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State of New York Public Employment Relations Board Decisions from January 14, 1986

New York State Public Employment Relations Board

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Keywords

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF SUFFOLK DEPARTMENT OF LABOR RELATIONS,

Respondent,

-and-

CASE NO. U-8345

SUFFOLK COUNTY ASSOCIATION OF MUNICIPAL EMPLOYEES-WHITE COLLAR UNIT,

Charging Party.

ROGERS and CARTIER, P.C. (JAMES K. HOGAN, ESQ. of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Suffolk County Association of Municipal Employees-White Collar Unit (Association) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its charge against the County of Suffolk Department of Labor Relations (County).

The charge, which was executed on October 2, 1985, alleges

> Some time in 1983, Jack Farneti, then Labor Relations Director, made a determination that Donald Gruen should not be in the Bargaining Unit 2.

It complains that this action of the County constitutes discrimination against an employee for an improper purpose, and therefore violates §209-a.1(b) of the Taylor Law.

The Director dismissed the charge on the ground that it was not timely filed.[1/] The Association argues that the Director did not give sufficient consideration to its allegation that from the time of Gruen's removal from the unit until mid-June 1985, it had been negotiating that matter with the County. It contends that these negotiations constituted an exhaustion of administrative remedies which was a precondition for the filing of the charge herein, and which therefore extended the time in which to file this charge.

We affirm the decision of the Director. "The time to file a charge runs from the time when a charging party knows, or should have known, of the facts constituting the unlawful conduct."[2/] In New York City Transit Authority, 10 PERB ¶3077 (1977), a charging party had argued that the time during which to file a charge does not begin to run until the charging party exhausts its contractual remedies. We rejected this argument, holding that a contractual grievance procedure cannot be analogized to an administrative

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1/Section 204.1(a)(1) of our Rules of Procedure permits the filing of a charge within four months of the conduct complained about.

2/Onteora CSD, 16 PERB ¶3098 (1983) at p. 3163.

procedure. We stated that a grievance procedure is designed to protect private rights, while §209-a of the Taylor Law is designed to protect statutory rights, and that the two sets of rights do not always coincide.

What we said about grievance procedures applies a fortiari to negotiations. Although it is an adjudicatory process, a contractual grievance procedure is not designed to provide a remedy for a statutory violation. Negotiation is not an adjudicatory process at all; rather, it is designed to facilitate accommodation where the parties differ as to what terms and conditions of employment ought to be. Accordingly, there is no basis for holding that negotiations extended the time during which the charge may have been filed.

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

DATED: January 14, 1986
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INCORPORATED VILLAGE OF HEMPSTEAD,

Respondent,

-and-

CASE NO. U-8165

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE VILLAGE OF HEMPSTEAD,

Charging Party.

CULLEN AND DYKEMAN, ESQS. (GERARD FISHBERG, ESQ. of Counsel), for Respondent

AXELROD, CORNACHIO & FAMIGHETTI, ESQS. (MICHAEL E. AXELROD, ESQ. of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Incorporated Village of Hempstead (Village) to a decision of an Administrative Law Judge (ALJ) that it violated §209-a.1(d) of the Taylor Law by appointing a hearing officer to hear disciplinary charges that it preferred against a police officer represented by the Patrolmen's Benevolent Association of the Village of Hempstead (PBA). The ALJ determined that there was a past practice of disciplinary charges being heard by the Board of Trustees of the Village Board itself, and that the appointment of a hearing officer

constituted a unilateral change of a term and condition of employment.

The Village makes two arguments in support of its exceptions. The primary one is the advancement of a proposition of law, that its decision to appoint a hearing officer is not a mandatory subject of negotiation because, pursuant to State law, it is reserved to the discretion of the public employer. Its secondary argument is that the record does not support the ALJ's finding of a past practice.

Dealing with the proposition of law first, we affirm the conclusion of the ALJ. As noted by the Village, §75 of the Civil Service Law provides that it is within the discretion of a public employer to hear a disciplinary charge itself or to appoint a hearing officer.[1/] It does not follow, however, that because §75 gave the Village's Board of Trustees the discretion to hear a charge itself or to appoint a hearing officer, it may exercise that discretion unilaterally without violating §209-a.1(d) of the Taylor Law which obligates public employers to negotiate with respect to

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1/An unpublished decision of Justice Velsor at Special Term, Sup. Ct. Nassau Co. on July 21, 1985, explicitly held that the appointment of a hearing officer in the instant disciplinary proceeding was authorized by §75 of the Civil Service Law.

mandatory subjects of negotiation.[2/] The fact that but for the Taylor Law a decision would be left to the discretion of a public employer does not insulate it from mandatory negotiations. On the contrary, it is only where a public employer would otherwise have discretion to change a term and condition of employment that negotiations are mandated. Where a statute specifies a term and condition of employment, collective negotiations are preempted.

This focuses attention on the question of whether employee discipline procedures constitute a mandatory subject of negotiation, a question long ago resolved by the courts. In City of Auburn,[3/] we held that a demand for variations from the disciplinary scheme set forth in §75 is not a mandatory subject of negotiation. While finding

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2/In BOCES v. PERB, 82 A.D.2d 691, 14 PERB ¶7025, 7052 (1981), the Third Department, confirming a determination of this Board, said

> The duty to negotiate in good faith includes an obligation to continue past practices that involve mandatory subjects of negotiation, even in the absence of a provision to that effect in the contract.

See also County of Onondaga v. PERB, 77 A.D.2d 783, 13 PERB ¶7011 (1980) (4th Dept. 1980) and NLRB v. Katz, 369 U.S. 736 (1962).

3/10 PERB ¶3045 (1977), motion for reargument denied, 10 PERB ¶3060 (1977).

discipline to be a term and condition of employment,[4] we nevertheless found it a prohibited subject of negotiation because of the preemptive effect of §§75 and 76 of the Civil Service Law.

The courts reversed our determination that the subject of discipline is preempted by the Civil Service Law provisions,[5] the Third Department saying, "disciplinary procedures are not per se prohibited subjects of collective bargaining." The effect of that holding is that disciplinary procedures, including procedures relating to the designation of hearing officers, are a mandatory subject of negotiation.

As noted, it is a corollary to a public employer's duty to negotiate mandatory subjects of negotiation that it refrain from taking unilateral action with respect to them. Accordingly, if there is a past practice that no hearing officer be appointed in disciplinary charges involving employees represented by PBA, then the Village's conduct violated §209-a.1(d) of the Taylor Law. This brings us to the Village's second argument.

4/See City of Albany v. Helsby, 56 A.D.2d 976, 10 PERB ¶7006 (1977), in which the Third Department confirmed PERB's holding that discipline involves a term and condition of employment, and, consequently, a mandatory subject of negotiation. The question of preemption had not been raised in that case.

5/Auburn Police Local 195 v. Helsby, 10 PERB ¶7016 (Alb. Co., 1977), aff'd, 62 A.D.2d 12, 11 PERB ¶7003 (3d Dept. 1978), aff'd on opinion of Appellate Division, 46 N.Y.2d 1034, 12 PERB ¶7006 (1979).

In pertinent part, the record herein consists of a short stipulation of fact,[6/] stating:

> 4. On or about June 10, 1985, the Board of Trustees appointed an arbitrator from the panel of the American Arbitration Association as hearing officer.
>
> 5. Other cases have been heard by the Board of Trustees.

This language is ambiguous. PBA has argued that it implies that all disciplinary charges have been heard by the Board of Trustees, and that the number of such cases, as well as the variety of circumstances with which they dealt, is sufficient to establish a past practice. The ALJ was persuaded by this argument. The Village argues, however, that this language is consistent with the proposition that some of the cases have been heard by the Board of Trustees and that they are neither sufficient in number nor in the variety of circumstances to constitute a past practice. Instead, according to the Village, the stipulated facts are consistent with the proposition that the Board of Trustees exercises discretion on a case-by-case basis whether or not to appoint a hearing officer.

Interpreting the stipulation most favorably to PBA, we could hold that the record raises a sufficient inference of a

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6/After meeting with the parties at a pre-hearing conference, the ALJ summarized her understanding of those facts not in dispute. The following language is from that summary. The parties had been given the opportunity to question its accuracy or completeness but neither party did so.

past practice under which cases are heard by the Board of Trustees itself so as to shift the burden of proof to the Village. Following this approach, we would find that the Village has presented no evidence to refute the evidence of such a past practice, and we would affirm the decision of the ALJ. Alternatively, we could interpret the stipulation most favorably to the Village and conclude that the evidence is not sufficient to establish such a past practice. Were we to do so, we would reverse the ALJ and dismiss the charge. Because of the ambiguity of the single relevant sentence in the stipulation, we decline to do either. Instead, as suggested by the Village's brief, we remand this matter to the ALJ to take further evidence regarding the issues of fact and to reach a new decision based upon those facts.

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

DATED: January 14, 1986
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 2, UNITED FEDERATION OF TEACHERS,

Respondent,

-and- CASE NO. U-8082

SYLVIA ZEDLAR,

Charging Party.

JAMES R. SANDNER, GENERAL COUNSEL, NEW YORK STATE UNITED TEACHERS (PAUL H. JANIS, ESQ., of Counsel), for Respondent

LLOYD SOMER, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Sylvia Zedlar to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her charge against Local 2, United Federation of Teachers (UFT). The exceptions argue that the Director erred in dismissing four specifications alleging violations of UFT's duty of fair representation.[1/]

The first specification is that UFT was grossly negligent or irresponsible in its representation of Zedlar at

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1/There are some indications in Zedlar's charge and supporting papers that she also alleged a violation of UFT's duty to negotiate in good faith. The Director ruled that no such charge could be entertained because the duty to negotiate is a reciprocal obligation of public employers and recognized or certified employee organizations which is not owed to an individual. The exceptions do not address this issue.

an arbitration hearing held on November 13, 1984. She complains that UFT failed to call witnesses whom she had identified and whose testimony would have been helpful, that it did not introduce relevant documents, and that it failed to challenge perjured testimony. The Director dismissed this specification on the ground that the charge, having been filed on April 9, 1985, was not timely to the extent that it complains about events occurring before December 9, 1984.

In her exceptions, Zedlar argues that the events of November 13, 1984 were part of a continuing course of conduct in that UFT had assured her that it would attempt to remedy the problem by moving to vacate an adverse arbitration award. In effect, she is arguing: 1) that subsequent events tolled the four-month limitation period, and 2) it should be tolled for equitable reasons because "a promissory estoppal argument is certainly germane to the instant issue." She does not cite any legal authority to support these positions, and we are not persuaded by them. Dealing with the first argument, Captain's Endowment Association, 10 PERB ¶3034 (1977), indicates that actions of a union subsequent to conduct which might constitute a violation of the union's duty of fair representation do not extend the period during which an individual may complain about the original conduct. As to the second argument, Zedlar's claim of assurance is based upon a statement allegedly made to her by the UFT field

representative at the time of the arbitration hearing that if the award should be unfavorable, one could go to court. The Director found this allegation insufficient to constitute an assurance that UFT would take the matter to court. We agree.

The second specification is that UFT failed to inform Zedlar promptly of the arbitrator's award. Zedlar's papers show that UFT sent her the award on December 2, 1984, more than four months prior to her filing of the charge. Accordingly, the Director dismissed this specification as not being timely. He also indicated that he would have dismissed it on the merits in any event. Zedlar's papers show that UFT held the award about seven days before mailing it to Zedlar; the Director determined that this delay did not amount to gross negligence or irresponsibility.

To the extent that the Director's decision is based on lack of timeliness, Zedlar's exceptions make the same argument as they did with respect to the first specification, and they are rejected for the same reasons. Insofar as the decision to dismiss the specification was on the merits, Zedlar requests that the Board undertake an investigation into whether she was treated in a different manner than other unit employees. She does not indicate that there is any reason for suspecting that her treatment was unusual in this regard. In any event, this proposal misapprehends this Board's role in connection with allegedly improper conduct. It affords parties a forum in which to litigate issues and

decides cases on the basis of evidence presented to it;[2/] it does not undertake investigations.

The third specification is that UFT did not move to vacate the arbitration award. Zedlar argues that UFT was obligated to do so because of its incompetent handling of the original arbitration. She also reiterates the equity argument: UFT assured her that it would do so; she relied on that assurance; therefore, UFT is obligated to perform in accordance with that assurance.

As noted, the Director properly found Zedlar's allegations insufficient to constitute an assurance that UFT would move to vacate the arbitration award. He further ruled that even if an assurance had been given to Zedlar at the time of the arbitration hearing, it would not have been binding upon UFT once it received the award, because UFT would then have been free to make a judgment as to the likelihood of success of a court appeal. In this connection, he noted that Zedlar's papers show that UFT wrote to Zedlar on January 2, 1985, that there were no grounds to have the arbitration award vacated.

We affirm this analysis of the Director. In State of New York (Diaz), 18 PERB ¶3047 (1985), we found a violation of the duty of fair representation in that the union was

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2/PERB's Rules of Procedure, Part 204.

irresponsible in its handling of its unit employee's grievance. Even so, we dismissed a separate charge alleging that the union's violation had obligated it to at least remain neutral with respect to his appeal of the arbitration award.[3/] We found that the union did not act wrongfully in supporting the employer's opposition to a motion to vacate the arbitration award. A fortiari, a union is not obligated to support such a motion.

The fourth specification is that UFT did not inform Zedlar that there was a 90-day period during which she herself could have brought a motion to vacate. The Director dismissed this specification on the ground that a union has no affirmative obligation to advise unit members regarding the possibility of, or procedures for, filing such a motion on their own. He noted that this presupposes that the union does not provide this information to some unit members on a discriminatory basis, but found no allegation of such discrimination.

The exceptions merely reiterate Zedlar's position that UFT had an affirmative obligation to inform her of the 90-day limitation. They do not state any legal basis for that position, and we find none. Finding no merit in Zedlar's exceptions, we affirm the decision of the Director.

3/Local 418 (Diaz), 16 PERB ¶3108 (1983), aff'd, Diaz v. PERB, ___A.D.2d___, 18 PERB ¶7019 (3d Dept. 1985).

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

DATED: January 14, 1986
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

#3A-1/14/86

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF COLONIE (DEPARTMENT OF PUBLIC WORKS),

Employer,

-and-

CASE NO. C-2986

TEAMSTERS LOCAL 294, IBT,

Petitioner,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that Teamsters Local 294, IBT 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: Class I Operator, Class 2 Operator, Park Maintenance.

Excluded: Foreman, Sanitation Supervisor and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294, IBT and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: January 14, 1986
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF SIDNEY,

Employer,

-and-

CASE NO. C-2995

TEAMSTERS LOCAL NO. 693, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that Teamsters Local No. 693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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: Employees employed in the following titles: Laborer; Motor Equipment Operator; Heavy Equipment Operator; Chief Wastewater Treatment Plant Operator; Wastewater Treatment Plant Operator; Building Maintenance Mechanic; Cleaner.

Excluded: All other employees.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with Teamsters Local No. 693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: January 14, 1986
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

#3C-1/14/86

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUTCHESS COUNTY COMMUNITY COLLEGE,

Employer,

-and- CASE NO. C-2983

DUTCHESS UNITED EDUCATORS,

Petitioner.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Dutchess United Educators 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 adjunct faculty.

Excluded: All other employees.

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

DATED: January 14, 1986
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

David C. Randles
David C. Randles, Member

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#6A-1/14/86

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

MARIO M. CUOMO
GOVERNOR

December 10, 1985

Dear Mr. Randles:

It is with sincere regret that I accept your resignation as a Member of the New York State Public Employment Relations Board, effective January 31, 1986.

I send you my personal thanks and those of the people of the State of New York for the time and energy you have devoted to the work of this important Board.

Sincerely,

Mario M. Cuomo

Mr. David Randles
P. O. Box 500
Clifton Park, New York 12065

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