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5-24-1985

## State of New York Public Employment Relations Board Decisions from May 24, 1985

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from May 24, 1985

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

SCHENECTADY POLICE BENEVOLENT  
ASSOCIATION,

Respondent,

-and-

CASE NO. U-7798

CITY OF SCHENECTADY,

Charging Party.

---

GRASSO & GRASSO, ESQS. (JANE K. FININ, ESQ.,  
of Counsel), for Respondent

BUCHYN, O'HARE AND WERNER, ESQS. (DOMINIQUE A.  
POLLARA, 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) dismissing its charge that the Schenectady Police Benevolent Association (PBA) improperly submitted a demand for a shift differential to compulsory interest arbitration. The demand was that police officers assigned to certain shifts should receive premium pay. It was made pursuant to a contract reopener applicable to the third year of a three-year contract period which, by its terms, covered "salary scale only".<sup>1/</sup> The City asserts that

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<sup>1/</sup>PBA made a similar demand while bargaining for the original three-year contract, but withdrew it as a part of those negotiations.

a shift differential is not within the contemplation of the language "salary scale".

The words "salary scale" are found in two places in the contract: Article XVIII, §9, which authorizes the reopening of negotiations, and Article XI, §1, which provides:

The wages or salary scale for members of the Department, including in-grade annual increments, if any, and longevity allowance shall be as set forth in Appendix A and B attached hereto and made a part hereof.

The appendices referred to in Article XI, §1, are for the first and second years of the contract period respectively. They consist of base salaries, step increments, longevity payments, and a differential for investigators. It is the contention of the City that by restricting negotiations to the "salary scale", Article XVIII, §9, permits only changes in the dollar amounts found in appendices A and B. The ALJ found, however, that negotiations for an improved "salary scale" could include differential pay, which would be a new form of compensation.

Although not specifically mentioned in them, the exceptions argue that the parole evidence rule bars consideration of testimony as to what the parties intended by their agreement because the written contract constitutes the entire agreement.

That rule provides that extrinsic evidence may not be relied upon to contradict or vary the terms of a written

agreement where the entire agreement was embodied in the writing. Where it is clear, however, that the writing does not completely integrate the terms of the agreement, parole evidence, not inconsistent with the writing, may be used to show what the entire contract really is.<sup>2/</sup>

The parole evidence rule applies to the interpretation of collective bargaining agreements as well as to commercial contracts. However, courts have found that, by their nature, collective bargaining agreements are more susceptible than commercial contracts to ambiguities which justify reliance upon parole evidence. Cappa v. Wiseman, 469 F. Supp. 437, 100 LLRM 3083 (N.D., Cal, 1979). Under such circumstances, "evidence of prior negotiations is admissible to show that the writing was not intended as a final expression of the terms and conditions."<sup>3/</sup>

Applying this test to the record evidence, we find that neither the written contract nor the reopener clause integrates the entire agreement of the parties. The City, itself, introduced evidence showing that there had been an oral agreement to permit the reopening of negotiations regarding work during vacation periods. Furthermore, the

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<sup>2/</sup>New York Jurisprudence, Evidence, Volume 22, Section 627.

<sup>3/</sup>Restatement (Second) of Contracts §209(3).

differential for investigators specified in the appendices is indicative of an ambiguity as to whether other differentials might have been within the contemplation of the parties when they referred to "salary scale". Accordingly, it was appropriate for the ALJ to consider the testimony regarding the meaning of this language.

The record establishes that the City's prior collective bargaining agreements with both PBA and the union representing its firefighters contained a reopener for a negotiation of wages. The City was disturbed when, under that agreement, the firefighters' union had attempted to negotiate such matters as educational incentive bonuses, productivity bonuses, additional holiday pay, clothing allowances and pension benefits. Accordingly, when the new agreement was being negotiated, its labor counsel proposed the substitution of the language "salary scale" in the reopener clause for the words "wages or wage scale", which he remembered to be in the reopener clause of the expired agreements.

Although the language in the prior agreements had precipitated a grievance, he testified that to his surprise, his suggested substitute language was accepted without any discussion as to its meaning. PBA's chief negotiator, who had also been the representative of the firefighters, remembered things differently. He testified that the

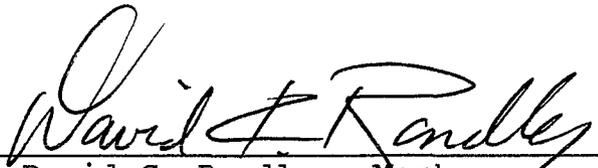
proposed language was discussed, and that he was given an oral assurance that while it was intended to preclude the negotiation of those above-mentioned matters that the firefighters had attempted to raise pursuant to the prior reopener, it was not intended to preclude the negotiation of a wage differential based upon different shift assignments.

The ALJ found the testimony of PBA's witnesses more credible than that of the City's witnesses. We find no reason to disturb his resolution of the credibility issue and affirm his decision.<sup>4/</sup>

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

DATED: May 24, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

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<sup>4/</sup>Compare, The Fashion Institute of Technology v. Helsby, 44 AD2d 550, 7 PERB ¶7005 (1st Dept., 1974).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

WAPPINGERS CENTRAL SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-7697

WAPPINGERS CENTRAL SCHOOL DISTRICT  
UNIT, DUTCHESS COUNTY EDUCATION LOCAL  
867, CSEA, AFSCME, AFL-CIO,

Charging Party.

---

RAYMOND G. KRUSE, P.C., for Respondent

ROEMER AND FEATHERSTONHAUGH, P.C. (WILLIAM M.  
WALLENS, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Wappingers Central School District (District) to a decision of an Administrative Law Judge (ALJ) finding it in violation of §209-a.1(d) and (e) of the Taylor Law. The ALJ found it in violation of §209-a.1(e) in that it refused to pay incremental salary increases and longevity payments to employees represented by Wappingers Central School District Unit, Dutchess County Education Local 867, CSEA, AFSCME, AFL-CIO (CSEA) after the expiration of its collective bargaining agreement with CSEA and before the conclusion of a successor agreement. He found it in violation of §209-a.1(d) in that it refused, after the expiration of the parties'

agreement, to provide paid personal leave for religious holidays in accordance with a past practice.<sup>1/</sup>

With respect to the ALJ's finding that the District violated §209-a.1(e) by not making incremental wage and longevity payments in accordance with the terms of the expired agreement, the District argues that the record is inadequate to prove that such payment increases were due after the expiration of the agreement. In doing so, it is not asserting that the agreement contained a "sunset" clause pursuant to which any obligation it may have had to provide such increases was terminated. Rather, it contends that CSEA has not satisfied its burden of proving that the terms of the contract, as extended by the operation of §209-a.1(e), had required any such payment to actual employees between the date of the expiration of the agreement and the time of the filing of the charge.

The parties' expired agreement provides for incremental salary and longevity step increases on the anniversary dates of unit employees. For the purpose of computing such step

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<sup>1/</sup>CSEA also complained that the District had refused to pay unit employees hired after September 1, 1984, the wages and benefits specified in the expired agreement. Noting that CSEA had filed a grievance embodying this complaint and that the parties' grievance procedure culminates in binding arbitration, the ALJ ruled that this specification of the charge should be conditionally dismissed in accordance with the deferral policy of this Board. There were no exceptions to this ruling of the ALJ.

increases, it provides that "the anniversary date for all employees hired between July 1 and December 31 shall be July 1, and the anniversary date for all employees hired between January 1 and June 30 shall be January 1." Accordingly, by reason of the extension of the parties' collective bargaining agreement pursuant to §209-a.1(e) of the Taylor Law, any unit employees who were hired between July 1 and December 31 of any year would have been entitled to step increases applicable to them under the salary schedule as of July 1, 1984.

In its answer to the charge, the District denied the allegation of the charge that it "failed to pay eligible employees increments and longevity payments due them under the agreement . . .", but admitted that it had "not made any incremental changes which would have been due after July 1, 1984, nor any longevity increases which would have been due after that date . . . ." As noted by the District in its brief in support of its exceptions, the ALJ interpreted the answer "to mean that the District had admitted any and all facts which the Administrative Law Judge might deem necessary to the proof of the charging party's case . . . ."

The District correctly argues now, as it did in its post hearing brief to the ALJ, that it never admitted that any unit employees were actually due step increases as of July 1, 1984. Thus, according to the District, the charge fails for the absence of proof that any unit employees had been hired

between July 1 and December 31 of any year and were thereby entitled to step increases.

We find merit in this argument. The ALJ's finding of a violation is not supported by record evidence regarding all the essential elements of the violation, and it must be set aside. We note, however, that, by reason of his misinterpretation of the District's admission, the ALJ restricted the hearing to evidence relating to the specification of the charge alleging a changed practice regarding paid personal leave for religious holidays issue. This was a reversible error, misleading CSEA as to what it had to prove to establish a violation regarding the step income issue, and depriving it of an opportunity to do so. Accordingly, in the interest of justice and in furtherance of the policies of the Taylor Law, we remand this matter to the ALJ to take further evidence regarding the entitlement of unit employees to salary increments and longevity pay between the date of the expiration of the agreement and the time of the filing of the charge.

The District argues that the ALJ erred in finding that it failed to provide paid personal leave for religious holidays in accordance with its past practice in that he relied upon hearsay evidence to reach that finding. CSEA's sole witness on this point was its president, Mary Jane MacNair. MacNair testified that there had been a past practice of granting such leave, which was recorded by the

District on the personnel records of the absent employee either by the notation "R" for religious or "P" for personal. She further testified that this practice was terminated on September 5, 1984, pursuant to a memorandum sent by the District's Superintendent to all its employees.

That memorandum is in the record. It states: "No paid time off for religious observance shall be given in the District outside time off specifically granted under the Collective Bargaining Agreement." The expired collective bargaining agreement specified reasons why paid personal leave might be taken. The observance of religious holidays was not one of them.

MacNair had never taken religious leave. Her knowledge that other unit employees had been given religious leave with pay is based upon reports to her by such other employees. While she saw the notations "R" and "P" on the payroll records of employees, her knowledge that these letters stood for religious leave and personal leave respectively came from the unit employees involved.

The District argues that MacNair's testimony is hearsay evidence and therefore insufficient to prove a) the existence of a past practice of granting paid holiday leave; b) that if such a past practice had existed, it was changed; c) that if such a past practice had been changed, it affected unit

employees to their detriment. Acknowledging in its answer that it had "altered its policy on religious holidays . . .", the District argues that CSEA has not satisfied its burden of proving "what the policy is that has been changed . . . ."

We reject this argument of the District. The rule in New York State is that hearsay evidence is admissible at administrative hearings but that a determination must be supported by some substantial evidence which is acceptable in a court of law.<sup>2/</sup> This means that an administrative agency can consider hearsay evidence which is inadmissible in a court of law but which is of the character that would make it otherwise reliable to supplement or resolve ambiguities in legally competent evidence.

The legally competent evidence establishes that, on September 5, 1984, the District altered a policy with respect to religious holidays; it also establishes that after that date, there would be no paid leave for religious observances. Next, the legally competent evidence establishes that notice of the change was sent to all the

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<sup>2/</sup>Ray v. Blum, 91 App. Div. 2d 822 (4th Dept., 1982);  
Warner v. New York State Racing and Wagering Board,  
99 A.D. 2d 680 (4th Dept. 1984).

District's employees, including unit members. Finally, it includes MacNair's testimony that by her own observation, she knew that unit employees who had been absent for religious observance prior to September 5, 1984 had the notation of "P" or "R" marked on their payroll records.

MacNair further testified that she was told by the affected employees that they had been paid for personal or religious leave on those days. Such information would have been given to her in the normal course of events by virtue of her role as president of the union representing the employees. Given its circumstantial setting, this testimony, albeit hearsay, was reliable.

We find that there is substantial evidence which is acceptable in a court of law to support the findings of the ALJ. We further find that the hearsay evidence which the ALJ considered to supplement and characterize the legally competent evidence was, under the circumstances, sufficiently reliable for that purpose. We therefore affirm his decision that the District violated §209-a.1(d) of the Taylor Law by unilaterally changing its past practice of paying unit employees for absences on religious holidays.

NOW, THEREFORE, WE ORDER:

1. The District to:

- a. revoke the memorandum from Superintendent Gilmore, dated September 5, 1984, by which the District altered its policy of approving unit members' requests for paid leave for religious holidays, to the extent the memorandum applies to unit members.
  - b. restore its practice of approving unit members' requests for paid leave for religious holidays, and make whole any unit employees who were denied such leave by reason of the District's altered policy.
  - c. post a notice in the form attached at all locations normally used to communicate with unit employees.
2. That the determination of the ALJ that the District violated §209-a.1(e) of the Taylor Law by failing to pay unit employees incremental wage and longevity increases due to them be set aside, and that this matter be, and it hereby is,

remanded to the ALJ for further  
proceedings as required by this decision.

DATED: May 24, 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 Wappingers Central School District Unit, Dutchess County Education Local 867, CSEA, AFSCME, AFL-CIO (Union) that the Wappingers Central School District (District):

1. Will revoke the memorandum from Superintendent Gilmore, dated September 5, 1984, by which the District altered its policy of approving unit members' requests for paid leave for religious holidays, to the extent the memorandum applies to unit members.

2. Will restore its practice of approving unit members' requests for paid leave for religious holidays, and make whole any unit employees who were denied such leave by reason of the District's altered policy.

Wappingers Central School District

Dated May 24, 1985

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.*

9707

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

ONONDAGA-MADISON BOARD OF COOPERATIVE  
EDUCATIONAL SERVICES,

Respondent,

-and-

CASE NO. U-7742

ONONDAGA-MADISON BOCES FEDERATION OF  
TEACHERS, NYSUT/AFT, LOCAL NO. 2897,

Charging Party.

---

GARRY A. LUKE, for Respondent

HELEN W. BEALE, for Charging Party

BOARD DECISION AND ORDER

The charge herein was filed by the Onondaga-Madison BOCES Federation of Teachers, NYSUT/AFT, Local No. 2897 (Local 2897). It alleges that the Onondaga-Madison Board of Cooperative Educational Services (BOCES) violated §209-a.1(d) of the Taylor Law by submitting two nonmandatory subjects of negotiation to a fact finder. The first demand, identified by the parties as BOCES I, provides:

BOCES I: Should negotiations not be completed prior to June 30, 1984, the BOCES requests that the Association refrain from insisting upon continuation of any nonmandatory subjects of negotiations that are contained in the current agreement.

The ALJ determined that this demand constitutes a nonmandatory subject of negotiation because, on its face, the subject matter pertains to nonmandatory subjects of negotiation. She further found it nonmandatory because it

would require Local 2897 to waive its statutory right to benefit from the terms of an expired agreement until a new agreement is negotiated, and a demand that a party waive a substantive statutory benefit is not a mandatory subject of negotiation.<sup>1/</sup>

In its exceptions, BOCES characterizes BOCES I as not being a demand at all. Rather, according to BOCES, it is a notice to Local 2897 that it was unwilling to renegotiate such nonmandatory subjects of negotiation as were dealt with in the parties' expired agreement, and that it was not required to do so.

Such a notice would not be improper. However, in BOCES' brief to the ALJ, it stated, "The BOCES contends that the proposals styled BOCES I and II are mandatory subjects of bargaining . . . ." On the basis of this statement, we conclude that BOCES I was a demand and not merely a notice. We further conclude that, as a demand, it is a nonmandatory subject of negotiation for the reasons given by the ALJ.

The second demand, identified by the parties as BOCES II, provides:

BOCES II: The parties agree that all terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's decision and control and shall not be the subject of negotiations until the

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<sup>1/</sup>City of Binghamton, 9 PERB ¶13026, aff'd, sub nom City of Binghamton v. Helsby, 9 PERB ¶17019 (Sup. Ct. Albany Co., 1976).

commencement of the negotiations for a successor to this agreement.

The ALJ determined that the demand is a mandatory subject of negotiation.

Local 2897 correctly asserts that the Taylor Law gives it the right to bargain about mandatory subjects of negotiation and that such matters not covered by a collective bargaining agreement, and not explicitly waived, may be negotiated during the life of that agreement.<sup>2/</sup> It further contends that BOCES II would restrict its statutory right to bargain about such matters during the life of the agreement, and it therefore constitutes a demand for a waiver of a statutory right.

We find that contention flawed. The Taylor Law obligation that public employers and employee organizations negotiate the terms and conditions of employment of unit employees affords the parties a process, and not a substantive benefit. That process may be satisfied by negotiations for an agreement that would grant a public employer the authority to act unilaterally with respect to terms and conditions of employment no less than by one in which the parties specify substantive settlement terms. Such a grant of authority is a mandatory subject of negotiation.<sup>3/</sup> Local 2897's objections to BOCES II therefore are more properly directed to the merits of the demand than to its negotiability.

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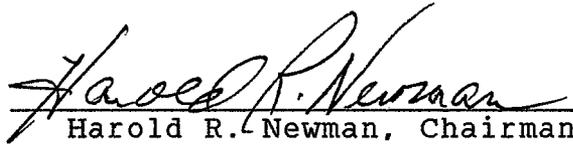
<sup>2/</sup>See New Paltz CSD, 11 PERB ¶13057 (1978).

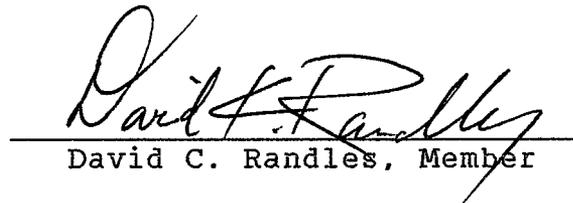
<sup>3/</sup>City of Albany, 7 PERB ¶13078 (1974).

NOW, THEREFORE, WE AFFIRM the decision of the ALJ, and  
WE ORDER BOCES to negotiate in good  
faith by withdrawing BOCES I from the  
fact finder.

WE FURTHER ORDER that in all other  
respects the charge herein be, and it  
hereby is, dismissed.

DATED: May 24, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
COUNTY OF SCHENECTADY and SHERIFF,  
Respondents,

-and-

CASE NOS.  
U-7473 & U-7532

SCHENECTADY COUNTY SHERIFF'S  
BENEVOLENT ASSOCIATION,

Charging Party.

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THOMAS B. HAYNER, COUNTY ATTORNEY (JOHN J.  
WARNER, JR., ESQ., of Counsel), for Respondents

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

BOARD DECISION AND ORDER

The two charges herein were filed by the Schenectady County Sheriff's Benevolent Association (SBA), an employee organization which is certified to represent the employees of the County of Schenectady and the Schenectady County Sheriff, a joint employer.

The first charge has two specifications. One is that the joint employer violated §209-a.1(a), (c) and (d) of the Taylor Law in that while the parties were in negotiations for a collective bargaining agreement to succeed one that had expired, it unilaterally, and for improper reasons, deprived all but five of the unit employees of their deputy-sheriff

status. The other is that the joint employer violated those provisions of the Taylor Law in that it unilaterally changed a past practice by curtailing parking privileges that had been enjoyed by unit employees. The second charge is that the joint employer violated §209-a.1(a), (c) and (d) in that it unilaterally, and for improper reasons, assigned female correction officers to male detention facilities.

The Administrative Law Judge (ALJ) dismissed the second charge and the specification of the first dealing with the status of unit employees as deputy sheriffs. He found merit in the specification of the first charge dealing with the parking privileges, but only to the extent that it alleged a violation of §209-a.1(d).

The matter now comes to us on the exceptions of SBA to the ALJ's dismissal of its second charge and the deputy sheriff status specification of its first charge.<sup>1/</sup> It also comes to us on the joint employer's exceptions to the determination of the ALJ that it violated §209-a.1(d) by curtailing the parking privileges of unit employees.

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<sup>1/</sup>SBA does not except to the ALJ's determination that the joint employer's conduct with respect to the parking specification merely violates §209-a.1(d) of the Taylor Law.

THE STATUS OF UNIT EMPLOYEES AS DEPUTY SHERIFFS

Our certification of SBA as the representative of unit employees was issued on the merits, after a contested proceeding. In issuing our decision we concluded that unit employees were deputy sheriffs.<sup>2/</sup> The joint employer now asserts that only five of the current unit employees are deputy sheriffs. Whatever the factual basis of this assertion, as a matter of law the joint employer is collaterally estopped from denying that any of the unit employees were other than deputy sheriffs on February 20, 1981, the date of the certification. As noted by the ALJ, it is possible that all but five of the present unit employees are not deputy sheriffs. This would be the case if subsequently hired unit employees were not deputized, and the deputy sheriff status of the other original unit employees had been revoked.

The ALJ made no determination as to whether either of these had occurred, and SBA argues that this was error. It asserts that the change in the status of unit employees from deputy to nondeputy deprives them of significant benefits, and is therefore a mandatory subject of negotiation.

SBA also argues that the joint employer's announcement of the change on March 16, 1984, which was during the course of negotiations for a collective bargaining agreement to

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<sup>2/</sup>County of Schenectady and Sheriff, 14 PERB ¶3013 (1981).

succeed one that had expired on December 31, 1983, evidenced a design to influence the course of the negotiations improperly. The ALJ found that the record does not support any inference of improper motivation, and we find nothing in SBA's exceptions or in our reading of the record to convince us of the contrary.

In arguing that deputy sheriff status carries with it benefits, the loss of which changes the terms and conditions of employment of unit employees, SBA contends that deputy sheriffs enjoy benefits under General Municipal Law §50-J and §207-C that are not enjoyed by other employees. It also contends that as deputy sheriff's, unit employees are entitled to representation and lobbying efforts by SBA's affiliates, but that such efforts would not be afforded to a unit of employees other than deputy sheriffs. Finally, it contends that the loss of deputy sheriff status would destroy its negotiating unit.

We find no merit in any of these contentions. The statutory provisions afforded to deputy sheriffs by the General Municipal Law are, by virtue of being statutory benefits, not mandatory subjects of negotiation.<sup>3/</sup>

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<sup>3/</sup>Binghamton, 9 PERB ¶3026 (1976), aff'd, 9 PERB ¶7019 (Sup. Ct. Albany Co. 1976).

Waverly CSD, 10 PERB ¶3103 (1977), cited by SBA for the proposition that an employer may not deprive unit employees of statutory benefits, is inapplicable. First, the statutory rights contemplated by Waverly CSD are the Taylor Law rights of representation and organization. Second, as noted by the ALJ,

Even if the statutory concomitants of deputy status were extinguished, malevolent intent is requisite to a violation of the Act. In the absence of proof of unlawful motive, direct or circumstantial, [even] decimation of a unit to whatever extent, by the abolition of titles is not an improper practice. (footnote omitted).

In any event, there is no indication that a change in status of the unit employees would destroy the negotiating unit. The basis of the separate unit established in 1981 was not that the unit employees were deputy sheriffs while the other employees in their prior unit were not. Rather, it was that these employees worked for the joint employer while the other employees did not. This is unchanged.

We also find no merit in the contention that the joint employer has injured the unit employees by depriving them of the lobbying efforts which SBA's affiliates provide to deputy sheriffs. The services that SBA and its affiliates choose to provide to unit employees is an internal union matter over which the joint employer has no control.

For the reasons stated herein we affirm the decision of

the ALJ dismissing this specification of the first charge.<sup>4/</sup>

REASSIGNMENT OF FEMALE CORRECTION OFFICERS

The ALJ determined that the joint employer acted for legitimate business reasons when it assigned female correction officers to male detention facilities. There had not been a sufficient number of female correction officers available to supervise female prisoners and the joint employer therefore transferred its female prisoners to another facility. The female correction officers were then assigned to male detention facilities where they were required to perform duties that were appropriate to their jobs. SBA argues that the new assignments were more dangerous than those that had been previously assigned to the female correction officers. While that may be so, it, nevertheless, was a management prerogative for the joint employer to make those assignments.<sup>5/</sup>

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<sup>4/</sup>We also reject SBA's exceptions arguing that the ALJ refused to reopen the record to take additional evidence and rejected some evidence during the hearing. The proffered evidence dealt with the question whether unit employees were deputy sheriffs. As noted, this is irrelevant to the basis of the ALJ's decision, and our own.

<sup>5/</sup>Whether an increase in hazard would justify impact demands need not be decided since there is no allegation that any such demand was made or that the joint employer refused to negotiate impact.

THE CURTAILING OF PARKING PRIVILEGES

There is a parking lot adjacent to the County Jail which had accommodated over 100 automobiles. It was used by all county employees, employees of the joint employer, employees of the State Office of Court Administration and even by members of the general public. Parking spaces had not been specifically assigned to unit employees but, in practice, the spaces nearest to the jail were usually left for them on a first come basis.

This changed when, by reason of a construction project, the jail facility was expanded into the parking lot, causing the elimination of the 20 spaces nearest to the jail. By reason of the loss of the 20 spaces, there was no longer sufficient parking in the lot for all the employees. The County addressed this problem in discussions with other unions representing its employees and those of the Office of Court Administration, and a solution was arranged. SBA was not made a part of these discussions. The parking lot was restricted to employees of the County, the Office of Court Administration and the joint employer on the basis of seniority. The 20 least senior employees, regardless of negotiating unit, were denied a right to park in the lot and were given parking privileges in another lot, 400 yards away.

Obviously, parking in a lot almost a quarter of a mile away from the jail is less convenient for unit employees than parking in a lot adjacent to it. It was wrong for the joint

employer to impose this solution upon employees in the SBA unit while the unions representing County and OCA employees had been included in discussions designed to resolve the problem. By doing so the joint employer violated §209-a.1(d) in that it changed a past practice unilaterally.

In its exceptions the joint employer contends that SBA waived its right to object to the change because it never demanded negotiations on the assignment of parking spaces. This argument is rejected. The violation herein is not a refusal to negotiate over demands that were made but a failure to negotiate by virtue of having taken unilateral action.<sup>6/</sup>

The ALJ ordered the joint employer to restore the parking privileges to unit employees that they had enjoyed before the elimination of 20 spaces. We find this remedial order appropriate. Obviously, it does not require the joint employer to permit unit employees to park in spaces that no longer exist. The record shows that there had been open parking in the lot as a whole before the change, and the order merely obligates the joint employer to permit all unit employees to enter the lot and park in open spaces.<sup>7/</sup>

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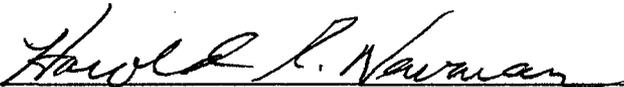
<sup>6/</sup>County of Cattaraugus, 8 PERB ¶3062 (1975).

<sup>7/</sup>Even if it were a relevant defense, there could be no claim of legal impossibility based upon the proposition that all spaces in the lot are already committed to employees in other negotiating units. Several of the spots are used by County vehicles.

NOW, THEREFORE, WE ORDER

1. The joint employer to
  - a. Restore all parking privileges previously in effect at the lot immediately adjacent to the jail, and
  - b. Upon the demand of SBA, negotiate in good faith with it regarding the parking privileges of unit employees, and
  - c. Sign and post a notice in the form used at all locations regularly used to communicate with unit employees.
2. That in all other respects the charges be, and they hereby are, dismissed.

DATED: May 24, 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 unit represented by the Schenectady County Sheriff's Benevolent Association that the County of Schenectady and the Schenectady County Sheriff will:

1. Restore all parking privileges previously in effect at the lot immediately adjacent to the jail, and
2. Upon the demand of SBA, negotiate in good faith with it regarding the parking privileges of unit employees.

COUNTY OF SCHENECTADY AND  
SCHENECTADY COUNTY SHERIFF

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

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In the Matter of  
WILLIAMSVILLE CENTRAL SCHOOL DISTRICT,  
Employer,

-and-

CASE NO. C-2835

WILLIAMSVILLE SUBSTITUTE TEACHERS  
ASSOCIATION, NYSUT, AFT, AFL-CIO,  
Petitioner.

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SAPERSTON, DAY, LUSTIG, GALLICK, KIRSCHNER & GAGLIONE,  
P.C. (THOMAS S. GILL, ESQ., Of Counsel), for Employer  
PAUL LUCZAK, for Petitioner

BOARD DECISION AND ORDER

The Williamsville Substitute Teachers Association, NYSUT, AFT, AFL-CIO (Association) filed the petition herein to represent per diem substitute teachers employed by the Williamsville Central School District (District). The Director of Public Employment Practices and Representation (Director) dismissed the petition and the matter comes to us on the Association's exceptions.

On June 3, 1983, the District sent notices of assurance of continuing employment to its per diem substitutes. No such notice was sent in 1984 prior to July 2, when the District received a demand for recognition, and it did not respond to that demand. Three weeks later it sent a notice

to all the persons used as per diem substitutes the previous year notifying them that they were not being given reasonable assurance of continuing employment. They were, however, invited to submit applications for inclusion on a new list of per diem substitutes which was being compiled. This notice said, "We may hire all, some or none of the 1983-84 substitutes for the 1984-85 school year and you should not count on being employed."

The District then compiled a new list of per diem substitute teachers and, in September of 1984, it notified the per diems who were on that list. This notice did not indicate how much work the per diem substitutes might expect or any specific dates when they might work. It merely stated, "We are happy to place you on our substitute teacher list for the 1984-85 school year." The petition herein was filed after the September notification had been sent out.

Section 201.7(d) of the Taylor Law provides for the representation of substitute teachers who receive

a reasonable assurance of continuing employment in accordance with subdivision ten of section five hundred ninety of the labor law which is sufficient to disqualify the substitute teacher from receiving unemployment insurance benefits . . . .

The Taylor Law provision took effect on July 27, 1981. At that time the Labor Law provision disqualified teachers from

unemployment insurance benefits in

any week commencing during the period between two successive academic years or terms . . . provided . . . there is a reasonable assurance that the claimant will perform services in such capacity . . . for both such academic years or such terms . . . .

The substitute teachers herein, not having received such reasonable assurance, were eligible for unemployment insurance benefits during the summer vacation between the 1983-84 and 1984-85 school years and, under §201.7(d) of the Taylor Law, would have been ineligible for representation rights.

An April 2, 1984 amendment added to the Labor Law a provision disqualifying teachers from unemployment insurance benefits in

any week commencing during an established and customary vacation period or holiday recess, not between such academic terms or years, provided . . . there is a reasonable assurance that the claimant will perform any services . . . in the period immediately following such vacation period or holiday recess. (emphasis supplied)

The Director and the parties have assumed that the notification given to teachers that they are on the District per diem substitute list constitutes sufficient assurance that they will be offered substitute assignments after vacation periods. Thus, according to the Director, if the new Labor Law language is read into the Taylor Law, the substitute teachers have been given sufficient assurance to

disqualify them from unemployment insurance benefits and, thereby, to qualify them for representation rights.

The basis of the Director's decision dismissing the petition is the proposition that when one statute incorporates a second by reference, as the Taylor Law does to the Labor Law, it is presumed to have incorporated only those provisions of the earlier statute as existed at the time that the new statute was enacted. This proposition is challenged by the Association. It argues that the legislative history of §201.7(d) of the Taylor Law demonstrates a legislative intent that future disqualifications from unemployment insurance benefits would qualify per diem substitutes for representation rights.

We need not resolve the question whether the April 2, 1984 amendment of Labor Law §590.10 has been incorporated into §201.7(d) of the Taylor Law. Unlike the Director and the parties, we conclude that the Labor Law does not disqualify the per diem substitutes of the District from unemployment insurance benefits during any vacation period or holiday recess, not between academic terms or years.

In interpreting Labor Law §590.10, we follow the interpretations of the New York State Labor Department, the agency which administers that law. At page 7 of its

March 22, 1985 Special Bulletin A-710-53 the Labor

Department stated:

A letter informing an employee that (s)he will be placed on a substitute list does not, in and of itself, establish reasonable assurance of employment . . . .[D]uring a customary and established vacation period or holiday recess not between academic terms or years, the law requires that there be a reasonable assurance that the claimant will perform services "in the period immediately following such vacation period or holiday recess." As the "period immediately following" has been defined as the first business day after the vacation or recess, a per diem employee has reasonable assurance of employment only if (s)he has a pre-assigned job to report to on that day. (emphasis in original)

There is no evidence that any per diem substitutes have been pre-assigned work on the day after such a vacation or holiday.

Absent evidence of the elements of reasonable assurance of continuing employment, the Labor Department would not disqualify per diem substitutes from unemployment insurance benefits<sup>1/</sup> who are otherwise eligible.<sup>2/</sup> It follows that the per diem substitutes herein are not eligible for representation rights under §201.7(d). Accordingly, for reasons other than those given by the Director, we affirm his decision.

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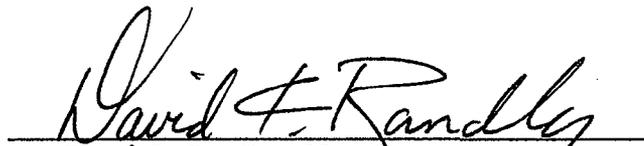
<sup>1/</sup>Decision of the Unemployment Insurance Appeal Board. S.S.A. No. 050-50-3744, May 31, 1984.

<sup>2/</sup>The Labor Law has other criteria for eligibility.

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

DATED: May 24, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

COUNTY OF ONEIDA and ONEIDA COUNTY  
SHERIFF,

Employer,

-and-

CASE NO. C-2773

ONEIDA COUNTY DEPUTY SHERIFF'S  
BENEVOLENT ASSOCIATION,

Petitioner,

-and-

TEAMSTERS LOCAL NO. 182,

Intervenor.

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Oneida County Deputy Sheriff's Benevolent Association has been designated and selected by a majority of the employees of the above named employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

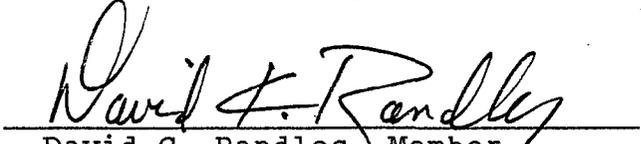
Unit: Included: All full-time employees of the Oneida County Sheriff's Department.

Excluded: Sheriff, Undersheriff, Captain of Patrol, Captain of Corrections, Sheriff's Secretary.

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

DATED: May 24, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member