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New York State Public Employment Relations  
Board (PERB)

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10-9-1986

## State of New York Public Employment Relations Board Decisions from October 9, 1986

New York State Public Employment Relations Board

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# State of New York Public Employment Relations Board Decisions from October 9, 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  
BRUNSWICK CENTRAL SCHOOL DISTRICT,  
Respondent,

-and-

CASE NO. U-8546

PATRICIA A. JACKSON,  
Charging Party.

---

WHITEMAN, OSTERMAN & HANNA (MELVIN H. OSTERMAN, JR., ESQ.,  
of Counsel), for Respondent

ARTHUR F. MCGINN, JR., ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Patricia A. Jackson to a decision of an Administrative Law Judge (ALJ) dismissing her charge against the Brunswick Central School District (District). The gravamen of the charge is that the District violated §§209-a.1(a) and (d) of the Taylor Law by denying her the opportunity to be effectively represented at a grievance hearing and misusing the hearing to obtain information in support of disciplinary charges.

FACTS

In July, 1985, Jackson, a teacher in the District, received a written reprimand from her principal upon the written complaint of a parent. She was thereafter

reassigned to another teaching position. She filed a grievance with respect to both the reprimand and the reassignment. Denied at the first stage, on October 31, 1985, it was scheduled to be heard before Jerome J. Ochs, the Superintendent of Schools, on November 6, 1985, with Jackson to be represented by the local union president. On November 5, 1985, Jackson requested the New York State United Teachers' (NYSUT) field representative to represent her. He was not available the next day and, when he could not reach Ochs to adjourn the matter, he advised the union president to represent Jackson as originally planned. Representation at Stage II by a local union official is NYSUT'S normal way of proceeding.

At the November 6 hearing, Jackson requested an adjournment. Ochs denied the request. She was then given time to telephone her attorney but was unable to reach him. After refusing another request for adjournment, Ochs proceeded with the hearing.

Upon taking the written reprimand and the complaint upon which it was based from Jackson's file, Ochs noticed that written comments had been made upon them. Ochs then proceeded to question Jackson about these comments and whether she had informed him or the Clerk of the Board that she had made them. Ochs and Jackson also engaged in a discussion concerning her having written these comments. During the questioning and discussion, Ochs informed Jackson

that he considered her having written on the documents to be improper. Upon concluding this discussion, Ochs asked Jackson if she had anything to add. She reiterated that she had a right to be represented by the field representative and again requested an adjournment for that purpose. Again, it was denied. The hearing then ended.

In December, the District filed disciplinary charges against Jackson pursuant to §3020-a of the Education Law. The charges contained numerous specifications, including one that Jackson had placed unauthorized written comments on the parental complaint.

As noted, Jackson's improper practice charge asserts that the District's conduct violated subdivision (d) (refusal to negotiate) as well as subdivision (a) (interference) of §209-a.1 of the Taylor Law.

In a letter dated January 31, 1986, the assigned ALJ advised Jackson that the allegation of a violation of §209-a.1(d) would not be processed because an employer's duty to negotiate flows only to a union. An attempt to review separately this holding was denied by this Board as premature in a decision dated March 19, 1986 (19 PERB §3018).

After conducting a hearing, the ALJ issued a decision holding that neither the refusal to grant an adjournment nor the questioning of Jackson concerning her written comments on the two documents interfered with her Taylor Law rights. He therefore dismissed the charge.

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DISCUSSION

The charging party's exceptions challenge the ALJ's findings that the superintendent's conduct did not interfere with her rights in violation of §209-a.1(a) of the Taylor Law. They also take issue with his determination that only an employee organization can charge that an employer has refused to negotiate in violation of §209-a.1(d).

We turn first to the charging party's claim that the District violated §§209-a.1(a) and (d) of the Taylor Law by denying her an opportunity to obtain effective representation. These claims are rejected for the reasons given by the ALJ. As stated by the ALJ, §209-a.1(d) cannot be applicable because the duty to negotiate in good faith goes, as this Board has consistently held, only to the union and not to individual employees. However, as recognized by the ALJ, the failure to afford an employee the opportunity to be represented in a grievance proceeding can, under the appropriate circumstances, constitute interference in violation of §209-a.1(a). This aspect of the case was decided by the ALJ on the basis of his finding that the charging party was not denied the opportunity to be represented. This finding is amply supported by the record.

We now consider the charging party's exception to the ALJ's finding that the superintendent's questioning of her and the ensuing discussion did not violate the act. The ALJ noted that the nature of the grievance was such as to call for the production of the reprimand and the complaint upon which it was based. He then stated, "Some questioning by Ochs on the

contents was not only reasonable, but inevitable. That the questioning produced information which was later used in disciplinary charges against Jackson does not taint its legitimacy nor render it improper, per se, under the Act".<sup>1/</sup>

We view the matter differently. The presentation of grievances is an activity protected by §209-a.1(a) of the Taylor Law.<sup>2/</sup>

In this case, the questioning by Ochs and the related discussion concerning Jackson having written on the parental complaint and reprimand were extensive. In fact, except for the discussion of an adjournment, they were the sole subject of the grievance hearing. None of the questioning or discussion related to the merits of the grievance but only to the propriety of her having made the comments. They therefore bore no relationship to the processing of the grievance but only to the possibility of bringing disciplinary charges. We believe that this type of questioning and discussion has a chilling effect upon the presentation of grievances and, therefore, interferes with the statutory right to do so. We therefore find that the questioning and discussion engaged in by Ochs violated

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<sup>1/</sup>The ALJ cited for authority State of New York (Office of Mental Health - Bronx Children's Psychiatric Center), 17 PERB ¶4576 (1984).


<sup>2/</sup>Sag Harbor School District v. Helsby, 54 A.D.2d 391, 9 PERB ¶7023 (3rd Dep't 1976).

§209-a.1(a) of the Taylor Law.<sup>3/</sup>

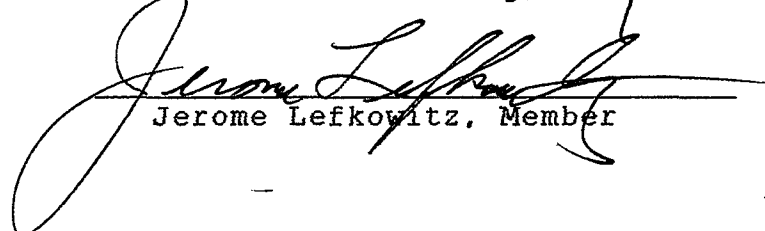
NOW, THEREFORE, WE ORDER the District to:

1. Cease and desist from interfering with the rights of its employees by conducting an investigation of matters unrelated to the merits of the grievance during the course of a grievance hearing.
2. Sign and post a notice in the form attached at all locations ordinarily used to post communications to unit employees.

DATED: October 9, 1986  
Albany, New York

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

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

  
 \_\_\_\_\_  
 Jerome Lefkowitz, Member

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<sup>3/</sup>The Administrative Law Judge's decision in State of New York (Office of Mental Health - Bronx Children's Psychiatric Center), 17 PERB ¶4576 (1984) cited by the ALJ as authority for the proposition that information obtained at a grievance proceeding may be later used in disciplinary charges, is distinguishable. There, the testimony given by the grievant at a grievance hearing revealed wrongdoing by the grievant. The ALJ held that the grievance proceeding could not be used as a shield to protect that wrongdoing. We agree with this. However, we do not believe that a grievance proceeding can be used to conduct a disciplinary investigation unrelated to the merits of the grievance. Of course, nothing herein would prevent an employer from investigating conduct which first came to its attention during the processing of a grievance so long as the investigation does not intrude upon the processing of the grievance.



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** District employees represented by the Brittonkill Teachers Association that:

1. We will not interfere with the rights of our employees by conducting an investigation of matters unrelated to the merits of a grievance during the course of a grievance hearing.

BRUNSWICK CENTRAL SCHOOL DISTRICT

Dated .....

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

*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.*

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
ADDISON TEACHERS ASSOCIATION,

Respondent,

-and-

CASE NO. U-8627

ADDISON CENTRAL SCHOOL DISTRICT,

Charging Party.

---

JOHN B. SCHAMEL, for Respondent

R. WHITNEY MITCHELL, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Addison Teachers Association (Association) to a decision of an Administrative Law Judge (ALJ) that it violated §209-a.2(b) of the Taylor Law by refusing to negotiate several proposals presented to it by the Addison Central School District (District) in contract negotiations.

FACTS

At their initial negotiating session, the District and the Association exchanged negotiating proposals. After caucusing to review each other's proposals, the Association's negotiator advised the District's negotiator that the Association would not bargain with respect to several of the

District's proposals, all set forth in the ALJ's decision, because they were not in precise contract language. The Association's refusal was in reliance upon its then current contract with the District, which contained a negotiating ground rule that at the first meeting each party would give the other a complete set of proposals "reduced in writing to the precise language desired . . . ."

The Association, having filed a contract grievance, requested that PERB defer to arbitration. The ALJ denied this request and examined the merits. He found that all of the proposals which the Association refused to negotiate were clear and comprehensible,<sup>1/</sup> and held that the Association's refusal violated §209-a.2(b) of the Taylor Law.

The Association's exceptions assert that the ALJ erred by: (1) not deferring to arbitration; (2) finding a violation based upon a single refusal to negotiate the demands as submitted; (3) construing its contractual claim as one of waiver by the District of the right to negotiate the proposals; (4) releasing the District from its contractual obligation to articulate its demands in precise language.

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<sup>1/</sup>In fact, the Association never claimed they were not clear and comprehensible, only that they were not in precise contract language.

Having reviewed the record, we affirm the decision of the ALJ that the Association violated §209-a.2(b) of the Taylor Law.

(1) The ALJ's decision not to defer the dispute to arbitration was a proper exercise of his discretion. As noted by the ALJ, the promotion of collective negotiations by parties mutually obligated to engage in such negotiations is a fundamental responsibility of this Board.

(2) The Association's refusal to negotiate the demands in question was absolute. Accordingly, it was sufficient to constitute a violation of the Taylor Law.

(3) & (4) The ALJ did not release the District of its contractual obligation to articulate its demands in precise language except insofar as the Association asserts that the alleged failure of the District to satisfy this obligation relieves it of any Taylor Law duty to negotiate those demands. The ALJ properly characterized this assertion of the Association as a claim that the District waived its negotiation right, and he properly rejected it.<sup>2/</sup>

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<sup>2/</sup>The ALJ acknowledged that the District may have breached a contract obligation, and left it to the parties' grievance procedure to resolve this issue, including the formulation of a remedy other than waiver of the right to negotiate.

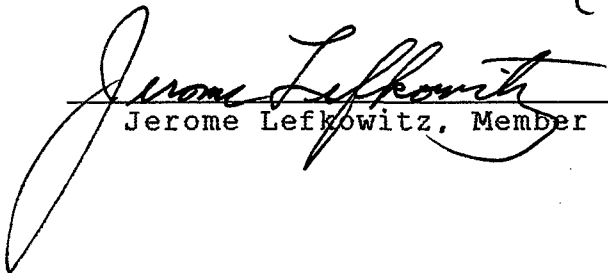
NOW, THEREFORE, WE ORDER that the Association:

1. Negotiate in good faith with the Addison Central School District;
2. Post a notice in the form attached at all locations ordinarily used by it to communicate with bargaining unit employees.

DATED: October 9, 1986  
Albany, New York

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

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

  
\_\_\_\_\_  
Jerome Lefkowitz, Member

# 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 all employees in the unit represented by the Addison Teachers Association that the Association will negotiate in good faith with the Addison Central School District.

..... Addison Teachers Association .....

Dated .....

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

10596

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

GLEN COVE PUBLIC LIBRARY,

Employer,

-and-

CASE NO. C-3084

LOCAL 810, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA,

Petitioner,

-and-

GLEN COVE LIBRARY UNIT NASSAU LOCAL  
NO. 830, CIVIL SERVICE 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 Local 810, 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.

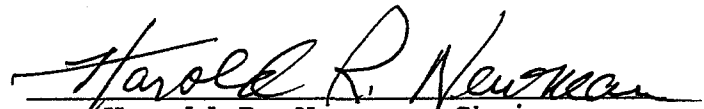
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Unit: Included: All full-time professional, clerical  
and custodian personnel.


Excluded: Library Director and all other  
employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 810, 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: October 9, 1986  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

  
Jerome Lefkowitz, Member





NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
50 WOLF ROAD  
ALBANY, NEW YORK 12205

COUNSEL  
MARTIN L. BARR

October 14, 1986

Evan A. Davis, Esq.  
Counsel to the Governor  
State of New York  
Executive Chamber  
Albany, NY 12224

RE: PERB's 1987 Legislative  
Program

Dear Mr. Davis:

The Public Employment Relations Board has three legislative proposals:

1. Amendment of Civil Service Law §213 to clarify that only final orders of PERB are subject to judicial review.

In drafting Civil Service Law §213 in 1971, it was our intention that PERB orders would be reviewable pursuant to the provisions of CPLR Article 78, including that Article's limitation of review to final orders (CPLR §7801). During the following years, it appeared that the courts so construed the statute, since in several instances we were successful in obtaining dismissal of proceedings which sought review of interlocutory orders.

However, in State of New York (Insurance Department Liquidation Bureau) v. PERB, 114 A.D.2d 734 (3rd Dept 1985), 18 PERB ¶7017, reversed on dissenting opinion in Appellate Division 68 N.Y.2d 695 (1986), 19 PERB ¶7015, it was held that the provisions of §213(a) and (b) permit judicial review of all orders of PERB, except those specified in §213(b).

Thus, the present language of the statute has been construed to deprive PERB of the important benefits of the

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doctrine of exhaustion of administrative remedies. The availability of judicial review of PERB intermediate orders is particularly egregious since it undermines a long recognized policy that the public interest is best served by resolving public sector labor disputes as expeditiously as possible. Multiple judicial review of PERB proceedings can only delay final resolution of such disputes.

It is not our intention to bar judicial review of intermediate jurisdictional determinations which meet judicially approved standards of "finality". Finality for purposes of review is and will remain a question of law to be determined by the courts. The amendment which we propose will simply give PERB the benefit of the "final order" reviewability standard applicable to other administrative agencies under Article 78.

2. Increase the compensation of the per-diem members of the Board from \$250. to \$350. a day.

Civil Service Law §205.3 now specifies a per-diem rate of \$250. for members of the Public Employment Relations Board other than the Chairman. This rate has been in effect since 1979 (Laws of 1979, Ch. 307 §20). We propose to amend the statute to increase the per-diem rate to \$350.

The present per-diem rate is substantially less than the average rate for arbitrators assigned by PERB to police/firefighter disputes and also substantially less than the average daily rate that arbitrators earn who are selected from lists supplied by PERB for grievance arbitration. A recent survey conducted by PERB shows that the weighted daily average rate charged by such arbitrators is \$379. Board members have traditionally been appointed on the basis of their labor relations expertise, including prominence as arbitrators. The PERB per-diem rate should be reasonably related to the average rate charged by arbitrators if PERB is to continue to secure and retain the services of outstanding labor relations experts. It should also be noted that the Chairman's annual salary has increased since 1979 as well as other state salaries.

3. Divest PERB of its prosecutorial role in strike penalty proceedings which PERB must determine.

Under present law, the responsibility for instituting a proceeding before PERB to determine if an employee organization should forfeit its right to dues check off for having engaged in a strike rests both with PERB and with the chief legal officer of the government involved.

Evan A. Davis, Esq.  
October 14, 1986

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PERB also has the quasi-judicial function of determining whether such charge is meritorious and, if so, the penalty that should be imposed upon the offending employee organization. We propose to eliminate PERB's prosecutorial function. The strike charge would be brought and prosecuted by the chief legal officer of the government involved and PERB's responsibility would be limited to the quasi-judicial role.

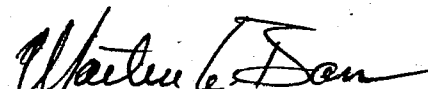
In 1984, PERB proposed legislation which would have eliminated both the prosecutorial and quasi-judicial functions with regard to strike penalties. Its quasi-judicial functions would have been transferred to the courts. The bill was approved for introduction but was not reported in either house.

The present proposal was approved for introduction in 1986 (Assembly: 11242, Senate: 9303) but was not reported in either house.

Since we continue to believe that it is inappropriate for PERB both to prosecute and adjudicate strike charges, we propose that a further effort be made to seek legislative approval of the divesting of PERB's prosecutorial function.

Drafts of each proposal are submitted herewith for your consideration.

Very truly yours,

  
Martin L. Barr  
Counsel

MLB/mn  
Encs.

10601

AN ACT to amend the civil  
service law in relation to  
judicial review of orders of the  
public employment relations board

The People of the State of New York, represented in Senate  
and Assembly, do enact as follows:

Section 1. Subdivisions (a) and (b) of section two hundred  
thirteen of the civil service law, as amended by chapter five  
hundred three of the laws of one thousand nine hundred seventy  
one, are amended to read as follows:

(a) [Orders] Final orders of the board made pursuant to  
this article shall be [deemed to be final] conclusive against  
all parties to its proceedings and persons who have had an  
opportunity to be parties to its proceedings unless reversed or  
modified in proceedings for enforcement or judicial review as  
hereinafter provided. Such orders shall be (i) reviewable  
under article seventy-eight of the civil practice law and rules  
upon petition filed by an aggrieved party within thirty days  
after service by registered or certified mail of a copy of such  
order upon such party, and (ii) enforceable in a special  
proceeding, upon petition of such board, by the supreme court.

(b) Orders of the board or its agents made in  
proceedings conducted pursuant to [subdivisions one and two of]  
section two hundred seven of this chapter shall be reviewable  
only in a proceeding brought under article seventy-eight of the  
civil practice law and rules to review an order of the board  
made pursuant to subdivision three of section two hundred seven  
of this chapter or an order which dismisses the proceeding.

§2. This act shall take effect immediately except that it  
shall not apply to any proceeding commenced pursuant to  
subdivisions (a) and (b) of section two hundred thirteen of the  
civil service law prior to the effective date of this act.

Public Employment Relations Board  
Proposal #2 (1987)

AN ACT to amend the civil  
service law in relation to  
compensation of members of the  
public employment relations  
board, other than its chairman

The People of the State of New York, represented in Senate  
and Assembly, do enact as follows:

Section 1. Subdivision three of section two hundred five  
of the civil service law, as amended by chapter three hundred  
seven of the laws of one thousand nine hundred seventy nine, is  
amended to read as follows:

3. Members of the board other than the chairman shall,  
when performing the work of the board, be compensated at the  
rate of [two] three hundred and fifty dollars per day, together  
with an allowance for actual and necessary expenses incurred in  
the discharge of their duties hereunder. The chairman shall  
receive an annual salary to be fixed within the amount  
available therefor by appropriation, in addition to an  
allowance for expenses actually and necessarily incurred by him  
in the performance of his duties.

§2. This act shall take effect immediately.

Public Employment Relations Board  
Proposal #3 (1987)

AN ACT to amend the civil  
service law in relation to  
responsibilities of the public  
employment relations board  
regarding employee organizations  
that strike

The People of the State of New York, represented in Senate  
and Assembly, do enact as follows:

Section 1. Paragraphs (b) and (c) of subdivision three of section two hundred ten of the civil service law, as amended by chapter twenty four of the laws of one thousand nine hundred sixty nine, are amended to read as follows:

(b) In the event that it appears that a violation of subdivision one of this section may have occurred, it shall be the duty of the chief executive officer of the public employer involved (i) forthwith to so notify [the board and] the chief legal officer of the government involved, and (ii) to provide [the board and] such chief legal officer with such facilities, assistance and data as will enable [the board and] such chief legal officer to carry out [their] his or her duties under this section.

(c) In the event that it appears that a violation of subdivision one of this section may have occurred, the chief legal officer of the government involved [, or the board on its own motion,] shall forthwith institute proceedings before the board to determine whether such employee organization has violated the provisions of subdivision one of this section.

§2. This act shall take effect immediately except that it shall not apply to any proceeding commenced pursuant to subdivision three of section two hundred ten of the civil service law prior to the effective date of this act.