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State of New York Public Employment Relations Board Decisions from April 1, 1986

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 1, 1986

Keywords

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

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF JAMESTOWN

CASE NO. E-1056

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

JAMES P. SUBJACK, ESQ., Associate Corporation Counsel,
for City of Jamestown

LODESTRO & ASSOCIATES (JOHN L. LA MANCUSO, ESQ., of
Counsel), for Jamestown Professional Firefighters
Association, Local 1772, AFL-CIO

LOMBARDI, REINHARD, WALSH & HARRISON, P.C., for New
York State Professional Fire Fighters Association,
amicus curiae.

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the
Jamestown Professional Firefighters Association, Local 1772,
AFL-CIO (Association) to a decision of the Director of Public
Employment Practices and Representation (Director) holding
that four assistant fire chiefs employed by the City of
Jamestown (City) are managerial employees.

FACTS

The City's fire department consists of approximately 90
employees. There is a fire chief but there has been no
deputy fire chief for at least 18 years. Thus, the second

level consists of four assistant fire chiefs. The assistants serve as line officers but they have had some staff responsibilities in that the chief has consulted with them regarding such matters as station and vehicle maintenance and the purchase of new vehicles. The assistant chiefs also substitute for the chief in his absence, such assignments being made in order of seniority. There is no evidence that any assistant chief has ever performed a function which may be characterized as managerial by reason of such an assignment.

In 1984, the chief indicated that he wanted to reorganize the department by giving each of the four assistants a primary responsibility. In order of seniority the assignments would be: Pederson - vehicle maintenance, Pillsbury - station maintenance, Hayes - inspection and training, DeVol - personnel and labor relations. He further indicated that all four would form a cabinet with which he would hold monthly meetings at which labor relations, inter alia, would be discussed. The chief testified that while one assistant would sit with him in the current negotiations the designation might change in future negotiations. Moreover, according to the chief, the remaining three would be

informed about the progress of negotiations, not only their union proposals but also the City's, and how they stand on certain proposals and what their intent would be and how the negotiations are proceeding.

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He also testified that the three remaining assistant chiefs would have similar responsibilities with respect to the administration of the contract.

The Director found the evidence sufficient to indicate that the four assistants would be given collective negotiation and contract administration responsibilities sufficient to make them managerial. He was not persuaded, however, by evidence designed to show that the four already had policy making responsibilities.

Nine months later the City had not yet put its proposed reorganization into effect. It explained, at a second hearing, that it was awaiting the execution of the parties' agreement and also awaiting the removal of the assistant chiefs from the negotiating unit before giving them managerial responsibilities.

DISCUSSION

Both parties rely on City of Newburgh, 16 PERB ¶3053 (1983). In that case, this Board designated Deputy Fire Chief Winstanley as managerial and Assistant Fire Chief Paden as confidential. Both had been in the negotiating unit represented by the union. Paden had performed managerial/confidential duties involving personnel and negotiation matters. Although Winstanley's prescribed duties included assistance in the formulation and implementation of departmental policy, he had not actually

been assigned managerial functions. The chief testified that he would have been given such assignments but for the fact that he was in the negotiating unit. The Director, and the Board, were persuaded by the chief's testimony that the City needed Winstanley to perform these functions and held (at 3082): "[A]n employee may be designated 'managerial' on the basis of services that may be required of him in the future. . . ." (emphasis in original)

The Director rejected the City's application insofar as it sought the designation of three other assistant chiefs as managerial or confidential. He wrote, at 16 PERB ¶4015, at 4022 (1983):

Although the Chief has expressed his desire to likewise consult with and confide in the other Assistant Chiefs, given their irregular contact with the Chief, and their job description which indicates that they are, at best, supervisors who, in the chain-of-command, are only in charge of a shift, it would be unreasonable to expect that they will be called upon to perform the same type of duties as Winstanley.

In this connection the Director noted that Paden was in daily contact with the chief while the other assistants "see the Chief perhaps once a week." There were no exceptions to the dismissal of the application with respect to the other assistant chiefs.

The City argues that the four assistant chiefs should all be seen in the same light as Winstanley because, there being no deputy chief, they are jointly and severally at the

second level of command. The Association argues that they should be treated the same as the three assistant chiefs of Newburgh who were not declared managerial. The question is how much weight should be given to the testimony of the chief as to his intention to use employees as managers in the future. In Newburgh we were persuaded that Winstanley's services in such capacity could reasonably be required of him in the future even though they were not required of him in the past. We were not persuaded, however, by the chief's testimony in Newburgh that the three assistants would reasonably be required to perform such duties.

The major distinction in Newburgh was that Winstanley was on a higher level than the assistants, which made it more reasonable that he alone would be required to perform managerial functions. Here, the assistant chiefs, like Winstanley in Newburgh, are second in the chain of command, and we are persuaded that the chief intends to use them to perform managerial functions involving collective negotiations and contract administration.

In an amicus brief in support of the Association, the New York State Professional Fire Fighters Association argues that we should reverse the Director's decision because L. 1971, c. 503 and c. 504, as amended by L. 1975, c. 854, enunciates a public policy that the statutory definition of managerial employees should be applied conservatively so that


uncertainties are resolved in favor of Taylor Law coverage. This Board so held in City of Binghamton, 10 PERB ¶3038 (1977). Here, however, as in Newburgh, we find the evidence sufficient for a designation, and that such designation is consistent with the public policy enunciated in the legislation.

NOW, THEREFORE, WE ORDER that the following employees of the City be, and they hereby are, designated managerial: Norman Pederson, Otis Pillsbury, Phillip Hayes and Kenneth DeVol..

DATED: April 1, 1986
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MOHAWK VALLEY GENERAL HOSPITAL,

Employer,

BOARD DECISION
AND ORDER

-and-

CASE NO. C-3009

COMMUNICATION WORKERS OF AMERICA,
LOCAL 1126, AFL-CIO,

Petitioner.

NIXON, HARGRAVE, DEVANS & DOYLE, ESQS. (GERALD L. PALEY, ESQ.
and MICHAEL A. HAUSKNECHT, ESQ., of Counsel), for Employer

DAVID A. MINTZ, ESQ., for Petitioner

This matter comes to us on the exceptions of the Mohawk Valley General Hospital (Employer) to a decision of the Director of Public Employment Practices and Representation (Director) that the Communication Workers of America, Local 1126, AFL-CIO (CWA) should be certified without an election in a unit of nurses and related occupations pursuant to §201.9(g)(1) of our Rules of Procedure.^{1/} The employer

^{1/}Section 201.9(g)(1) provides:

Certification without an election. If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization, that choice may be ascertained by the Director on the basis of dues deduction authorizations and other evidences instead of by an election. In such a case, the employee organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the certification.

makes two arguments in support of its exceptions:

1. The evidence that CWA submitted to show that it represents the majority of the employees in the unit is tainted, and
2. Designation cards and petitions are, by their nature, inadequate evidence of majority status.

FACTS

After CWA filed its petition, the employer and CWA executed our standard Consent Agreement. That agreement specified a unit which was larger than the one originally sought by CWA. It also provided for a secret ballot election, stating:

Unless the Petitioner submits to the Director within seven (7) days from the approval date of this agreement indications of employee support sufficient to satisfy the requirements of Section 201.9(g)(1) of the Rules of Procedure for certification without an election, an election will be held

The employer identified 158 employees as being in the negotiating unit and CWA submitted 125 cards executed by such employees. The cards state:

I hereby join with my fellow workers in organizing a union to better our conditions of life and secure economic justice. I have voluntarily accepted membership in the Communication Workers of American (CWA) AFL-CIO and declare that this union shall be my representative in collective bargaining over wages, hours and all other conditions of employment.

As a union member, I intend to pay dues after a union contract has been voted on and approved by the members.

I have also agreed to the membership provisions on the other side of this card.

As the cards amount to 79 percent of the unit, the Director determined that CWA had satisfied the requirement for certification without an election.

~~The employer alleges that after issuance of the~~ Director's decision, it discovered that some of the signed cards were obtained as a result of "substantial material misrepresentations." In support of this proposition, it has submitted six affidavits by unit employees and a letter from three others. As to the affidavits, five state that the affiant signed a designation card without reading it because she was told that a sufficient number of signed cards were required before CWA would send a representative to meet with the employees and that, if the employees were interested in being represented by CWA, they would have an opportunity to make that interest known in a closed ballot election. None of the affidavits allege that the affiant was pressured into signing, but some affiants state that they know of others who were so pressured. Several also say that they know of others who signed because of similar misrepresentations. Neither the identity of these other people nor their total number is given.

The sixth affidavit is by an employee who did not sign a designation card. She says that she knows of others who signed because of misrepresentations.

In addition, three unit employees signed a letter stating that they signed designation cards because of CWA's misrepresentation and/or "strong persuasion".

CWA has responded to the exceptions with affidavits of its own. These affidavits are from those who solicited the cards which form the bases of the employer's exceptions. They assert that the employees in question were all told to read the card before they signed it and were invited to ask questions as to its meaning. They further indicate that several of these employees attended a CWA meeting before signing their cards and that CWA disclosed at the meeting that it was seeking cards for the purpose of certification without an election.

DISCUSSION

Section 207.2 of the Taylor Law explicitly provides that certification shall be "on the basis of dues deduction authorizations and other evidences, or, if necessary, by conducting an election." The Director has been faced with several cases in which someone has objected to certification without an election on the ground that some unit employees were induced to execute cards through misrepresentation or duress. He has dismissed these objections where the employees involved were not numerically sufficient to bring the number supporting the

union below a majority.^{2/} In doing so, he rejected the proposition that the identification of a few such instances of misrepresentation or duress was but "the tip of the iceberg".

We have dealt with related issues in two cases. In New York City Transit Authority, 15 PERB ¶3037 (1982), we set aside a certification without an election because of evidence that two of the signatures on designation cards were forged. Here, there is no question but that the signatures on CWA's submission are all authentic. Moreover, in New York City Transit Authority, the two forged signatures were necessary for the union to establish its numerical majorities.

In Village of Monticello, 16 PERB ¶3077 (1983), two employees indicated that they had misunderstood the implications of the cards which they had signed. Without their cards, the majority support for the union would not have been established. We ruled that the unit employees were bound by their signatures on the cards because there were no allegations of fraud or misrepresentation.

Having reviewed our past decisions and those of the Director, we now hold that, absent evidence of fraud or duress, allegations that challenge the reliability of the

^{2/}See Rensselaer-Columbia-Greene Counties BOCES, 18 PERB ¶4052 (1985), and Mamaroneck UFSD, 18 PERB ¶4073 (1985).

evidence of majority status of an employee organization will not defeat certification without an election unless the allegations are both supported by persuasive evidence and they affect enough employees so as to bring into question the petitioner's claim of majority status. We understand this to be an appropriate application of the public policy articulated by §207.2 of the Taylor Law, which provides that an election should be held only if necessary.

Given the fact that CWA submitted 125 designation cards from a unit of 158 employees, we find that the unchallenged designation cards would be significantly more than numerically sufficient to establish CWA as the chosen representative, even if we were persuaded by the total of nine affidavits and letters submitted by the employer that the nine designation cards were not reliable. Furthermore, we find that the probative value of the affidavits and letters is relatively weak given the wording of the designation cards. These cards are unusually explicit in their statement that the signatories seek to be represented by CWA. While we might be persuaded by the affidavits of individuals who say that they themselves did not read the cards before they signed them, we are unwilling to give any credit to the hearsay statements that other unit employees were unaware of the content of the designation cards which

they signed. Similarly, we find that the statements regarding "strong persuasion" are not sufficient to raise an issue of duress.

NOW, THEREFORE, WE ORDER that the exceptions of the

Employer be, and they hereby are,

dismissed; and

WE HEREBY CERTIFY that the

Communication Workers of America, Local 1126, AFL-CIO, has been designated and selected by a majority of the employees of the Mohawk Valley General Hospital 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 full-time, part-time and per diem Registered Nurses, Head Nurses, Charge Nurse, In House Service Coordinator, Operation Room Supervisor, Licensed Practical Nurse Team Leaders, Nursing Assistants, Transport Aide, Emergency Room Receptionist, Ward Clerks.

Excluded: Director of Nursing, Nursing Supervisors, Secretary to the Director of Nursing, all other employees.

WE FURTHER ORDER that the Mohawk Valley General Hospital shall negotiate collectively with the Communication Workers of America, Local 1126, AFL-CIO, and enter into a written agreement with it with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with it in the determination of, and administration of, grievances of such employees.

DATED: April 1, 1986
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LONG BEACH PUBLIC LIBRARY, (ALLARD K.
LOWENSTEIN PUBLIC LIBRARY),

Employer,

-and-

CASE NO. C-3010

CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

ALLARD K. LOWENSTEIN PUBLIC LIBRARY
EMPLOYEES ASSOCIATION,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, 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.

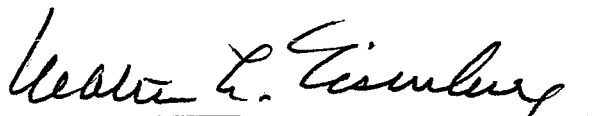
Unit: Included: All full-time and regular part-time employees, including librarians, clerical employees, custodians and information specialist programmer/publicist.

Excluded: Director, Assistant Director, Administrative Assistant to the Director, pages and staff of the Board of Trustees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, 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: April 1, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member