nonmandatory subject of negotiation because its purpose was to control sick leave abuse. Our most relevant decision on this point is City of Rochester, 12 PERB ¶3010 (1979), in which we found a union demand involving sick leave not to be a mandatory subject of negotiation. We said (at p. 3018): "Although the subject of sick leave is a mandatory subject of negotiation, a demand that the employer relinquish to unit employees alone all control of abuses in the taking of sick leave is not." There is no question of relinquishment of all control here. Rather, the County's action involves the rescheduling of work in order to discourage sick leave abuse, and such rescheduling of work is a mandatory subject of negotiation.

The County next argues that the action it took is covered by the contract. The ALJ agreed, that being her reason for dismissing the charge. Accordingly, there is no basis for this exception.

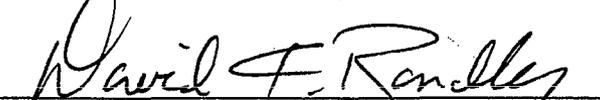
Finally, the County argues that it could not have violated any duty to negotiate its decision to change schedules because it had indicated its availability and willingness to do so. The record supports this proposition, but that availability and willingness occurred after the unilateral change. Such availability and willingness would not authorize unilateral action unless the subject had been previously negotiated to impasse and the unilateral change was made because of a compelling need.^{3/} This is not the case here.

For the reasons set forth herein, we affirm the decision of the ALJ, and WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: May 8, 1985
Albany, New York



Harold R. Newman, Chairman



David C. Randles, Member

^{3/} Cohoes CSD, 12 PERB ¶3113 (1979)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CITY OF SCHENECTADY,

Respondent,

-and-

CASE NO. U-7597

SCHENECTADY POLICE BENEVOLENT
ASSOCIATION,

Charging Party.

BUCHYN, O'HARE and WERNER, ESQS. (JOSEPH J. BUCHYN,
Esq., of Counsel), for Respondent

GRASSO & GRASSO, ESQS. (JANE FININ, ESQ., of Counsel),
for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Schenectady (City) to the decision of an Administrative Law Judge (ALJ) that it violated §209-a.1(d) of the Taylor Law in that it refused to negotiate the impact of a unilateral change. The unilateral change was the reduction below 14 of the number of patrolmen assigned to street duty during a police patrol shift. Although a nonmandatory subject of negotiation, the City and the Schenectady Police Benevolent Association (PBA) have from

time-to-time, included minimum manning clauses in past collective bargaining agreements. Moreover, the minimum manning standard of 14 patrolmen on street duty per shift was maintained by the City even when it was not covered by an agreement.

FACTS

When the parties' current agreement was being negotiated, the City indicated that it would not consent to the extension of a provision carried over from an earlier supplementary agreement for minimum manning.^{1/} Recognizing that the provision was not a mandatory subject of negotiation, PBA interposed no objection. It did, however, indicate its objection to the extension of a mandatory overtime clause contained in that supplementary agreement unless the minimum manning provision were

^{1/}The supplementary agreement, dated September 4, 1981, provided in pertinent part:

14. Until December 31, 1981, and continuing thereafter, unless the City elects not to negotiate the matter which is recognized as a non-mandatory subject of bargaining . . . , [e]ach platoon shall have no less than fourteen patrolmen and one supervisor assigned for street duty.

retained.^{2/}

The mandatory overtime clause had been utilized by the City to compel off-duty police officers to fill in for absent regularly scheduled officers when an insufficient number of them volunteered for overtime work. The City informed PBA that it would not be able to maintain the minimum staffing levels without mandatory overtime, but PBA replied that it would oppose mandatory overtime unless minimum staffing were required by contract. The effect of this exchange between the parties is that the current

^{2/}In pertinent part, the supplementary agreement provides:

15. The provisions of section 14 above may require police officers to engage in overtime work to maintain the manning standards therein provided. Police officers may volunteer for such overtime work by submitting their names for overtime lists prepared for each grade or class of officer . . . Should canvassing of the voluntary over-time list not provide sufficient numbers to meet the above strengths, the least senior members otherwise qualified from said lists, shall be directed to work . . .

16. It is expressly understood and agreed that sections 14 and 15 above are always to be treated together, and that section 15 shall be applicable only as long as section 14 continues to be part of this contract or any successor contract.

collective bargaining agreement contains neither a minimum staffing nor a mandatory overtime provision.

Thereafter, there were at least two occasions when staffing fell below 14 per shift. On those occasions, the City had sought volunteers for overtime work, but had not been able to replace all the absentees.

The situation giving rise to the charge was precipitated by a four-day PBA convention, May 14-17, 1984. Eight unit employees attended and were therefore unavailable for work. Concerned about the "substantial increase in overtime costs" that would be required to find substitutes for all of them, the City's Mayor directed its Chief of Police not to fill all the openings. This was the first time that the City had made a conscious decision not to meet the past minimum staffing standard. PBA then issued a demand to the City that it negotiate the impact of this reduction in manpower. The City declined to enter into impact negotiations and PBA filed the charge herein.

DISCUSSION

The City's first argument is that the ALJ erred in finding that a minimum manning standard existed. Reviewing the record, we find that it did. We further find that the City changed its past practice regarding minimum manning and that, upon demand, it was required to negotiate the impact of the change with PBA.

The more serious question raised by the City's exceptions is whether it had satisfied its duty to negotiate the impact of its change. It asserts that PBA initiated impact negotiations when it demanded that the mandatory overtime clause be deleted from the parties' agreement if the minimum staffing clause were deleted. It further asserts that this demand was negotiated and that PBA was successful in those negotiations.

The record supports the proposition that PBA successfully demanded the termination of mandatory overtime unless the City consented to the extension of minimum manning. Thus, ordinarily, we would rule that the City satisfied its duty to negotiate the impact of its actions.^{3/} A different conclusion, however, is required here.

Chapter 360 of the Laws of 1911^{4/} specifies the maximum number of hours that may be assigned to police. On the face of this statute, police may not be assigned overtime work except under emergency conditions. Courts

^{3/}When a union confronted with a unilateral change submits impact demands, and those demands are negotiated to the point of settlement, the union is precluded from negotiating further impact demands until the expiration of the parties' agreement. Baldwinsville CSD, 15 PERB ¶3032 (1982).

^{4/}This session law appears in McKinney's Unconsolidated Laws, §971.

have held that the statutory provisions notwithstanding "public employees, through their organizations, may bargain for and agree upon provisions for overtime as part of the collective bargaining process."^{5/} This is because "[p]arties in voluntary agreement are not limited, except for rare matters contrary to public policy, from agreeing to anything they wish."^{6/} Accordingly, employee benefits and protections may be waived in collective negotiations.^{7/}

While statutory overtime restrictions for police may be waived in collective negotiations, it does not follow that a police union can be compelled to negotiate a demand for such a waiver. Dealing with a different statutory protection for police and fire fighters, we have held that

^{5/}Spring Valley PBA v. Village of Spring Valley, 80 A.D.2d 910, 911, 14 PERB ¶7515, at 7522 (2d Dept. 1981); Follett v. Sejan, 123 Misc.2d 263, 17 PERB ¶7513 (Sup. Ct. Broome Co. 1984).

^{6/}Mount St. Mary Hospital v. Catherwood, 26 N.Y.2d 493, 507 (1970).

^{7/}Antinore v. State of New York, 29 A.D.2d 6, 8 PERB ¶7513 (4th Dept. 1975), aff'd, 40 N.Y.2d 921, 9 PERB ¶7528 (1976).

a public employer's demand for a waiver of rights for paid sick leave is not a mandatory subject of negotiation.^{8/}

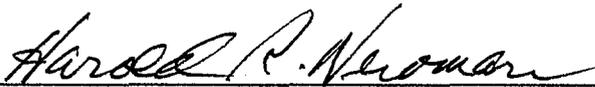
We find that there were discussions between the parties concerning minimum manning and mandatory overtime, but that these discussions did not constitute normal negotiations. The City merely stood upon its statutory right to require the termination of the minimum manning clause of the prior supplementary agreement because it involved a nonmandatory subject of negotiation. Similarly, PBA stood upon its statutory right to require the termination of the mandatory overtime clause of the prior supplementary agreement because it, too, involved a nonmandatory subject of negotiation. As this action of PBA did not constitute normal negotiations, we must reject the City's assertion that PBA had previously submitted and negotiated impact demands related to the City's unilateral action to an extent that would bar a later impact demand. It was therefore improper for the City to refuse to negotiate PBA's current impact demands.

^{8/}City of Binghamton, 9 PERB ¶13026 (1976), aff'd, City of Binghamton v. Helsby, 9 PERB ¶17019 (Sup. Ct. Albany Co. 1976).

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

1. Negotiate, upon demand, the impact of its decision not to fill vacancies caused by employee absences during the period May 14-17, 1984; and
2. Post a notice in the form attached at all places ordinarily used to convey information to unit employees.

DATED: May 8, 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 all employees in the unit represented by the Schenectady Police Benevolent Association that the City will negotiate, upon demand, the impact of its decision not to fill vacancies caused by employee absences during the period May 14 - 17, 1984.

CITY OF SCHENECTADY

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
CITY OF KINGSTON,

Respondent,

-and-

CASE NO. U-7932

LOCAL #461 OF THE INTERNATIONAL
ASSOCIATION OF FIRE FIGHTERS,
CITY OF KINGSTON,

Charging Party.

In the Matter of
CITY OF KINGSTON,

Employer,

-and-

CASE NOS. IA84-31;
M84-248

LOCAL #461 OF THE INTERNATIONAL
ASSOCIATION OF FIRE FIGHTERS,
CITY OF KINGSTON,

Employee Organization.

LOMBARDI, REINHARD, WALSH & HARRISON, P.C. (RICHARD P.
WALSH, ESQ., of Counsel), for Local #461 of the
International Association of Fire Fighters, City of
Kingston

ANDREW GILDAY, ESQ., Corporation Counsel, for City of
Kingston

BOARD DECISION AND ORDER

On January 4, 1985, the City of Kingston (City)
petitioned for interest arbitration to resolve an impasse in
negotiations with Local #461 of the International Association

of Fire Fighters, City of Kingston (Local #461). The negotiations were for an agreement to succeed one that had expired on December 31, 1983. It provided benefits involving nonmandatory subjects of negotiation. Apparently more interested in retaining these nonmandatory benefits than in the potential new benefits that might be won at arbitration, Local #461 objected to the appointment of an arbitrator.

On January 15, 1985, Local #461 filed the charge herein. It alleges that the City's mere filing of the petition constituted a violation of §209-a.1(e) of the Taylor Law because the employer could not alter the terms of an expired agreement, even if directed to do so by an arbitrator, unless there were a negotiated agreement.^{1/} The Director of Public Employment Practices and Representation dismissed the charge on the ground that it failed to allege facts constituting a violation. He did not consider whether or not §209-a.1(e) precludes a public employer from changing terms and conditions of employment pursuant to an arbitration award. Rather,

^{1/}The statute provides in pertinent part:

It shall be an improper practice for a public employer or its agents deliberately . . . to refuse to continue all the terms of an expired agreement until a new agreement is negotiated

he concluded that the mere filing of the petition does not make any such changes.

This matter comes to us on the exceptions of Local #461 to that ruling.^{2/} It also comes to us on an appeal from a determination of the Director of Conciliation that he would process the petition for interest arbitration.

We affirm the decision of the Director of Public Employment Practices and Representation dismissing the improper practice charge. In City of Batavia Firefighters, 17 PERB ¶3007 (1984), we held that the mere filing of a petition for interest arbitration would not be improper even if a public employer could not abide by the arbitration award. Local #461 contends that Batavia is not applicable here because, in that case, the petition was filed by the union. That distinction is significant to the extent that we indicated in Batavia that the arbitration award would bind the union because, by petitioning for arbitration, it had consented to the process and thereby waived its right to stand on the expired agreement. However, the Batavia

^{2/}Local #461 also alleged that the City violated §209-a.1(d) by including in its petition matters that had been resolved during the course of negotiations. The Director of Public Employment Practices and Representation dismissed the (d) specification on the ground that the charge contained no allegations of fact to support it. The exceptions do not address this matter.

decision goes further than saying that a union which consents to the interest arbitration process is bound by whatever resolution emerges from that process. An alternative basis for our decision contemplated the absence of a valid consent, and we said (at p. 3014):

The problem for the employer would arise, if at all, only when the employer actually altered the terms of an expired agreement pursuant to such an arbitration award.

It is this language that the Director of Public Employment Practices and Representation properly applied here.

Turning now to the determination of the Director of Conciliation that he would process the petition for interest arbitration, we address the question whether an award could authorize the City to change the terms of the parties' expired agreement. We considered this question in Batavia and, before that, in County of Niagara, 16 PERB ¶3071 (1983). In Niagara, we held that absent a union's consent to the process, a public employer could not impose the terms of a legislative determination but was required to continue the terms of the parties' expired agreement until the negotiation of a new agreement.

The rationale for our decision was based upon the legislative history of §209-a.1(e). When it was first passed by the Legislature, many representatives of public employers urged the Governor to veto it because it would limit the role of local legislative bodies and arbitrators

in resolving negotiation deadlocks. Notwithstanding these representations, the Governor signed the bill. In doing so, he announced his intention to seek legislation that would provide:

that the improper practice will be the refusal to continue all the terms of an expired agreement until a new agreement is negotiated or negotiations are resolved pursuant to the procedures established in section two hundred nine or pursuant to section two hundred twelve of Article 14^{3/}

Such a bill was introduced at the request of the Governor during an extraordinary session of the Legislature in December 1982. The memorandum in support of this program bill of the Governor stated:

One clarification provided in the instant legislation provides for the recognition that a "new agreement" may be achieved through impasse procedures contained in section 209 of the Civil Service Law. Arbitration in police and fire impasse resolution and legislative hearings for other impasse resolutions can result in the achievement of new agreements which succeed an expired agreement. This legislation makes clear that an agreement achieved by such impasse processes supplants an expired agreement. (emphasis supplied)

The bill was not passed in the form proposed by the Governor. On the contrary, language which referred to provisions of the Taylor Law that authorize legislative

^{3/}Memorandum of Governor Carey upon approving L. 1982, c. 868. McKinney's 1982 Session Laws, p. 2631, 2632.

determinations or interest arbitration was deleted. All that survived of the bill was language relieving a public employer of any obligation to abide by the terms of an expired agreement if the employee organization engaged in a strike.

The Director of the Governor's Office of Employee Relations then recommended that this amendatory legislation be vetoed because it did not cure the defect in the original bill with respect to either "legislative hearing (CSL, §209.3) or interest arbitration (CSL, §§209.2, 209.4)" The Governor, nevertheless, signed the bill and it became law.^{4/}

It is clear that legislative history which persuaded us that legislative determinations may not be imposed upon unconsenting unions also applies to interest arbitration awards. Indeed, we said as much in footnote 9 of our Niagara decision. It provides, in pertinent part (at p. 3116):

[A]n employee organization may consent to the issuance of a legislative determination by a legislative body or to a determination by a public arbitration panel, in which event it would waive its right to require the public employer to abide by the terms of the expired agreement.

^{4/}L. 1982, c. 921.

The Appellate Division, Fourth Department, affirmed our decision, County of Niagara v. Newman, 104 AD2d 1, 17 PERB ¶7021 (4th Dep't. 1984), without mentioning arbitration. It said (at pp. 1-2):

We note, first, that the simple language of the statute supports this construction. The amendment provides that the duty exists "until a new agreement is negotiated." Resolving an impasse by legislative action is not the same as negotiating an agreement
. . . .

We would add that resolving an impasse by interest arbitration is also not the same as negotiating an agreement.^{5/}

Our analysis gives police and fire fighter unions the option of standing on prior agreements or invoking interest arbitration while denying a similar option to public employers. This follows from the legislation which inserted (e) in §209-a.1 without inserting a parallel provision in §209-a.2. We conclude that (1) the mere filing of an arbitration petition is not an improper practice, but (2) the terms of an expired agreement may not be changed except by a subsequent negotiated agreement unless the union involved agrees to the submission of the deadlock for resolution by an arbitration award or a legislative determination. It follows that, as a

^{5/}See City of Mount Vernon, 5 PERB ¶3057 (1972), in which this Board analogized a legislative determination to an arbitration award.

matter of law, the arbitration process could be allowed to run its course up to, but not including, the point where the award is put into effect. That last step would be contingent upon Local #461's consent.

We decline to process the arbitration petition under these circumstances. Our first reason for not permitting the arbitration process to run its course is that it would be futile to do so. The purpose of arbitration under §209.4 of the Taylor Law is to provide a final disposition of a negotiation deadlock. There is no substantial likelihood that this would occur in the instant matter.^{6/} Our second reason is that it is unlikely that the arbitration panel could perform its work effectively. Local #461 could not be expected to present information or argument to the panel because its participation might constitute a waiver of its objection to the process. Finally, if the panel proceeded without Local #461's participation and issued an award, Local #461 would have an unfair advantage over the City by

^{6/}This would not be so if the City's petition for interest arbitration merely dealt with matters not covered by the expired agreement, and otherwise sought extension of that agreement. Compare Niagara County, supra, footnote 9, which provides in pertinent part:

[A] legislative body is still free to impose terms and conditions of employment not dealt with in the expired agreement. It may also impose the terms and conditions of employment contained in the prior agreement

knowing the terms of the award before having to decide whether to be bound by it.

NOW, THEREFORE, WE ORDER that the charge in Case No. U-7932 be and it hereby is, dismissed, and WE REMAND Case Nos. M84-248/IA31 to the Director of Conciliation for further processing consistent with this decision.

DATED: May 8, 1985
Albany, New York



Harold R. Newman, Chairman



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GREECE CENTRAL SCHOOL DISTRICT,

Employer/Petitioner,

-and-

CASE NO. C-2859

GREECE UNITED SUBSTITUTE TEACHERS
ORGANIZATION,

Intervenor.

HARRIS, BEACH, WILCOX, RUBIN AND LEVEY, ESQS.
(PETER J. SPINELLI, ESQ., and BRIAN P.
O'CONNOR, ESQ., of Counsel), for Employer/
Petitioner

JOHN J. MOODY, for Intervenor

BOARD DECISION AND ORDER

The petition herein was filed by the Greece Central School District (District). It seeks to decertify the Greece United Substitute Teachers Organization (GUSTO) - which had been certified on July 27, 1983, following an election - on the ground that GUSTO no longer represents a majority of the unit employees. The petition is opposed by GUSTO.

The District and GUSTO had been in negotiations during the period between GUSTO's certification and the District's petition, but no agreement was reached. The Director of

Public Employment Practices and Representation (Director) ruled that this petition for decertification filed by a public employer before the parties have concluded their first collective bargaining agreement may not be entertained unless the public employer has demonstrated that it has "objectively reasonable grounds for believing that the incumbent union has lost its majority support." He found that the District did not have such "objectively reasonable grounds", and he dismissed the petition. The matter now comes to us on the District's exceptions.

Our Rules of Procedure expressly specify the circumstances under which a petition for decertification may be filed. Two are relevant - but only peripherally so - to the instant proceeding. Rule 201.3(d) permits a petition for decertification during the "window period" before the expiration of a collective bargaining agreement. That "window period" is the thirty-day time frame immediately preceding the expiration of the period of unchallenged representation accorded by §208.2 of the Taylor Law to a recognized or certified employee organization. The rule provides that unless filed by a public employer, the petition shall be supported by a showing of interest. The clear implication of this rule is that such a petition may be filed by a public employer without either a showing of interest or other "objectively reasonable grounds".

Rule 201.3(e) permits for a petition 120 days after the expiration of a collective bargaining agreement so long as no new agreement has been executed. Such a petition may only be filed by an employee organization other than the one that was recognized or certified. Thus, if a public employer fails to file during the "window period" preceding the expiration of an agreement, it may not file thereafter until a new agreement is reached. The policy underlying Rule 201.3(e) is that the public employer should be under major pressure to conclude an agreement to succeed one that has expired, and it should not be able to evade this pressure by filing a petition. The potential problem of unit employees being represented by an employee organization that is no longer of their choosing may be remedied by an appropriate petition, but not one brought by the public employer.

One other provision of our rules is relevant to the instant proceeding. Rule 201.3(g) provides:

No petition may be filed for a unit which includes job titles that were within a unit for which, during the preceding twelve-month period, a petition was filed and processed to completion.

It is implicit that some petitions may be filed once the twelve-month "certification bar" has run its course, but it does not follow that petitions for decertification may then be filed by a public employer. This rule was

primarily designed to assure stable relationships between public employers and their employees by barring new petitions for certification for a reasonable time after a former petition had been dismissed. Secondly, it permits the filing of a petition for decertification under the same limited circumstances as one is permitted by Rule 201.3(e), the reasons for the limitations being the same.

Noting that our rules do not expressly provide for a petition for decertification by a public employer after the certification bar has expired and no contract has been negotiated, the Director ruled that such a petition could, nevertheless, be entertained. He imposed the "objectively reasonable grounds" requirement in the instant case on the basis of the rationale of the National Labor Relations Board in U.S. Gypsum Co., 61 LRRM 1384 (1966). The public policy underlying that decision is that an employer disrupts the collective bargaining rights of a union by filing decertification petitions and therefore it should not be allowed to do so without good reason.

The matter now comes to us on the exceptions of the District. It argues that U.S. Gypsum Co. is inapplicable in that the Board has established a different standard for permitting employer decertification petitions during the "window periods". It also argues that there is no logical reason why the policy considerations should be different

depending upon whether the petition is filed during a "window period" or after the expiration of the "election bar" period. It further argues that by requiring "objectively reasonable grounds for believing that the incumbent union has lost its majority support" as a condition for filing the petition, the Director was engaging in rule making, and the requirement must be set aside because the rule was not promulgated in accordance with the procedures prescribed in the Administrative Procedures Act.

The District's next argument is that this Board rejected the "objectively reasonable grounds" test for the filing of a petition for decertification by a public employer in Hempstead UFSD, 7 PERB ¶3017 (1974). Its final argument is that, in any event, it had submitted sufficient evidence to indicate that it had "objectively reasonable grounds" for its petition.

As noted above, the filing of an employer's petition for decertification one year after certification of a union, but before the conclusion of an initial collective bargaining agreement, is more comparable to the filing of an employer's petition for decertification after expiration of a collective bargaining agreement but before

the conclusion of a successor agreement than it is to the filing of an employer's decertification petition during a "window period". It is therefore reasonable that our rules permit no employer petition for decertification in both situations when the parties are not subject to a collective bargaining agreement.

We hold that the Director erred in determining that the District could file a petition one year after GUSTO's certification when no collective bargaining agreement had been concluded. It is irrelevant whether the District had objectively reasonable grounds for filing its petition. Indeed, as noted by the District, the Director's action constituted a supplementation of our rules.^{1/} However, that supplementation was not merely the requiring of "objectively reasonable grounds" but also the permitting of the petition even with "objectively reasonable grounds".

For this reason we find it unnecessary to consider the District's further arguments, the petition not being timely in any event.

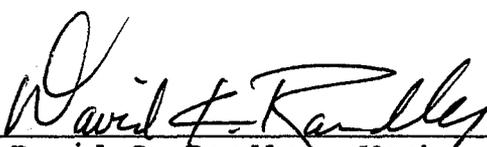
^{1/}Cf. Albany Housing Authority, 7 PERB ¶4017 (1974); decertification was ordered, 7 PERB ¶3018 (1974), without any issue regarding the merits of the matter being raised before us.

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

DATED: May 8, 1985
Albany, New York



Harold R. Newman, Chairman



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROME CITY SCHOOL DISTRICT

CASE NO. E-1111

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

HANCOCK & ESTABROOK, ESQS. (JAMES P. BURNS, 3rd, ESQ.
and ELLETTA SANGREY CALLAHAN, ESQ., of Counsel),
for the District

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Rome City School District (District) to a decision of the Director of Public Employment Practices and Representation (Director). In his decision the Director granted the District's application to designate two of its clerical employees confidential in accordance with the criteria set forth in §201.7(a) of the Taylor Law. The exceptions indicate that the District is not satisfied with the Director's decision; it asserts that the decision should have designated not only the two clerical employees referred to in its application as confidential but also their "successors so long as the job assignments and responsibilities remain the same".

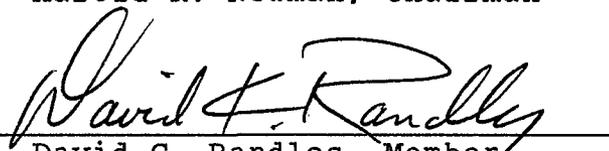
The above-quoted language was included in our designation in Board of Education of the City School District of the City of New York, 10 PERB ¶3024 (1977). However, the situation there was different. In that case, there had been a turnover in positions covered by the application during the period between the filing of the application with respect to named employees and the decision of the Director. Accordingly, the decision applied to successors already at work.

Even though the above decision is not precedent for language such as that sought by the District, there is a question whether such language is required. We hold that it is not. In City of White Plains, 18 PERB ¶3031 (1985), which we have issued today, we have held that successor employees are covered by a managerial or confidential designation even without such language so long as their duties are identical with those originally found to support the original designation. The language sought by the District is therefore redundant.

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

DATED: ~~May 8, 1985~~
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LAKE PLACID VILLAGE, INC.,

Employer,

-and-

CASE NO. C-2899

TEAMSTERS, LOCAL 648,

Petitioner,

-and-

LAKE PLACID POLICE UNIT, ESSEX COUNTY
LOCAL, CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC., LOCAL 1000, AFSCME,
AFL-CIO,

Intervenor.

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 Teamsters, Local 648 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.

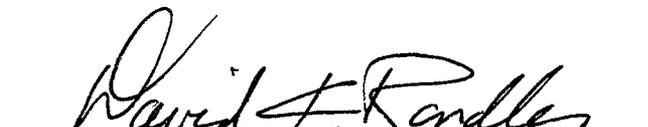
Unit: Included: All police officers.

Excluded: Chief of Police and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters, Local 648 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: May 8, 1985
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member