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# State of New York Public Employment Relations Board Decisions from February 3, 1986

New York State Public Employment Relations Board

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# State of New York Public Employment Relations Board Decisions from February 3, 1986

**Keywords**

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**Comments**

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

STATE OF NEW YORK (DIVISION OF  
MILITARY AND NAVAL AFFAIRS),

Employer,

-and-

CASE NO. C-2900

TEAMSTERS LOCAL 294, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

-and-

CSEA, LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

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JOSEPH M. BRESS, ESQ. (ROBERT E. WATERS, ESQ., of  
Counsel), for Employer

POZEFSKY, POZEFSKY & BRAMLEY, ESQS. (BRUCE C.  
BRAMLEY, ESQ., of Counsel), for Petitioner

ROEMER AND FEATHERSTONHAUGH, P.C. (RICHARD L.  
BURSTEIN, ESQ., of Counsel), for Intervenor

BOARD DECISION AND ORDER

On November 16, 1984, the State of New York (Employer) recognized CSEA, Local 1000, AFSCME, AFL-CIO (Intervenor) as the exclusive negotiating representative of the approximately 750 civilian employees of its Division of Military and Naval Affairs (DMNA) in a single negotiating unit. Notice of this recognition was posted on December 3, 1984. Teamsters Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Petitioner) then filed a

timely petition on December 31, 1984, to remove approximately 77 supervisory employees from such unit, and for its certification as the negotiating representative of such supervisors.

After four days of hearings before an Administrative Law Judge,<sup>1/</sup> the Director of Public Employment Practices and Representation (Director) issued an interlocutory decision, on November 6, 1985, in which he removed the positions of Armory Superintendent I, II and III, Maintenance Supervisor I, other than the one located at Camp Smith, and Maintenance Supervisor III from the negotiating unit for which the Intervenor was recognized. He has not yet determined whether such supervisors properly constitute an independent unit or, if so, whether the Petitioner should be certified as its representative. This matter now comes to us on the exceptions of the Intervenor from the interlocutory decision, filed by permission.<sup>2/</sup> The Employer supports the exceptions and the Petitioner opposes them.

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<sup>1/</sup>The parties were given a sufficient opportunity to present their evidence. At the close of the hearing, the State asked that the record be kept open for it to present additional evidence -- the details of written standard operating procedures -- if, upon reviewing them, its attorney deemed them relevant. The Administrative Law Judge declined to hold the record open. Instead, he invited the State to move to reopen the record if it deemed the materials relevant. The State made no such motion. Some other evidence was rejected but only after the Administrative Law Judge ruled, on the basis of an offer of proof, that it would either be irrelevant or redundant.

<sup>2/</sup>Matter of State of New York, 18 PERB ¶3084 (1985).

FACTS

The supervisors covered by the petition are assigned to armories or flight facilities operated by DMNA. With the exception of Camp Smith, no more than one is assigned to a single installation, but three of them are assigned to two installations. They supervise from two to fifteen civilian employees each<sup>3/</sup> in the maintenance of the installation. The overall responsibility for each installation is vested in a military officer called the Officer in Charge and Control (OICC). The OICC is not usually in attendance at the armory and he therefore exercises little control over the work of the civilian employees. There are, however, detailed written procedures governing the work of the civilian employees. Furthermore, there is a full-time military employee at each site who would be expected to bring improprieties in the operation of the installation to the attention of the OICC.

The supervisors covered by the petition take part in interviewing prospective civilian employees and, on occasion, sit on promotion boards involving their subordinates. They are the first step in the Employer's four-step grievance procedure, they recommend discipline and they participate in the evaluation of their subordinates for salary and promotion

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<sup>3/</sup>The salary grade of each supervisor is related to the number of employees supervised.

purposes. Their supervisory responsibilities also include the adaptation of the written procedures to local needs, scheduling the work of their subordinates and assigning specific duties to them.<sup>4/</sup> The supervisors perform some of the tasks of the rank-and-file employees. The extent to which they do so diminishes as the number of employees supervised grows.

There are employees of the Employer in its Operational Services Negotiating Unit and in its Institutional Services Negotiating Unit who are assigned similar supervisory responsibilities and are in the same negotiating unit as those they supervise.

Prior to the Employer's recognition of the Intervenor, the supervisors received the same package of benefits as did employees who had been designated managerial or confidential. Since that recognition, they have been provided with the alternative package of benefits which is furnished to the rank-and-file civilian employees of DMNA.

There is no history of negotiations under the Taylor Law involving employees of DMNA prior to the Employer's recognition of the Intervenor on November 16, 1984. There were, however, "informal negotiations". For over ten years, a chapter of the Intervenor represented civilian employees of DMNA in the Capital District in such informal negotiations.

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<sup>4/</sup>The above is not true with respect to the Maintenance Supervisor I at Camp Smith.

There was a second, unaffiliated, organization which, for a period of five years, unofficially represented civilian employees of DMNA statewide. These organizations developed in response to a call of the chief of staff of DMNA for some kind of an organization with which it could have a working liaison. They lobbied to improve the terms and conditions of the civilian employees of DMNA and negotiated informally with DMNA's comptroller and personnel director. Throughout much of their history, both organizations were led by the same person, a supervisory civilian employee of DMNA.

The Employer opposes fragmentation of the DMNA Unit. Its reason is that the creation of an additional negotiating unit would be administratively inconvenient in that it would impose added burdens upon its Office of Employee Relations in the negotiation of, and administration of agreements.

#### DISCUSSION

The Intervenor and the Employer both complain that the Administrative Law Judge erred in excluding material evidence. Having reviewed the record, we find no merit in this contention. The Employer also argues that it was prejudiced in that the Administrative Law Judge required it to submit its evidence in support of a unit of all civilian employees of DMNA before the Petitioner was compelled to present its evidence in support of a separate unit for the supervisors. We find that this conduct of the Administrative Law Judge was neither inappropriate nor prejudicial. A

petition for certification initiates an investigation into a question concerning representation rather than an adversary proceeding.<sup>5/</sup> Accordingly, it was not inappropriate for the Administrative Law Judge to require the Employer to present evidence regarding the duties and terms and conditions of employment of DMNA employees at the outset of the hearing. On the contrary, it was logical for him to do so because the Employer had available to it more relevant information than did the Petitioner and that information was a useful point of departure for further analysis. Moreover, the Employer was not prejudiced because it had the opportunity to present rebuttal evidence should it have deemed it desirable to do so after the Petitioner submitted its evidence.

Dealing with the merits, §207 of the Taylor Law sets forth two applicable standards for the definition of a negotiating unit:<sup>6/</sup>

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<sup>5/</sup>Rules of Procedure, §201.2(a).

<sup>6/</sup>There is another statutory standard:

[T]he officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate . . . .

It is not relevant to the issue before us. Whether there is a single unit or separate unit for supervisors and rank-and-file employees, the Employer's Office of Employee Relations will represent it in negotiations.



the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;

the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.

The first standard can be stated in both positive and negative terms. Is the community of interest shared by the employees in a possible unit so much greater than alternative communities of interest shared by other configurations of employees as to make that unit inevitable or very desirable? Notwithstanding their shared community of interest, are there also conflicts of interest among employees in a proposed unit which make such a unit unacceptable or undesirable?

Dealing with the first question, we find that all the civilian employees of DMNA share a close community of interest. All of them, and they alone among those who work for the Employer, are civilian employees in its military service.<sup>7/</sup> Moreover, they all receive the same package

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<sup>7/</sup>See State of New York, 16 PERB ¶13016 (1983), conf'd, State of New York v. PERB, 103 A.D.2d 876, 17 PERB ¶7014 (3rd Dep't 1984).

of fringe benefits, which indicates a high community of interest with respect to terms and conditions of employment. On the other hand, in derogation of their close community of interest, we note that until the Employer's recognition of the Intervenor there was a dichotomy in the package of fringe benefits provided to supervisory and rank-and-file employees. Thus, the close community of interest has a relatively short history and, to some extent, may well have been created by the Employer in anticipation of the representation rights that are the subject of this proceeding.

As to the conflict of interest between the supervisors and rank-and-file employees, we agree with the Director that some such conflict is always present between supervisors and rank-and-file employees. Here, the level of supervisory authority is not very high as the supervisors must follow detailed written procedures and their recommendations with respect to hiring, promotions and discipline, etc., go through several levels before they are converted into action. On the other hand, we find it significant that the supervisors covered by the petition are the only supervisory employees at the work site. Accordingly, whatever tension is generated by supervision will complicate relationships between those supervisors and the rank-and-file employees. This raises a concern that the supervisors may not be adequately represented in a unit that is overwhelmingly dominated by rank-and-file employees.

The Intervenor and the Employer argue that this potential conflict should be disregarded here as it was with respect to supervisors who perform similar tasks but were, nevertheless, assigned to the Employer's Operational Services and Institutional Services Units along with rank-and-file employees whom they supervise. This argument points to the second relevant statutory standard, which this Board has interpreted to focus on the administrative convenience of the public employer.<sup>8/</sup>

The Operational Services and Institutional Services Units were defined by this Board in State of New York, 1 PERB ¶399.85 (1968) and 2 PERB ¶¶3035 and 3036 (1969). The circumstance dealt with in that case was the unit placement of almost 150,000 State employees. We struck a balance between too few negotiating units, which would deprive employees of an opportunity for meaningful representation in collective negotiations, and narrow occupational fragmentation, which would lead to unwarranted and unnecessary administrative difficulties for the employer. Doing so, we concluded that the second relevant standard:

requires the designation of as small a number of units as possible consistent with the overriding requirement that the employees be permitted to form organizations of their own choosing to represent them in a meaningful and effective manner.<sup>9/</sup>

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<sup>8/</sup>Board of Education of the City School District of the City of Buffalo, 14 PERB ¶3051 (1981).

<sup>9/</sup>State of New York, 1 PERB ¶399.85, at 3231 (1968).

The problem with respect to supervision was that there were many levels of supervision. Thus, if employees who supervised others were not placed in the same unit as those whom they supervised, there would have had to be a multiplicity of units just to deal with the layers of supervision. Accordingly, lower level supervisors were placed in the same unit as rank-and-file employees while higher level supervisors were placed in the Professional, Scientific and Technical Services Unit.<sup>10/</sup> Inasmuch as there is only one level of supervisors among the civilian employees of DMNA, the problem before us here is nowhere near as great as the one that confronted us in 1968 and 1969. Accordingly, we affirm the determination of the Director that the concerns raised by the first standard which indicate that there should be separate units are sufficient to overcome the concern for administrative convenience inherent in the second relevant standard.

The final argument of the Intervenor and the Employer is that there is a ten-year history of both supervisors and rank-and-file employees of DMNA being represented by a single organization without any apparent conflict of interest. They contend that this history is sufficient to overcome any assumptions that such a conflict would be

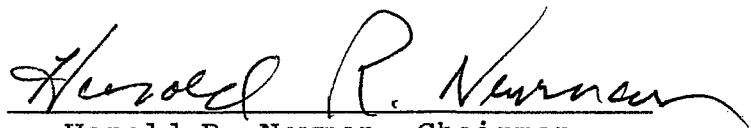
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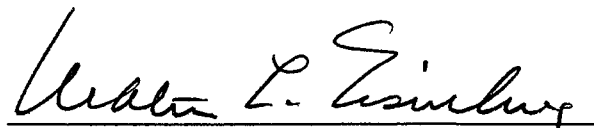
<sup>10/</sup>State of New York, 2 PERB ¶3044 at 3336 (1969).

inevitable if a single negotiating unit should be defined as appropriate. We disagree. The history does not involve Taylor Law representation. Such representation as existed involved far less formal relationships than are required by the Taylor Law. While the representative of the civilian DMNA employees did engage in some informal negotiations with the comptroller and personnel director of DMNA, there is no indication that those negotiations dealt with matters which focused attention on the competing interests of supervisors and rank-and-file employees. Accordingly, we do not find this history relevant to that issue before us.

NOW, THEREFORE, WE AFFIRM the decision of the Director,  
and  
WE ORDER that this matter be, and it  
hereby is, remanded to the Director for  
further proceedings.<sup>11/</sup>

DATED: February 3, 1986  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

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<sup>11/</sup>As stated above, the decision of the Director was interlocutory.