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6-18-1986

## State of New York Public Employment Relations Board Decisions from June 18, 1986

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from June 18, 1986

### 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  
POUGHKEEPSIE CITY SCHOOL DISTRICT,  
Respondent,

-and-

CASE NO. U-8360

POUGHKEEPSIE PUBLIC SCHOOLS  
PARA-PROFESSIONALS, LOCAL 3180B,  
AFSCME, COUNCIL 66, AFL-CIO,

Charging Party.

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DAVID S. SHAW, ESQ. (DAVID S. SHAW, ESQ. and GARRETT L.  
SILVEIRA, ESQ., of Counsel), for Respondent

FREDERICK J. PFEIFER, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Poughkeepsie City School District (District) to a decision of an Administrative Law Judge (ALJ) finding that it violated §209-a.1(d) of the Taylor Law by unilaterally changing terms and conditions of employment involving employees in units represented by the Poughkeepsie Public Schools Para-Professionals, Local 3180B, AFSCME, Council 66, AFL-CIO (Association).

The charge alleges that the District unilaterally instituted a policy of requiring some employees taking sick leave or illness-in-the-family leave to justify some of such

leave by submitting medical documentation.<sup>1/</sup>

FACTS

On September 1, 1985, the District issued a policy statement regarding the sick leave rights of unit employees. Intending to restate the existing practice, it announced that employees in the unit represented by the Association shall be allowed 12 days paid sick leave each year and three days paid illness-in-the-family leave.<sup>2/</sup> It then went on to state that employees who take more than ten days of such leave without proper medical documentation will be presumed to have abused their leave rights. Similarly, employees who take more than three such leave days which extend weekends or holidays -- without medical documentation -- are presumed to have abused their leave rights. Such employees are warned that they are in jeopardy of disciplinary action.

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<sup>1/</sup>A policy similar to that instituted for the Association was also instituted for employees in a unit represented by the Poughkeepsie Public Schools Office Personnel Association, and that employee organization joined in the charge before us. The ALJ dismissed that part of the charge because the District and that employee organization were parties to a collective bargaining agreement which contained provisions concerning the monitoring of leave abuse. She therefore concluded that that part of the charge merely complained about a contract violation. There are no exceptions to this decision.

<sup>2/</sup>That is all it did with respect to employees in the Poughkeepsie Public Schools Office Personnel Association unit. The amount of leave provided by the expired contract in the unit herein was actually 12 days sick leave and two days illness-in-the-family leave. The charge does not refer to this discrepancy.

10425

DISCUSSION

The District argues that its policy involves a management prerogative -- the monitoring of sick leave. The Association responds that the new policy goes beyond the monitoring of sick leave abuse because it is applicable to all unit employees whether or not there is any indication that they are sick leave abusers. It also states that the change imposes an unreasonable burden upon unit employees who are ill because it requires them to finance the new process.<sup>3/</sup>

Various types of leave are mandatory subjects of negotiation. These include personal leave and vacation, which might not be restricted to specific purposes, and sick leave, which clearly is. When the parties agree to a restricted-purpose leave, such as sick leave, the employer has an inherent right to monitor the conduct of its employees who avail themselves of such leave to ascertain that they are using it for the purposes contemplated by the contract.<sup>4/</sup>

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<sup>3/</sup>The record does not indicate whether this is so. It may be a reasonable implication of the announced policy that unit employees will have to bear the financial burden of going to a physician to obtain appropriate medical documentation, whether or not they believe that medical attention is required for their condition. On the other hand, this would not be so if the employees enjoy medical insurance coverage that reimburses them for such costs.

<sup>4/</sup>City of Rochester, 12 PERB ¶3010, at p. 3017 (1979).

Here, the District has announced that it is suspicious that employees who take more than ten days sick leave during a contract year or more than three such leave days at times when they extend vacations or holidays are abusing their sick leave rights. It has further announced that it may initiate disciplinary action against such employees. Finally, it has announced that its suspicion of such employees would be allayed if such employees would submit medical documentation of some of their absences.

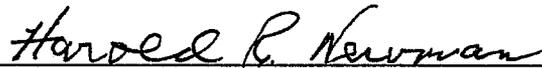
This announcement has not altered any of the terms or conditions of employment of unit employees. The number of sick leave days available to them has neither been increased nor diminished. All that has happened is that the employees have been put on notice as to the standards that the District will be using in monitoring sick leave and as to circumstances which may persuade it to initiate disciplinary proceedings. Unit employees are given an opportunity to change those circumstances by submitting medical documentation of illness. Those choosing not to do so may, in the discretion of the District, be brought up on charges, but the burden of proving sick leave abuse would still fall upon the District. It is not as if the District had promulgated a new work rule which provides that the taking of sick leave without medical documentation is itself a chargeable offense.

10427

As the District's policy statement merely announced standards that it would apply in discipline cases and does not change terms and conditions of employment, it does not constitute improper unilateral action.<sup>5/</sup>

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

DATED: June 18, 1986  
Albany, New York

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

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

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<sup>5/</sup>Compare Elwood UFSD, 10 PERB ¶3107 (1977), regarding standards for evaluation, and Onondaga Community College, 11 PERB ¶3045 (1978), regarding standards for promotion and standards for initial appointment.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
CONNETQUOT CENTRAL SCHOOL DISTRICT,  
Respondent,

-and-

CASE NO. U-8312

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CONNETQUOT UNIT OF SUFFOLK EDUCATIONAL  
LOCAL 870, LOCAL 1000 CIVIL SERVICE  
EMPLOYEES ASSOCIATION, AFSCME,  
AFL-CIO,

Charging Party.

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INGERMAN, SMITH, GREENBERG & GROSS (JOHN H. GROSS,  
ESQ., of Counsel), for Respondent

ROEMER AND FEATHERSTONHAUGH, P.C. (CLAUDIA R.  
MCKENNA, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Connetquot Unit of Suffolk Educational Local 870, Local 1000 Civil Service Employees Association, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing, without a hearing, its charge against the Connetquot Central School District (District). The charge alleges that the District violated §209-a.1(a) and (d) by placing a newly hired senior account clerk on Step 6 of the existing salary schedule when

the past practice and contractual provisions governing such hirings is explicit that a new hiree will not be granted greater than a one-step adjustment for each two years experience, up to a maximum of Step 4 of the current schedule.

10429

CSEA's theory of an (a) violation, as set forth in the charge, is that "bypassing the Union in granting such step increase is so destructive of the Union's status that the District must be deemed to have actual or presumptive knowledge that its actions would be coercive." Its theory of a (d) violation is that a unilateral payment in excess of the amount authorized by contract is inherently different from payment of an amount less than that authorized by contract. The latter merely seeks enforcement of a contract right, a matter over which PERB has no jurisdiction, but the former constitutes the imposition of new terms and conditions of employment without negotiations.

The ALJ concluded that the (d) specification of the charge merely seeks interpretation of an agreement and its enforcement, and he therefore dismissed it. He dismissed the (a) violation for failure to allege facts that might indicate improper motivation, noting that "[a] simple breach of contract is not inherently detrimental to the rights of representation . . . ."

The relevant provision of the parties' collective bargaining agreement provides:

For salary purposes only, prior service credit will be granted on the following basis for acceptable experience as determined by the administration:

<u>Experience</u>	<u>Salary Credit</u>
Two Years	One Year
Four Years	Two Years
Six Years	Three Years

We find this language to be ambiguous. CSEA seems to understand the last line as if it read:

Six or more Years                      Three Years

It argues that the parties' past practice would support this interpretation. The District seems to understand the experience and salary credit tables as exemplifying the proposition that each two years' experience yields one additional year's salary credit. It, too, argues that past practice supports its position. We do not know what the past practice would show because the ALJ dismissed the charge for failure to state a cause of action and therefore took no evidence regarding past practices.

Section 205.5(d) of the Taylor Law provides that mere breach of a collective bargaining agreement does not constitute an improper practice and that we may not exercise jurisdiction over an alleged contract violation unless the conduct complained about would otherwise constitute an improper practice. Here, CSEA complains about a breach of contract and the District defends its conduct by asserting a claim of right under the contract. Ordinarily, such allegations would indicate nothing more than a contract dispute even though a contract may be ambiguous and both parties resort to past practice to give it meaning. Here, however, the difference between payment of less than the contract amount and of more than the contract amount is significant.

In County of Suffolk, 15 PERB ¶3021 (1982), we affirmed the decision of a hearing officer who said (14 PERB ¶4598, at p. 4701 [1981]):

[A] contract was in effect. If the charge complained of a decrease in salaries at that time it would be dismissed for lack of jurisdiction, since PERB has no authority to remedy a breach of a collective bargaining agreement. [footnote omitted] Bestowing greater benefits than those agreed to by the parties does not constitute a breach, however, since a contract creates only the minimum benefits which must be provided. When an employer desires to increase salaries it must, as with all other terms and conditions of employment, deal solely with the negotiation agent, and not act unilaterally.

This rationale is correct as far as it goes in that it indicated that there is an issue of a violation of §209-a.1(d) of the Taylor Law,<sup>1/</sup> but more must be said about the matter herein. Where benefits are provided that are less than what is called for in a collective bargaining agreement, the appropriate remedy is an action in court or the initiation of a grievance. However, the provision of benefits that are more than what is called for in a collective bargaining agreement is inherently destructive of a union's representation rights. It can be construed to give a message that the unit employees would do better if they abandoned their union. An implicit promise of benefits in such terms would violate §209-a.1(a) of the Taylor Law.

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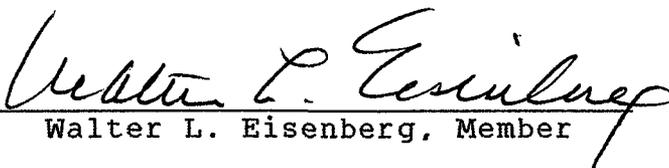
<sup>1/</sup>See also Wappingers Central School District, 16 PERB ¶3029 (1983).

Based on this analysis, we conclude that the charge herein articulates a prima facie case for violation of the Taylor Law. Whether or not there is such a violation turns upon the meaning of the parties' agreement and if only a violation of §209-a.1(d) were alleged, we would defer to arbitration for the interpretation of it.<sup>2/</sup> We do not, however, defer §209-a.1(a) charges to arbitration,<sup>3/</sup> and it would be inappropriate to bifurcate the instant matter.

ACCORDINGLY, WE ORDER that the entire case be, and it hereby is, remanded to the ALJ for consideration of its merits.

DATED: June 18, 1986  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

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<sup>2/</sup>We note that an appropriate grievance is pending.

<sup>3/</sup>Addison CSD, 17 PERB ¶13076 (1984).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
NEW YORK CITY TRANSIT AUTHORITY,  
Respondent,

-and-

CASE NO. U-8005

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AMALGAMATED TRANSIT UNION,  
DIVISION 726, AFL-CIO,

Charging Party.

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ALBERT C. COSENZA, ESQ., for Respondent

GLADSTEIN, REIF & MEGINNISS, ESQS. (WALTER M.  
MEGINNISS, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

The charge herein was brought by the Amalgamated Transit Union, Division 726, AFL-CIO (ATU). It alleges that the New York City Transit Authority (TA) violated §209-a.1(d) of the Taylor Law by assigning unit work to nonunit personnel on January 21, 1985.

FACTS

Although TA has the right to direct its employees to work overtime when such work is needed, it is the parties' practice for TA to request ATU to solicit volunteers for overtime. This practice was followed on Sunday, January 20, 1985, when the TA sought volunteers to service the buses at its Edgewater Depot in Staten Island in order to avoid problems that might be occasioned by the severely cold weather. There were no volunteers and TA did not direct any unit employees to report.

At 5:00 a.m., Monday, January 21, 1985, TA discovered that most of the buses at the Edgewater Depot would not start because of the severely cold weather. Between nine and ten hours later, Cheney, TA's Assistant General Manager for Staten Island, called Reuter, TA's General Manager for Staten Island, and informed him of the problem.

Cheney then called Licatase, an ATU representative and TA's bus maintainer at the Yukon Depot in Staten Island. He asked Licatase to procure relief men to work at Edgewater, starting with the next tour of duty, 12:30 a.m., January 22, 1985.

Meanwhile, Reuter arranged to acquire immediate assistance from the Staten Island Rapid Transit Operating Authority (SIRTOA), an independent employer. SIRTOA sent seven employees along with a portable compressor and a tractor-type vehicle called a speed wing. One of the SIRTOA employees operated the speed wing.

ATU discovered the presence of SIRTOA personnel at about 5:00 p.m. and immediately objected to Cheney and Reuter. Licatase indicated that he could get unit employees to perform the work on overtime and Reuter agreed to remove all SIRTOA employees except the speed wing operator.<sup>1/</sup> The switchover from SIRTOA to TA employees was accomplished by 7:30 p.m.

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<sup>1/</sup>The operation of a speed wing is not claimed to be unit work and ATU does not complain about the operation of the speed wing by a SIRTOA employee.

TA had neither requested volunteers nor directed employees to work overtime until the conversation between Licatese and Reuter at 5:00 p.m.

The Administrative Law Judge (ALJ) found that the six SIRTOA employees were performing unit work and that TA's assignment of such work to them without having first attempted to find unit employees to do it was a violation of §209-a.1(d). She found no real emergency which might have justified the Authority's conduct because it had made no effort to find unit employees to do the work despite having some opportunity to do so. She ordered it to cease and desist from unilaterally transferring unit work and to post an appropriate notice. She also ordered it to compensate "the first six unit employees who would have been called for overtime duty to perform the work performed . . . who were available to perform said duty and who would have so performed . . . ."

#### DISCUSSION

The Authority's exceptions present four arguments. First, the ALJ erred in finding that the work assigned by Reuter to SIRTOA employees constituted unit work. Second, even if the work assigned constituted unit work, such assignment did not violate the Taylor Law because it was made under emergency conditions and continued only during the short period of time when the emergency persisted. Third, in any event, no violation should be found because the emergency was precipitated by the failure of ATU to cooperate with TA on

January 20, 1985 by making available unit employees who would keep the buses' motors running so that they would not freeze. Fourth, assuming a violation, it was de minimis. Unit employees lost the opportunity to earn the compensation for the 33 hours work by SIRTOA employees. Beyond that, no losses were suffered either by unit employees or by ATU.

The crux of TA's first argument is that the work performed by the six SIRTOA employees required qualifications that the unit employees lacked. It argues that they had to engage in team efforts involving work in concert with the speed wing which could not have been performed by the unit employees. It also argues that the portable compressor borrowed from SIRTOA was sufficiently different from the stationary compressor owned by TA so that unit employees were not qualified to operate it. Related to this, it argues that TA had no need for additional manpower other than those working with the SIRTOA equipment until 7:30 p.m. It was only after the work of such employees had been completed that the work of the unit employees could commence.

The record does not support TA's first argument. The evidence supports the ALJ's conclusion that, except for the operation of the speed wing, unit employees were qualified to perform the work that was performed by the SIRTOA employees. Accordingly, the decision of the ALJ is affirmed in this respect.

We also affirm the ALJ's conclusion that TA's assignment of the unit work should not be excused on emergency grounds.

The passage of several hours before calling in SIRTOA employees and the failure of TA to seek unit employees during this period persuades us of the correctness of this conclusion.

The argument that the charge should be dismissed because ATU did not cooperate in providing unit employees on January 20 is irrelevant. There is no evidence in the record that ATU discouraged employees from volunteering for work on January 20. The best that can be said for TA's position is that ATU had been unsuccessful in recruiting employees. Furthermore, as noted by the ALJ, TA had the authority to seek employees on its own and it never even made the attempt.

Finally, we find no merit in the TA argument that we should dismiss the charge on the ground that the violation was de minimis. Such an argument goes to the remedial order rather than to the finding of a violation.<sup>2/</sup>

This brings us to the question of the remedial order herein. The exceptions do not complain about the order as such, but the de minimis argument inherently relates to the

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<sup>2/</sup>See Catholic Medical Center v. NLRB, 589 F2d 1166, 100 LRRM 2225 (2d Circ. 1978). In that case, the court criticized a decision of the National Labor Relations Board for condemning conduct as being a violation which goes "to the very heart of the policies of the act." The court disagreed, finding it "one of the most inconsequential unfair labor practices in the history of the National Labor Relations Act", and remanded the matter to the Board with instructions that it fashion a narrower remedy.

remedial order.

Reviewing that order, we reject so much of it as requires TA to compensate "the first six unit employees who would have been called for overtime duty to perform the work performed . . . who were available to perform said duty and who would have so performed . . . ."

In doing so, we do not indicate that TA's violation was de minimis. On the contrary, TA's unilateral action could diminish the confidence of unit employees that their Taylor Law rights will be respected in the future. That is why the cease and desist and the posting obligation parts of the remedial order are appropriate. However, the impact of the violation upon individual employees was relatively inconsequential. Moreover, we disagree with the ALJ's conclusion that the record affords an adequate basis for deciding which unit employees should be compensated as a remedy for TA's violation.<sup>3/</sup>

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<sup>3/</sup>Contrast State of New York, 16 PERB ¶3050 (1983). In that case we directed the reimbursement of employees even though the record did not provide sufficient information for a completely reliable determination as to which employees suffered losses. There are two differences here. First, the identification of the employees who suffered losses could be made with greater confidence in that case. Second, it was more important that the effort be made there. There was a great deal of money at stake in that case and the employer's violation was occasioned by its desire to save that money. Without a make-whole remedy, the employer would have retained the fruits of its violation. Here, the money at stake is relatively inconsequential and it was not a factor in occasioning the violation.

10439

NOW, THEREFORE, WE ORDER the New York City Transit Authority to:

1. cease and desist from unilaterally transferring to nonunit personnel the work of employees who are within the unit represented by the Amalgamated Transit Unit, Division 726, AFL-CIO, and
2. sign and post notice in the form attached at all locations customarily used to post written communication to unit employees.

DATED: June 18, 1986  
Albany, New York

*Harold R. Newman*

Harold R. Newman, Chairman

*Walter L. Eisenberg*

Walter L. Eisenberg, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

**we hereby notify** employees of the New York City Transit Authority in the unit represented by the Amalgamated Transit Union, Division 726, AFL-CIO that the New York City Transit Authority:

will not unilaterally transfer to nonunit personnel the work of employees who are within the unit represented by the Amalgamated Transit Union, Division 726, AFL-CIO.

NEW YORK CITY TRANSIT AUTHORITY

Dated .....

By .....  
(Representative) (Title)

10441

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

NEW YORK STATE INSPECTION, SECURITY  
AND LAW ENFORCEMENT EMPLOYEES,  
DISTRICT COUNCIL 82, AMERICAN FEDERATION  
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,  
AFL-CIO,

CASE NO. D-0178

Upon the Charge of Violation of  
Section 210.1 of the Civil Service Law.

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BOARD DECISION ON MOTION

This matter comes to us on a motion of the New York State Inspection, Security and Law Enforcement Employees, District Council 82, American Federation of State, County and Municipal Employees, AFL-CIO (DC 82) that its dues and agency shop fee checkoff privileges in the Security Services Unit be restored forthwith.

On September 24, 1981, this Board found that DC 82 had encouraged and condoned a strike by employees in the Security Services Unit against the State of New York.<sup>1/</sup> As a penalty for the strike, this Board ordered that DC 82's dues and agency shop fee checkoff privileges in that unit be forfeited for a period of 18 months.<sup>2/</sup> Our decision was appealed and a lengthy court action ensued, but on December 12, 1985, the

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<sup>1/</sup>The strike took place at State correctional institutions between April 18, 1979 and May 4, 1979.

<sup>2/</sup>State of New York, 14 PERB ¶3069 (1981).

appeal was dismissed.<sup>3/</sup> The penalty was then put into effect; the first pay period for which DC 82's dues and agency shop fees were not checked off was February 5, 1986.

#### FACTS

DC 82 has submitted several affidavits in support of its motion for the restoration of its checkoff privileges. These affidavits support three propositions. First, it has made exhaustive efforts to collect its dues without the benefit of checkoff. Second, it has expended a large amount of money on these efforts and has still lost a great amount of revenue. Third, these expenditures and loss of revenue have had a substantial adverse impact upon its ability to provide representational services to persons in its negotiating unit.

#### Collection Efforts

DC 82 has adopted five methods of collection:

1) preauthorized transfers from bank accounts, 2) transfers from credit unions pursuant to checkoff, 3) direct payment by check or money order, 4) payment by Master Card or Visa, and 5) hand collection. Of these, direct payment is the method used by the majority of the members paying dues. Checkoff through credit unions and hand collection also produce significant payments, but bank transfers and the use of Master Card and Visa have been relatively ineffective. The hand

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<sup>3/</sup>New York State Inspection, Security and Law Enforcement Employees v. PERB, \_\_\_ F. Supp. \_\_\_, 18 PERB ¶7020 (Northern Dist. of NY, 1985).

collection of its dues absorbs much of the time of DC 82's field staff and of local officers. The record-keeping complications occasioned by partial payments absorb much of the time of the central office staff.

Cost of Collection and Loss of Income

DC 82's expenditures in pursuit of dues during the months of February, March and April come to \$131,456, which is about 24% of its normal dues income from the Security Services Unit. Most of these expenses involved startup costs; recurrent expenses in subsequent months would appear to amount to approximately \$24,000 or 13% of normal income per month.

Relatively little dues income was received in February, during which time the alternative procedures were being put into effect. The amount received in February was \$48,182, or 26% of the norm. In March, \$105,175 was received, or 57% of the norm. In April, \$124,416 was received, or 68% of the norm. Given the number of unit employees who are not members of DC 82, or who are members but support dissident factions, it is reasonable to conclude that the April figures approach the maximum that DC 82 will be able to raise in future months.

Therefore, DC 82 will sustain a 32% loss in collections and a 13% cost factor. This amounts to a 45% burden for future months.

Diminution of Services

DC 82 has submitted materials showing that it has fallen behind in the processing of grievances.<sup>4/</sup> Other aspects of the diminished services specified in DC 82's affidavits include the curtailment of programs for the training of shop stewards in the handling of grievances because its training

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<sup>4/</sup>There is a letter from Kevin Breen, the Director of Labor Relations for the Department of Correctional Services of the State of New York, which complains about the delay in the processing of grievances.

Field staff member LaDuke reports that he has a backlog of 40 contract grievances at step 3 and has not participated in a step 3 hearing or scheduled an arbitration for February, March, April or May. He indicates that he has not scheduled a step 2 grievance hearing since the middle of March. He has scheduled one step 2 grievance for June and has scheduled approximately one arbitration the week starting June 12 and into August.

Sears, another field representative, reports that he has ten disciplinary cases pending, only four of which are scheduled, and they are scheduled to be heard in September and October.

Zeller, yet another field representative, reports that he has approximately 35 grievances pending at step 3 and 14 grievances pending at step 2, which have not been scheduled, and that it is taking him from two to three months to move a contract case, while in the past it took him about one month.

Field staff member Cavanaugh reports that he has five disciplinary and 13 contract grievances pending at step 2, and 24 contract grievances pending at step 3, none of which have been scheduled.

Dean, another field staff member, reports that he has had to delay one disciplinary and one contract grievance.

specialist is now working full time on dues collection.<sup>5/</sup> It has also curtailed its lobbying activities on behalf of employee benefits which involve nonmandatory subjects of bargaining such as retirement benefits. Finally, several local officers have resigned because of the pressure of collecting dues, and this has deprived unit employees of people who have been trained to handle grievances.

#### DISCUSSION

This Board has granted motions similar to the one herein on four prior occasions.<sup>6/</sup> The test enunciated in the first of those cases and applied in the other three is that an employee organization would be given relief from a dues deduction forfeiture if it demonstrates that<sup>7/</sup>

despite substantial vigorous and costly efforts, it has been unable to collect necessary income; it has shown that representational services have already been impaired and that the continuation of the penalty will lead to the elimination or diminution of other necessary and material services to the public employees.

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<sup>5/</sup>See CSEA (Diaz), 18 PERB ¶3047 (1985), regarding a public employee organization's obligation to provide such training.

<sup>6/</sup>UFT, Local 2, 15 PERB ¶3091 (1982); Local 100, TWU, 16 PERB ¶3020 (1983); ATU, Local 1056, 16 PERB ¶3022 (1983); and ATU, Local 726, 16 PERB ¶3033 (1983).

<sup>7/</sup>15 PERB ¶3091 (1983), at p. 3138.

The evidence submitted by DC 82 in support of its motion herein is comparable to that which was found sufficient to grant similar motions in the four earlier cases. Accordingly, our application of the test applied in the earlier four cases dictates the granting of the motion herein.

NOW, THEREFORE, WE MODIFY our order to the extent that the forfeiture of dues and agency shop fee deduction privileges of DC 82 be suspended; that such suspension is subject to revocation in the event of a strike or strike threat. DC 82 may apply to this Board, on notice to the Governor's Office of Employee Relations of the State of New York, in August 1987 for full restoration of its dues and agency shop fee deduction privileges.

DATED: June 18, 1986  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

10447

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

CAMDEN CENTRAL SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-8442

CAMDEN TEACHERS ASSOCIATION,

Charging Party.

---

HANCOCK & ESTABROOK, ESQS. (JAMES P. BURNS, 3RD, ESQ.,  
of Counsel), for Respondent

RICHARD L. BRUCE, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Camden Teachers Association (Association) to the dismissal of its charge against the Camden Central School District (District). The charge alleges a violation of §209-a.1(a) and (d) of the Taylor Law in that the District unilaterally changed terms and conditions of employment by directing unit employees assigned as coaches to refrain from chewing tobacco while performing coaching duties. The District acknowledges its unilateral action, but it defends its conduct by asserting that a prohibition of faculty members from using tobacco while working in the presence of students is a management prerogative.

The issue raised by the exceptions is the ALJ's application of this Board's balancing test.<sup>1/</sup> The Association argues that the prohibition in question affects no vital interest of the District and that it may affect vital interests of employees who violate the directive because they might lose the extra compensation associated with coaching.

The District argues that the prohibition does affect a vital interest of the District in that coaches are role models and, therefore, their actions in the presence of students may influence student conduct. It contends that the discouragement of student use of tobacco is a proper concern of a school district. It further argues that the impact of the prohibition on employees should be measured on the assumption that the employees will comply with it rather than violate it. On that assumption, it contends, the employee impact is relatively slight.

We find the arguments of the District more persuasive. Indeed, we have already answered the question herein. In Steuben-Allegany BOCES, 13 PERB ¶3096 (1980), we dealt with a smoking prohibition that was applicable to work places remote from the students. Applying our balancing test, we found

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<sup>1/</sup>See: CSD of the City of New Rochelle, 4 PERB ¶3060 (1971); County of Rensselaer, 13 PERB ¶3080 (1980); State of New York, 18 PERB ¶3064 (1985); Board of Education of the CSD of the City of New York, 19 PERB ¶3015 (1986).

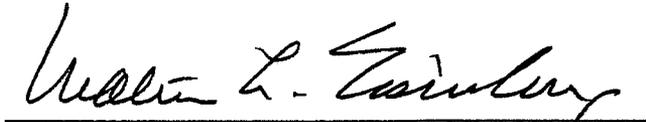
that the employee interests predominated. The critical factor, however, as noted by us (at p. 3154-5), was that the prohibition was imposed in a building "not normally used by students, thus, BOCES could not argue persuasively that the limitation on smoking was designed to influence student conduct."

The language quoted from Steuben-Allegany BOCES focuses on the question before us here, albeit in the obverse. It indicates why, where the use of tobacco in the presence of students is at issue, the prohibition involves a management prerogative.

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

DATED: June 18, 1986  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

BETHLEHEM POLICE BENEVOLENT  
ASSOCIATION,

Respondent,

-and-

CASE NO. U-8261

TOWN OF BETHLEHEM,

Charging Party.

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MATTHEW J. CLYNE, ESQ., for Respondent

WHITEMAN, OSTERMAN & HANNA, ESQS. (MELVIN H. OSTERMAN,  
JR., ESQ. and PHILLIP G. STECK, ESQ., of Counsel),  
for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Bethlehem Police Benevolent Association (PBA) to a decision of an Administrative Law Judge (ALJ) that PBA violated §209-a.2(b) of the Taylor Law by failing to negotiate in good faith with the Town of Bethlehem (Town). The nature of the violation is that John R. Cox, PBA's president and negotiator, failed to support an agreement that he had negotiated with the Town when it was presented to the membership for ratification.

The charge, as originally brought by the Town, complained that PBA had failed to negotiate in good faith in that it petitioned for the arbitration of several demands

which were inappropriate for interest arbitration. One of these demands was for a twenty-year, half-pay retirement plan.

At the conclusion of the hearing on this charge, the parties resumed negotiations on the underlying dispute. The Town made a comprehensive proposal, covering all unresolved issues, which did not include a twenty-year, half-pay retirement plan. On December 11, 1985, it was incorporated into a memorandum of agreement, and Cox agreed to "take it to the PBA and attempt or see if they would pass it."<sup>1/</sup> However, Cox later tried to revive the twenty-year, half-pay retirement issue but was rebuffed by the Town. When, thereafter, the agreement was presented for ratification by the PBA membership, Cox did not support it. On the contrary, he voted against it.

Before the time set for the submission of briefs on the pleaded charge, the Town moved to amend its charge to complain that Cox did not support ratification of the agreement. The hearing was reopened and, on the basis of evidence submitted to him, the ALJ found a violation of §209-a.2(b) of the Taylor Law, as alleged in the amended charge.<sup>2/</sup>

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<sup>1/</sup>The testimony of Cox, R-75. The District's witness was even more firm in his testimony that Cox undertook to seek ratification of the agreement.

<sup>2/</sup>He did not deal with the original basis of the charge -- finding it moot by reason of the parties' subsequent agreement. There are no exceptions directed to this part of his decision.

PBA makes three arguments in support of its exceptions. The first is that the ALJ erred in permitting the Town to amend its charge. It complains that the subject matter of the amendment is irrelevant to that of the original charge.

We find no error in the ALJ's granting the Town permission to amend its charge. Section 204.3(d) of our Rules of Procedure gives an ALJ broad discretion to do so, and there was no abuse of discretion here. The amendment raised a new issue between the parties which, like the original issue between them, grows out of differences relating to their collective negotiations. It could have been the subject of a new charge, but PBA was not prejudiced by its incorporation in the original charge.

PBA's second argument is that the ALJ erred in finding that the parties had reached a comprehensive agreement. In doing so it does not contend that there was no agreement. Rather, it contends that the ALJ erred in admitting evidence which established the agreement because the amended charge did not allege a comprehensive agreement, and the evidence therefore went beyond the scope of the amendment. The basis of this argument is that the Town amended a paragraph of the original charge which dealt with the twenty-year, half-pay retirement proposal. Therefore, PBA contends, evidence of an agreement dealing with other issues was inadmissible.

We reject this argument. The language of the amendment makes it clear that the Town alleged that there was a

comprehensive agreement. PBA was certainly aware of this allegation and had a sufficient opportunity to meet it on the merits.

PBA's third argument is that the ALJ erred in finding that Cox had been obligated to support the proposed agreement. There were two bases for the ALJ's conclusion. The first -- on the evidence -- was that Cox had undertaken to support the proposed agreement. The second -- on the law -- was that Cox was required to support the proposed agreement because he had not explicitly notified the Town that he would not do so.

PBA's argument is only directed to the first of the two bases for the ALJ's conclusion. We find that the evidence supports the ALJ finding in this regard. Moreover, the argument must be rejected as a matter of law because there is no evidence nor even a contention that Cox had advised the Town that he would not support the agreement. As noted by the ALJ, even without an affirmative undertaking to support ratification, a negotiator must do so unless, at the time when the agreement was reached, he advised the other side that he would not do so.<sup>3/</sup> Also, as noted by the ALJ, the improper failure of employee organization negotiators to

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<sup>3/</sup>See, e.g., Town of Putnam Valley, 17 PERB ¶3041 (1984).

support the ratification of an agreement deprives it of the right to require such ratification.<sup>4/</sup>

NOW, THEREFORE, WE FIND that PBA has violated

§209-a.2(b) of the Taylor Law, and

WE ORDER it:

1. upon request, to execute a formal agreement incorporating the provisions of the memorandum of agreement dated December 11, 1985, and
2. to withdraw the petition requesting arbitration.

DATED: June 18, 1986  
Albany, New York

*Harold R. Newman*

Harold R. Newman, Chairman

*Walter L. Eisenberg*

Walter L. Eisenberg, Member

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<sup>4/</sup>Union Springs CSD, 6 PERB ¶13074 (1973).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
TOWN OF BOMBAY,

Employer,

-and-

CASE NO. C-3048

TEAMSTERS LOCAL 687, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS OF AMERICA,

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 Teamsters Local 687, 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: All motor equipment operators and laborers employed in the Highway Department.

Excluded: All other employees of the employer.

~~Further, IT IS ORDERED~~ that the above named public employer shall negotiate collectively with the Teamsters Local 687, 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: June 18, 1986  
Albany, New York

*Harold R. Newman*  
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Harold R. Newman, Chairman

*Walter L. Eisenberg*  
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Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
CITY OF NEWBURGH,

Employer,

-and-

CASE NO. C-3040

POLICE SUPERIOR OFFICERS ASSOCIATION  
OF NEWBURGH, NEW YORK,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF  
NEWBURGH, NEW YORK, INC.,

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 Police Superior Officers Association of Newburgh, New York 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: Deputy Chief, Captains, Lieutenants and Sergeants.

Excluded: Patrolmen.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Police Superior Officers Association of Newburgh, New York 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: June 18, 1986  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
TOWN OF NASSAU,

Employer,

-and-

CASE NO. C-3047

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

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 Teamsters Local 294, 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: All highway department employees except  
the Superintendent of Highways.

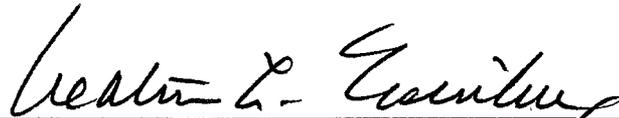
Excluded: All other employees.

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Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 294, 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: June 18, 1986  
Albany, New York

  
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Harold R. Newman, Chairman

  
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Walter L. Eisenberg, Member

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

MASSAPEQUA UNION FREE SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-3055

MASSAPEQUA PARAPROFESSIONAL ASSOCIATION,  
NYSUT, AFT,

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,

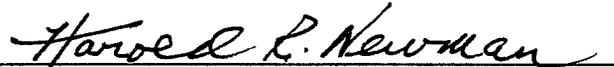
IT IS HEREBY CERTIFIED that the Massapequa Paraprofessional Association, NYSUT, AFT has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All employees in the following titles:  
cafeteria aide, hall monitor,  
playground monitor, receptionist,  
attendance aide, parking lot monitor.

Excluded: Substitutes and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Massapequa Paraprofessional Association, NYSUT, AFT 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: June 18, 1986  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
COPIAGUE UNION FREE SCHOOL DISTRICT,  
Employer,

-and-

CASE NO. C-3044

CIVIL SERVICE EMPLOYEES ASSOCIATION,  
SUFFOLK EDUCATIONAL LOCAL 870, 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 Civil Service Employees Association, Suffolk Educational Local 870, 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: Teaching Assistants.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Suffolk Educational Local 870, 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: June 18, 1986  
Albany, New York

*Harold R. Newman*

Harold R. Newman, Chairman

*Walter L. Eisenberg*

Walter L. Eisenberg, Member