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9-23-1985

## State of New York Public Employment Relations Board Decisions from September 23, 1985

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from September 23, 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

EAST ROCKAWAY UNION FREE SCHOOL  
DISTRICT,

Respondent,

-and-

CASE NO. U-7850

EAST ROCKAWAY ADMINISTRATORS  
ASSOCIATION,

Charging Party.

---

JASPAN, GINSBERG, EHRLICH, REICH & LEVIN (CAROL M.  
HOFFMAN, ESQ. and FLORENCE T. FRAZER, ESQ., of  
Counsel), for Respondent

SOLLEDER & SOLLEDER (GEORGE J. SOLLEDER, JR., ESQ.,  
of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the East Rockaway Administrators Association (Association) to the decision of an Administrative Law Judge (ALJ) dismissing its charge against the East Rockaway Union Free School District (District). The charge, as explicated by a bill of particulars, complains that the District unilaterally removed a position from a negotiating unit for which the Association had been recognized as the exclusive negotiating representative. The ALJ dismissed the charge on the ground

that, both on its face and as explained in the bill of particulars, it does not allege facts which constitute a violation of the Taylor Law.

FACTS

The material facts as alleged are:

1. The District recognized the Association on October 18, 1982 to represent a unit of school administrators including the position of Director for Special Educational Services.
2. The position of Director for Special Educational Services became vacant on June 30, 1983.
3. The District then changed the title of the vacant position to Director of Pupil Personnel Services and, as renamed, it filled that position.
4. The duties of the position of Director for Special Educational Services were not changed when the title of the position was changed to Director of Pupil Personnel Services.
5. On August 3, 1984, at the commencement of negotiations between the parties for a first contract, the District informed the Association that the position of Director of Pupil Personnel Services was not in the negotiating unit but was part of central administration.

6. The charge specifies violations of §209-a.1(a), (b) and (c) of the Taylor Law.

The District moved for particularization on December 20, 1984. The Association submitted papers opposing the motion on December 28, 1984. A conference was held on April 9, 1985 after which the ALJ directed the Association to provide additional information, some of which had not been requested in the motion for particularization. The additional information was contained in the bill of particulars which was submitted on May 20, 1985. The bill of particulars contains a conclusory statement that "the District refused to negotiate in good faith concerning the position 'Director of Special Educational Services a/k/a Director of Pupil Personnel' . . . ." It also states: "The former School Superintendent, Michael Maiden, expressed animus toward the Association and its members."

#### DISCUSSION

The Association first contends that the ALJ erred in granting the motion for particularization, both because the original charge was sufficient and because the motion was defective in its form. We reject this contention. The motion for particularization was made in appropriate form and the granting of it by the ALJ was proper because the

charge was vague.<sup>1/</sup>

The Association next contends that the ALJ erred in ruling that it should provide information not requested in the motion for particularization, but we sustain the ALJ's ruling. It is normal and proper practice for ALJs to request additional information on their own motion when they find charges insufficient.

According to the Association, the ALJ erred in not finding a (d) violation. The ALJ's grounds were that no (d) violation had been alleged. The Association argues that a (d) allegation was inherent in its original charge and was made explicit in its bill of particulars.

On its face, the charge specified violations only of paragraphs (a), (b) and (c). While the bill of particulars does refer to a refusal to negotiate, we see that allegation as an explication of the (a), (b) and (c) specifications in the charge rather than as a new and independent specification. Moreover, if the bill of particulars were deemed to contain an independent (d) specification, it would have to be rejected on the ground that it was untimely.<sup>2/</sup>

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<sup>1/</sup>See §204.3(b) of our Rules of Procedure.

<sup>2/</sup>A charge may not be factually amended to plead a new specification if the time has run for making such a complaint in a separate charge. City of Mount Vernon, 14 PERB ¶13037 (1981); East Moriches Teachers Assn., 14 PERB ¶13056 (1981); Western Regional Off-Track Betting Corporation, 14 PERB ¶13104 (1981); City of Buffalo, 15 PERB ¶13027 (1982).

Dealing with the merits of its charge, the Association contends that the ALJ erred in not finding a (c) violation. We agree with the ALJ's finding that there was no allegation of discrimination, an essential element of such a violation. Accordingly, we affirm this part of her decision.

We also reject the Association's contention that the ALJ erred in not finding a (b) violation. The ALJ correctly found that there had been no allegation that the District attempted to meddle in the internal affairs of the Association, an essential element of a violation of §209-a.1(b).

This brings us to the Association's contention that the ALJ erred in not finding an (a) violation. The ALJ's ground was that the District was not charged with animus toward the Association or any other indication of improper motivation. The Association contends that the ALJ read its charge and bill of particulars too narrowly.

We find that this specification of the charge sets forth a prima facie case. As correctly noted by the ALJ, the mere change of a job title does not constitute a violation. However, the ALJ concluded that the Association's allegations merely indicate that the District created a new nonunit position -- something it was free to do -- and then assigned unit work to the holder of that new position -- possibly a violation of paragraph (d), but such an alleged violation was not a part of the charge.

We disagree. If, as alleged, the job duties of the newly created Director of Pupil Personnel Services are identical with those of the old Director of Special Educational Services, the unilateral action of the District would then have been intended to remove a unit position from the negotiating unit merely by changing the name of the position. This, if not explained, would be a violation of §209-a.1(a) of the Taylor Law.<sup>3/</sup>

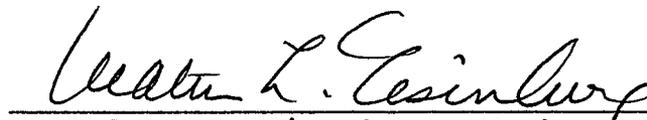
Having found that the charge presents a prima facie violation of §209-a.1(a) of the Taylor Law,

WE ORDER that the charge herein be, and  
it hereby is, remanded to the ALJ for  
further proceedings consistent herewith.

DATED: September 23, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

  
Walter L. Eisenberg, Member

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<sup>3/</sup>County of Orange, 14 PERB ¶3060 (1981). See also City of White Plains, 18 PERB ¶3031 (1985), in which we held that job duties and not job title determine the placement of a position. We further note the allegation that "the former School Superintendent, Michael Maiden, expressed animus toward the Association and its members." This is a relevant allegation of fact.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Respondent,

-and-

CASE NO. U-7479

ORGANIZATION OF STAFF ANALYSTS,

Charging Party.

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JEROME ROTHMAN, ESQ., for Respondent

JOAN STERN KIOK, ESQ., for Charging Party

BOARD DECISION AND ORDER

The charge herein was filed by the Organization of Staff Analysts (OSA). It complains that the Board of Education of the City School District of the City of New York (District) commenced a reevaluation of its employees serving in its staff analyst series with the intention of reclassifying and reassigning some of them "for the purpose of restraining those employees in the analyst series of titles who were not managerial and/or confidential from exercising their rights under the Taylor Law." The Administrative Law Judge (ALJ) dismissed the charge "for failure to establish a prima facie case". The matter now comes to us on the exceptions of OSA.

FACTS AS ALLEGED BY OSA

For the purpose of deciding whether the ALJ erred in dismissing the charge herein, OSA's allegations of fact must be deemed true.

The staff analyst series consists of three positions. In ascending order, they are staff analyst, associate staff analyst and administrative staff analyst. The District created the three positions in the expectation that all the positions in the series would be designated Managerial and/or Confidential (M/C). On November 26, 1980, it filed an application for such a designation.

On April 14, 1981, OSA, which was then affiliated with Local 237, IBT, petitioned for representation of the three titles in the staff analyst series.<sup>1/</sup> The representation (C-2190) and M/C cases (E-0916) were still pending on February 7, 1984, when the disaffiliation of OSA from Local 237 was acknowledged and OSA was continued as an independent party.<sup>2/</sup>

On March 22, 1984, the District's attorney wrote to the ALJ requesting a postponement of a meeting in the representation and M/C cases because, inter alia, "The Division of Personnel of the Board of Education is beginning

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<sup>1/</sup>An earlier petition to represent the staff analyst and associate staff analyst titles had been filed by the Communication Workers of America.

<sup>2/</sup>17 PERB ¶4011 (1984).

to reevaluate those persons who are serving in the staff analyst series but not performing staff analyst work." What was meant by this is that it was going to undertake a desk audit and apply to those positions the criteria articulated by this Board in City of Binghamton, 12 PERB ¶3099 (1979), for the designation of positions as M/C with the intention of reclassifying and transferring all the employees in the staff analyst series who did not meet those criteria. It was the further intention of the District that those positions that were reclassified would fit into negotiating units currently represented by employee organizations other than OSA.

Once it commenced the reevaluation, the District discovered that some of the employees in the staff analyst series whose job duties did not meet the Binghamton criteria were nevertheless performing functions covered by the staff analyst series job descriptions. It did not reclassify them or other employees in the staff analyst series who did not perform M/C assignments but whose positions did not immediately fit into other classifications. It did, however, reassign 10 to 15 employees who, upon reassignment, were treated by it as being in existing negotiating units. Thereafter, this Board issued a decision in the representation and M/C cases <sup>3/</sup> and certified OSA in a unit of staff

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<sup>3/</sup>18 PERB ¶3025 (1985). Based upon the record evidence, this Board did not so designate all the positions considered managerial or confidential by the District.

analysts. 4/

The evidence indicates that the District, in creating the staff analyst series, intended that the positions in it should all involve the performance of M/C duties. It further indicates that when the District commenced the reevaluations, it had a good faith belief that all the employees in the staff analyst series were either M/C or were incorrectly classified in that series; only after the District undertook the reevaluations did it discover that some employees classified in the staff analyst series were performing duties encompassed by their job description, albeit not M/C duties.

There is no convincing evidence that animus towards OSA played any role in the District's actions, but the record establishes that the reevaluation of the positions would not have been undertaken if OSA had not opposed the District's M/C application and the representation petition were not pending. Indeed, it shows that having sought to create the staff analyst series for M/C positions only, the District undertook the reevaluations -- after the commencement of the representation case -- for the purpose of altering the outcome of that case.

DISCUSSION

The question of law is whether the District may evaluate, reclassify and reassign employees for the purpose of altering the outcome of a pending representation case. We answer this question in the negative. Such action by a public employer is violative of §209-a.1(a) of the Taylor Law.

In finding a possible violation here, we emphasize the proposition that the purpose of the District is of the essence.<sup>5/</sup> Evaluation, reclassification and transfer are proper management tools if undertaken for legitimate operating purposes. They become improper if undertaken for the purpose of interfering with public employees' right of organization. Thus, we found the abolition of positions in order to thwart organizational efforts of employees to be improper in Village of Wayland, 9 PERB ¶3084 (1976), conf. sub. nom. Village of Wayland v. PERB, 61 A.D. 2d 674 (3rd Dept. 1978), 11 PERB ¶7004 (1978).<sup>6/</sup>

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<sup>5/</sup>We would find no violation if the evidence should persuade us that the purpose of the District had been to create an improved civil service classification structure. We would so find even if the imperfections in the structure were revealed to the District during the processing of the representation case and the corrections were undertaken at that time.

<sup>6/</sup>See also NLRB v. Big Bear Supermarkets, 640 F2d 924 (9th Cir. 1980), cert. den., 449 U.S. 919, involving improperly motivated transfers of employees; NLRB v. Ship Shape Maintenance Co., 474 F2d 434 (D.C. Cir. 1972), improperly motivated transfers; NLRB v. Amber Delivery Service, 651 F2d 57, (1st Cir. 1981), involving improperly motivated conversion of drivers to owner-operators.

The District's alleged justification of the action it took herein reflects a misunderstanding of the Taylor Law process for resolving issues of representation. A public employer may not designate a position as managerial or confidential.

Such a designation may be made only by this Board upon the application of the public employer. The designation is based upon the actual job duties of the employees and not upon the expectations or intentions of the public employer.<sup>7/</sup>

Similarly, where there is a dispute as to the definition of a negotiating unit, it is the responsibility of this Board, and not the public employer, to resolve that dispute.<sup>8/</sup> Where an M/C or Representation case is pending, a public employer may advance its position by presenting evidence and legal argument so as to persuade this Board of the merit of its position. It may not, however, for the purpose of affecting the outcome of a proceeding, make changes so as to present this Board with a fait accompli.

One might argue that no violation of §209-a.1(a) could

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<sup>7/</sup>Section 201.7 of the Taylor Law; East Ramapo Teachers Association, 11 PERB ¶3075 (1978).

<sup>8/</sup>Section 207.1 of the Taylor Law; §201.3 (a) and (b) of our Rules of Procedure; County of Orange, 14 PERB ¶3060 (1981); County of Rensselaer, 18 PERB ¶3001 (1985).

have occurred because, inasmuch as it is only this Board that may define the unit in a representation case, the action of the District was of no legal consequence, and therefore no harm was done. A second argument might be that the employees never had enjoyed more than a potential right to a unit of employees in the staff analyst series, and that such a potential right is not protected by the Taylor Law. <sup>9/</sup>

We have considered these arguments and reject them. Section 209-a.1(a) of the Taylor Law provides that a public employer may not interfere or coerce public employees in the exercise of their rights of organization "for the purpose of depriving them of such rights...." It is not necessary that the public employer succeed in accomplishing that purpose. Improper conduct in furtherance of that objective is sufficient.

The District's alleged effort to reclassify positions out of the staff analyst series in order to forestall its organization is violative of §209-a.1(a) in two respects. First, it is coercive of employees in the series. The staff analyst titles carry a prestige which may be of value to some of the employees subject to reclassification. Thus, the reclassification is coercive of them to withdraw support from

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<sup>9/</sup>These arguments were found persuasive by New York City's Board of Collective Bargaining in dismissing a charge by OSA against the City of New York in a parallel case. Decision No. B-22-84. That decision is on appeal to us pursuant to §205.5(d) of the Taylor Law. Our decision in that case is rendered today. Board of Collective Bargaining of the City of New York, 18 PERB ¶3067.

OSA so that, free from the pendency of the representation petition, they might be allowed to remain in their present title. Second, it is an interference with the right of employees to organize. That right, until it is realized by recognition or certification of a union in an appropriate unit, may always be characterized as merely "potential." However, to characterize the action as affecting only a "potential" right, is not a defense to an improper practice charge. Until representation rights become firm by reason of certification or recognition, they are always merely "potential". But that potential right to a unit must be seen as a present right of employees to seek such unit. The District may not act to foreclose such representation during the pendency of a representation proceeding. This is equally true whether the attempted foreclosure is by way of layoff<sup>10/</sup> or reclassification. Neither can be used as a device for depriving or inhibiting the §202 rights of these employees.

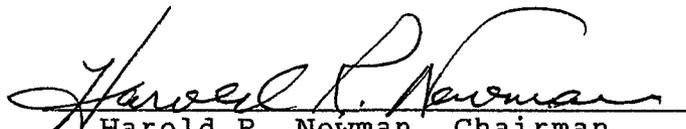
We reverse the decision of the ALJ. Inasmuch as the charge was dismissed "for failure to establish a prima facie case" before the District submitted its evidence, we remand the matter to the ALJ to complete the record and to issue a decision based upon the completed record.

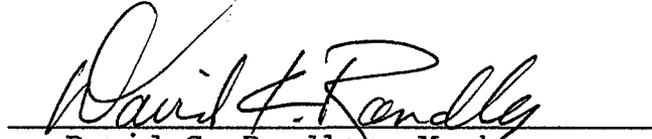
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<sup>10/</sup>See Village of Wayland and fn. 6 supra.

NOW, THEREFORE, WE ORDER that this matter be, and it hereby is, remanded to the ALJ for further proceedings consistent with this decision.

DATED: September 23, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

CITY OF POUGHKEEPSIE,

Employer,

BOARD DECISION  
ON MOTION

-and-

INTERNATIONAL ASSOCIATION OF FIRE  
FIGHTERS, AFL-CIO, LOCAL 596,

CASE NO. C-2797

Petitioner.

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On September 23, 1985 the City of Poughkeepsie (City) made a motion to this Board to remand this matter to the Director of Public Employment Practices and Representation (Director) for further investigation. The basis for the City's motion is that new evidence came to its attention on September 18, 1985 which indicates that there is a conflict of interest between supervisory and rank and file firefighters.<sup>1/</sup>

The International Association of Fire Fighters, AFL-CIO, Local 596 (Local 596) argued against the motion. It contends that the granting of the motion is likely to delay the successful resolution of current negotiations between the City and Local 596.

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<sup>1/</sup>The motion was made when the parties appeared before us to present oral argument with respect to exceptions to a decision of the Director of Public Employment Practices and Representation in this matter. Having indicated from the bench that we would grant the motion, we did not hear the oral argument.

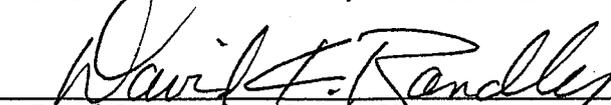
During the course of oral argument on the motion, the City stated that negotiations are not being affected by the pendency of this representation proceeding because it has negotiated on the basis of a single unit, as requested by Local 596, to the point of impasse and that the matter is now pending before an interest arbitrator pursuant to §209.4 of the Taylor Law. Local 596 acknowledged this to accurately represent the status of the current negotiations.

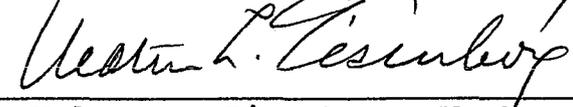
Finding that the evidence which the City seeks to introduce would be material, if established, and that Local 596 would not be prejudiced by a delay occasioned by the reopening of the record, we grant the motion.<sup>2/</sup>

NOW, THEREFORE, WE ORDER that the petition herein be, and it hereby is, remanded to the Director for further proceedings consistent with this decision.

DATED: September 23, 1985  
Albany, New York

  
\_\_\_\_\_  
Harold R. Newman, Chairman

  
\_\_\_\_\_  
David C. Randles, Member

  
\_\_\_\_\_  
Walter L. Eisenberg, Member

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<sup>2/</sup>As noted in footnote 1, exceptions to the substantive decision of the Director are also pending. Those exceptions complain, inter alia, that the Director excluded evidence proffered at the hearing. This decision on motion does not address those exceptions.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

The Petition of Organization of Staff  
Analysts to Review Decision No. B-22-84  
of the Board of Collective Bargaining of  
the City of New York.

CASE NO. N-0002

---

JOAN STERN KIOK, ESQ., for Petitioner

FRANCES MILBERG, ESQ. (MARC Z. KRAMER, ESQ., of  
Counsel), for Respondent, City of New York

BOARD DECISION AND ORDER

On October 25, 1984, the Board of Collective Bargaining (BCB) of the City of New York's Office of Collective Bargaining (OCB) issued a decision dismissing a charge of the Organization of Staff Analysts (OSA) complaining that the City of New York (City) violated Sections 1173-4.2a(1) and (3) of the New York City Collective Bargaining Law. On November 8, 1984, OSA filed a petition requesting this Board to review the BCB decision.<sup>1/</sup>

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<sup>1/</sup>Section 205.5(d) of the Taylor Law provides that:

[A] party aggrieved by a final order issued by the board of collective bargaining in an improper practice proceeding may, within ten days after service of the final order, petition the board for review thereof. Within twenty days thereafter, the board, in its discretion, may assert jurisdiction to review such final order . . . If the board shall choose to review, it may affirm, or reverse in whole or in part, or modify the final order, or remand the matter for further proceedings, or make such other order as it may deem appropriate, provided, however, that findings by the board of collective bargaining regarding evidentiary matters and issues of credibility regarding testimony of witnesses shall be final and not subject to board review.

On November 28, 1984, we issued a decision asserting jurisdiction in the matter. Our decision to assert jurisdiction was influenced by a concern for substantive consistency because the question of law decided by BCB was also "raised by an improper practice charge filed with this Board by the OSA against the New York City Board of Education."<sup>2/</sup>

Section 205.5(d) of the Taylor Law is the authority for BCB's issuance of improper practice decisions as well as for this Board's power to review such decisions. Both parts were added in 1978.<sup>3/</sup> While the statute does not specify a standard of review, Governor Carey's approval memorandum indicates that the procedure is intended to "assure the requisite consistency between OCB and PERB decisions".<sup>4/</sup> The City argues, however, that the standard of review should not be consistency between BCB and PERB decisions, but whether a BCB decision is grossly repugnant to fundamental rights under the Taylor Law. It finds support for this proposition in a decision in which this Board gave great deference to a BCB decision resolving a scope of negotiations issue when this Board was presented with the same issue in an improper

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<sup>2/</sup>See Board of Education of the City School District of the City of New York, 18 PERB ¶3068 (1985), issued today.

<sup>3/</sup>L.1978, c.291.

<sup>4/</sup>1978 N.Y. Session Laws at 1817 (McKinney's).

practice case.<sup>5/</sup>

The City's reliance upon our 1976 decision is not persuasive given the subsequent amendment of §205.5(d) of the Taylor Law. We also note that in urging the Governor to sign the 1978 amendment the City stated:<sup>6/</sup>

Enactment . . . will permit local administration of a most significant element of municipal labor relations in a manner appropriate to local circumstances and conditions and as part of a fully integrated and comprehensive system while assuring consistency with basic statewide standards and criteria. (emphasis supplied)

We therefore conclude that the standard of review is substantive consistency between BCB and PERB decisions in improper practice cases. In reaching this conclusion, we have taken into consideration that §205.5(d) of the Taylor Law explicitly accepts the improper practice provisions of §1173-4.2 of the Administrative Code of the City of New York. Accordingly, if those statutory provisions were not themselves substantively consistent with the provisions of §209-a of the Taylor Law, the State Legislature could not have intended that the decisions of the two agencies be substantively consistent. We therefore set forth the relevant provisions of the two statutes, side-by-side:

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<sup>5/</sup>City of New York, 9 PERB ¶13031 & 9 PERB ¶13034 (1976).

<sup>6/</sup>The City's memorandum is in the bill jacket of L.1978, c.291.

§1173-4.2 Improper practices;  
good faith bargaining.

§209-a. Improper employer  
practices; improper employee  
organization practices;  
application

a. Improper public employer  
practices. It shall be an  
improper practice for a public  
employer or its agents:<sup>7/</sup>

1. Improper employer  
practices. It shall be an  
improper practice for a public  
employer or its agents deliberately

(1) to interfere with,  
restrain or coerce public  
employees in the exercise of  
their rights granted in section  
1173-4.1 of this chapter;

(a) to interfere with, restrain  
or coerce public employees in the  
exercise of their rights guaranteed  
in section two hundred two for the  
purpose of depriving them of such  
rights;

. . . .

. . . .

(3) to discriminate against  
any employee for the purpose of  
encouraging or discouraging  
membership in, or partici-  
pation in the activities of,  
any public employee  
organization; . . .

(c) to discriminate against any  
employee for the purpose of  
encouraging or discouraging  
membership in, or participation  
in the activities of, any  
employee organization; . . .

A comparison of the statutes indicates that they are  
substantively consistent, which supports our threshold  
conclusion that the standard of review is whether the BCB  
decision is substantively consistent with the Taylor Law as  
interpreted by this Board.

We now apply this test to the decision of BCB before  
us. The underlying facts are that in April 1977, the City  
created a staff analyst series of titles, consisting of  
administrative analyst, associate staff analyst and staff

---

<sup>7/</sup>Although not explicitly stated in the  
Administrative Code, the opinion of BCB before us makes it  
clear that improper motivation is an element in the  
violation of §1173-4.2a(1).

analyst, which were intended to embrace positions that are either managerial or confidential, and therefore ineligible for collective negotiations. Two years later, four unions filed petitions to represent employees in the staff analyst series, and a fifth union was permitted to intervene in the proceedings. OSA is the successor to the intervenor.

The representation matter is still pending before OCB's Board of Certification (BC), although BC has issued two interim decisions which determine that the City had established a prima facie case as to the managerial or confidential status of many of the employees in the staff analyst series.

On September 3, 1982, the Director of the City's Office of Municipal Labor Relations wrote a letter to the Chairman of BC which indicates the City's understanding that the job duties of employees in the staff analyst series are all managerial or confidential in nature and that employees in that series who are not performing managerial or confidential duties have therefore been misassigned. Accordingly, it proposed to reevaluate the assignments of all employees in the series with a view to transferring those who are not performing managerial or confidential duties from that series, or assigning them such duties.

This letter triggered the charge of OSA. It complained that the City's transfer plan would dispose of the issue of appropriate unit placement for employees in the staff analyst

series instead of permitting the issue to be determined by BC. OSA also alleged that the City's proposal reflects a collusive arrangement between the City and some unions.

BCB dismissed OSA's charge without holding a hearing. Based upon the documentary evidence which it had before it, BCB found insufficient evidence to support allegations that the City's actions were improperly motivated by a desire to deprive eligible employees of statutory rights. Insofar as the alleged improper motivation might have been a collusive arrangement between the City and other unions, BCB's conclusion was one of fact only, not law.

Insofar as the alleged improper motivation might have been a design "to dissipate a potential bargaining unit," BCB's decision is based, in part, upon conclusions of law. BCB reasoned that the City's action was without legal consequence because the City could not, through the exercise of its right to reclassify employees, "usurp the authority of the Board to determine appropriate unit placement for employees who are subject to the staff analyst representation proceeding." BCB further reasoned that the employees' right to a unit of staff analysts was, at most, "potential", and there is "no basis in the law for a claim of right to a 'potential bargaining unit'".

OSA's petition for review specifies four BCB errors:

1) It failed to hold a hearing even though there were disputed issues of fact; 2) It reached conclusions of fact

that were not justified by the process it employed; 3) It failed to conclude that the City's action constituted a per se violation of the Taylor Law; 4) It ignored a decision of this Board in determining that the City's motivation was not improper.

We do not assert jurisdiction over the first basis of OSA's petition for review. It raises the issue of whether the procedures followed by BCB were appropriate rather than one of substantive consistency between the decisions of BCB and this Board. This question is subject to review only under CPLR, Article 78.<sup>8/</sup>

We also reject jurisdiction over the second basis of OSA's petition for review. To the extent that OSA complains that BCB made a factual determination without having held a hearing, the question is one of process which, as we have already stated, can be raised in an Article 78 proceeding. To the extent that the allegation is that BCB made an incorrect finding of fact, it is explicitly withheld from our jurisdiction by §205.5(d) of the Taylor Law.

We reject OSA's complaint that BCB erred in not finding a per se violation. As indicated in our decision in Board of Education of the City School District of the City of New York,<sup>9/</sup> it is not a per se violation for a public

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<sup>8/</sup>See New York City Admin. Code §1173-4.4.

<sup>9/</sup>See fn. 2, supra.

employer to reevaluate, reclassify or transfer positions during the course of a representation proceeding.<sup>10/</sup>

We do find merit in the proposition that BCB applied an incorrect conclusion of law in determining that the City was not improperly motivated. Again, as indicated in our decision of Board of Education of the City School District of the City of New York,<sup>11/</sup> it is not a defense to an improper practice charge that the City's action affected only a "potential" right to a negotiating unit. That potential right must be seen as the present right of employees to seek a negotiating unit of employees in the staff analyst series. Thus, reevaluations, reclassifications and transfers undertaken during the course of a proceeding pending before BC would be improper if intended to affect the outcome of that proceeding by making changes so as to present BC with a fait accompli. Indeed, if such were the motivation, it would be irrelevant that the City's action might have been without legal consequence because the actual

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<sup>10/</sup>We stated there:

We would find no violation if the evidence should persuade us that the purpose of the District had been to create an improved civil service classification structure. We would so find even if the imperfections in the structure were revealed to the District during the processing of the representation case and the corrections were undertaken at that time.

<sup>11/</sup>See fn. 2, supra.

decision regarding unit placement would be made by BC. As we stated in the Board of Education case, it is improper for a public employer to "interfere or coerce public employees in the exercise of their rights of organization 'for the purpose of depriving them of such rights.' . . . it is not necessary that the public employer succeed in accomplishing that purpose."

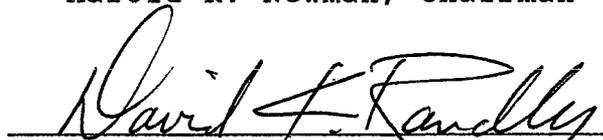
Whether or not the City was improperly motivated is a question of fact which must be resolved by BCB in the light of the legal analysis contained herein.

Accordingly, WE ORDER that the matter herein be, and it hereby is, remanded to BCB for further proceedings consistent with this decision.

In all other respects, WE ORDER that the petition herein be, and it hereby is, dismissed.

DATED: September 23, 1985  
Albany, New York

  
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Harold R. Newman, Chairman

  
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David C. Randles, Member

  
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Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

RENSSELAER-COLUMBIA-GREENE COUNTIES  
BOARD OF COOPERATIVE EDUCATIONAL  
SERVICES,

Employer,

-and-

CASE NO. C-2908

RENSSELAER-COLUMBIA-GREENE SPECIAL  
SUPPORT SERVICES FEDERATION, NYSUT,  
AFT, AFL-CIO,

Petitioner,

-and-

THE ASSISTANT UNIT OF THE RENSSELAER-  
COLUMBIA-GREENE COUNTIES TEACHERS  
ASSOCIATION,

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,

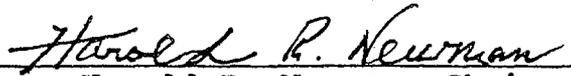
IT IS HEREBY CERTIFIED that the Rensselaer-Columbia-Greene Special Support Services Federation, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

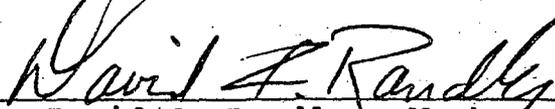
Unit: Included: Full-time and part-time aide, clerk, typist, clerical assistant, administrative program secretary, bus driver, cleaner, bus monitor aide, interpreter, film/video library clerk, account payable clerk, AV repair specialist, media courier, graphic artist, transportation mechanic, building and ground assistant courier, and DP control clerk and program trainee.

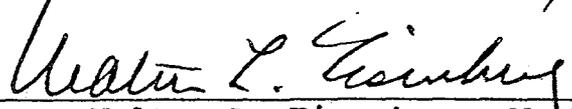
Excluded: Teaching assistant, migrant tutor assistant, physical therapist assistant, occupational therapist assistant, teacher, and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Rensselaer-Columbia-Greene Special Support Services Federation, NYSUT, AFT, AFL-CIO and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: September 23, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
TOWN OF HAVERSTRAW,

Employer,

-and-

CASE NO. C-2774

NEW YORK STATE FEDERATION OF POLICE,  
INC.,

Petitioner,

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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 New York State Federation of Police, Inc. 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.

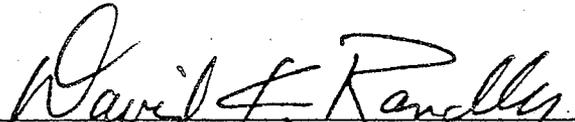
Unit: Included: Sergeants, full-time and part-time  
police officers, detectives, and youth  
officers.

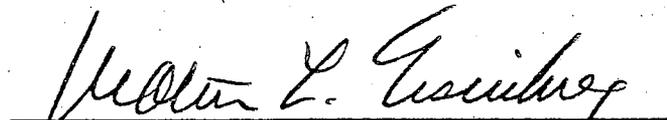
Excluded: Chief of Police and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Federation of Police, Inc. 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: September 23, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
VILLAGE OF SAG HARBOR,

Employer,

-and-

CASE NO. C-2892

SAG HARBOR VILLAGE UNIT, LOCAL 852,  
CSEA, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

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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 Sag Harbor Village Unit, Local 852, CSEA, Inc., Local 1000, AFSCME, AFL-CIO 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: Custodial worker, auto mechanic,  
laborer, sewer treatment plant operator  
and labor crew leader.

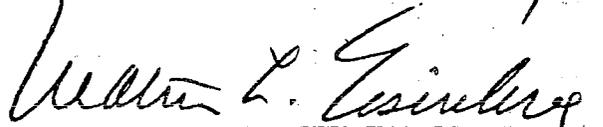
Excluded: Clerk-treasurer, deputy clerk  
treasurer, account clerk, village  
attorney, crossing guard, clerk-typist,  
police officer, police sergeant, police  
chief and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Sag Harbor Village Unit, Local 852, CSEA, Inc., Local 1000, AFSCME, AFL-CIO and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: September 23, 1985  
Albany, New York

  
Harold R. Newman, Chairman

  
David C. Randles, Member

  
Walter L. Eisenberg, Member