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10-27-1986

State of New York Public Employment Relations Board Decisions from October 27, 1986

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 27, 1986

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE OF NEW YORK (STATE UNIVERSITY
OF NEW YORK, EMPIRE STATE COLLEGE),

Respondent,

-and-

CASE NO. U-8206

UNITED UNIVERSITY PROFESSIONS,

Charging Party.

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

WILLIAM W. FINEMAN, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the United University Professions (UUP) to the decision of the Administrative Law Judge (ALJ) dismissing its charge that the State of New York (State University of New York, Empire State College) (State or College) violated §209-a.1(a) and (c) of the Act by refusing to extend a unit employee's temporary appointment and reassigning some of her duties to a nonunion tutor because she had filed a grievance against the State.

Sarah Gallagher has served as a writing and literature mentor for the College at its Buffalo Center since 1980.

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When first appointed, she was given a half-time term appointment. Since 1981 she has also held a series of half-time temporary appointments in addition to her half-time term appointments. Gallagher believed that such full-time professional obligation warranted a tenure track position for which her combination of term and temporary appointments did not qualify her. Ultimately, in early August 1984, Gallagher filed a grievance which challenged the State's right to continue her in full-time status under two separate part-time appointments. She sought a full-time term appointment in which she could be tenured.

In June 1985 her last half-time temporary appointment expired and it was not extended. Her term appointment, however, was renewed at the same time through June 30, 1988. Gallagher's temporary appointments were made on vacant "lines" created by leaves of absence granted to other faculty members. The "line" Gallagher had been occupying was no longer available when her temporary appointment expired in June 1985.

The record establishes that Gallagher was recognized as a competent teacher and that there continued to be a need for her services as a writing and literature mentor. The record also establishes that means existed to grant Gallagher a new part-time temporary appointment succeeding the one that expired on June 30, 1985, by virtue of other available

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"lines". College officials testified that it was their judgment that greater needs in other instructional areas required the decision to assign the other available "lines" to other mentors and tutors.

The ALJ concluded that the record did not establish any relationship between the filing of the grievance and the failure to extend or renew Gallagher's temporary appointment ten months later.

In doing so, he credited the testimony of the State's witnesses including their testimony that the filing of the grievance played no part in their considerations. In addition, he found support for his conclusion in several facts established by the evidence: (1) the use of tutors was an integral part of the instructional system at the College; (2) Gallagher's temporary appointment was subject to termination at any time; but, although the grievance was filed in August 1984, her employment in the temporary appointment was continued until June 1985; (3) the temporary appointment of another employee was also not extended; the other employee had held the same type of temporary appointment, had also had good credentials, and had not filed any grievance; and (4) after the filing of the grievance, her superior, who had concluded that her temporary appointment should not be renewed, recommended an increase in her term appointment to three-fourths time.

In its exceptions, UUP asserts that the ALJ misread the record in several respects. In particular, it asserts that the ALJ's conclusion that Gallagher's temporary appointment was employment at will is inaccurate. It also claims that the ALJ's finding that no "line" was available for Gallagher's reappointment is inaccurate, and that his comparison of Gallagher's situation with that of the other employee whose temporary appointment was not extended is misleading. UUP asserts that there was a "desperate" need for Gallagher's services but that the College hired a new employee to teach "exactly what Gallagher taught". In conclusion, it contends that there is "no other apparent logical reason" for Gallagher's "nonrenewal" except her filing of the grievance.

In its response, the State contests all of UUP's assertions, and argues that the record supports the decision of the ALJ.

DISCUSSION

In order to sustain UUP's charge, we would have to find, on this record, that, but for Gallagher's filing of her grievance, the College would have renewed her temporary appointment. There is no direct credible evidence of such a motive in this rather lengthy record.

In its absence, UUP argues that that is the only "logical" conclusion that the Board can draw from the

evidence. The record does establish Gallagher's competence as a teacher of literature and writing, a continuing need for services in these areas of instruction, and the availability of open lines under which her appointment could have been extended but which were used to hire others under various temporary arrangements.

However, the testimony of the State's witnesses, which the ALJ fully credited, established that, while other lines were available, judgments were made concerning the educational needs of the College which prompted a use for those lines in areas for which Gallagher was not most competent to teach. Nothing which UUP has produced warrants a rejection of the credibility determination and a finding that the explanations given by the State's witnesses were pretextual.


The factors relied upon by the ALJ support his credibility determination that the State was not improperly motivated. It is clear that under the Policies of the State University, Gallagher's temporary appointment was subject to termination at any time. Thus, we agree that there is, at best, only a tenuous temporal relationship between the filing of the grievance and the actions complained of. Furthermore, the conduct of Gallagher's superiors, both with regard to the expiration of the temporary appointment of another employee and the recommendation for an increased term appointment for

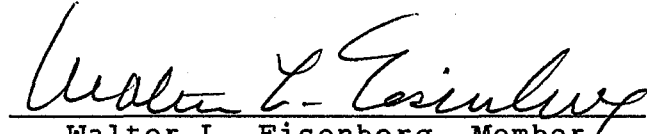
her, is inconsistent with any suspicion of improper motivation in violation of the Act.

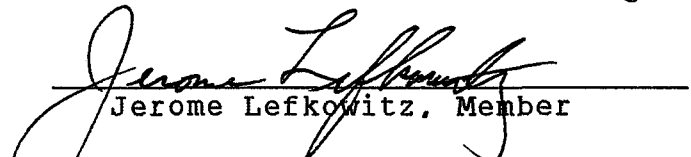
The record reveals that Empire State College is an unusual educational institution in which instruction is not given in the traditional manner. Under a system of individualized "learning contracts", instruction is not offered generally through customary classes but by means of a system of independent studies aided by so-called mentors, tutors and other adjunct faculty. Inasmuch as instructional needs and even enrollment may vary from time to time during the year, much use is made of temporary part-time appointments. UUP argues that this system permits "manipulation" of appointments, and that this case represents such an abuse. The State urges that the system must be sufficiently flexible to accommodate the constantly changing instructional needs of the College. For our purposes, it is sufficient to find, as we do, that the reasons given for the decisions not to extend Gallagher's temporary appointment and to give a temporary appointment to a tutor are rationally related to the academic concerns of this particular institution. In so finding, we reject UUP's proposition that the only "logical" conclusion that we can draw from the evidence is that the College would have renewed Gallagher's temporary appointment but for her filing of her grievance.

Accordingly, the decision of the ALJ is affirmed and WE ORDER that the charge be, and it hereby is, dismissed in its entirety.

DATED: October 27, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member


Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

OTSELIC VALLEY CENTRAL SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-8586

OTSELIC VALLEY TEACHERS ASSOCIATION,
LOCAL 2908,

Charging Party.

ANTHONY MASSAR, for Respondent

PETER D. BLOOD, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Otselic Valley Teachers Association, Local 2908 (Association) to a decision of the Administrative Law Judge (ALJ) dismissing its charge against the Otselic Valley Central School District (District). The charge alleged that the District unilaterally reassigned unit work to a nonunit teacher aide in violation of §209-a.1(d) of the Taylor Law.

The ALJ found, on the basis of the record evidence, that the alleged unit work done by the teacher aide was not the type of work that had been assigned exclusively to the unit employees represented by the Association.

The Association represents all professionally certified personnel including the title of library media specialist (LMS). The latter position is also referred to in the record as "teacher/librarian".

The District has one elementary school and one junior-senior high school. Until December 31, 1985, it employed one LMS at each school. With the retirement of the elementary school LMS at the end of 1985, the District began using the one remaining LMS to cover both schools, leaving the elementary school without an LMS each afternoon. Until early February 1986, afternoon library classes at the elementary school were taken by a substitute teacher. The District then assigned Carr, a teacher aide, to full-time duty in the elementary school library.

Conceding that most of Carr's duties are part of an aide's functions, the Association points solely to the fact that among her activities Carr reads to the children in her care. The sole issue therefore presented in this case is whether reading to the children constitutes exclusive unit work.

There is evidence in the record that from 1973 to 1980, when some elementary school children were taught at the junior-senior high school, the high school library aide would read stories to them to the extent that time and their schedule permitted. The story reading was one part of the

children's entertainment, which also included filmstrips, movies or records. These activities were rotated so that students in each of the four classes involved had a story read to them about once a month.

From 1980, when these elementary school children were transferred to the elementary school, until 1986, the library aide at the high school had no occasion to read to students. When Carr was assigned as the library aide in 1986, she devoted her time to carding, filing, repairing and shelving of books and periodicals, among other conceded aide's functions. She testified, however, that after children selected their books she would sometimes read them a story if time was available.

In its exceptions the Association argues that the record does not support the ALJ's conclusion that reading of stories to elementary school children was a regular aspect of a library aide's functions. It urges that we should find that Carr is performing teacher unit work to the extent that she reads to elementary school children.

DISCUSSION

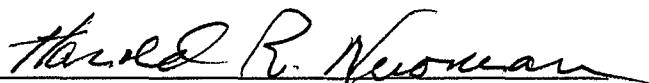
We have recently held that with respect to a charge alleging unilateral transfer of unit work "the initial essential questions are whether the work had been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those previously

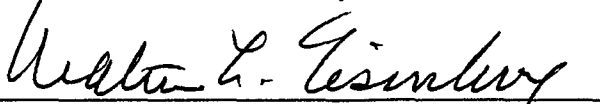
performed by unit employees."^{1/} The instant record contains no evidence regarding the duties of the LMS. It appears to be assumed by both parties that one of their functions was to read to the children. The Association does not identify any other task that the library aide does that is alleged to be substantially similar to that done by the LMS.

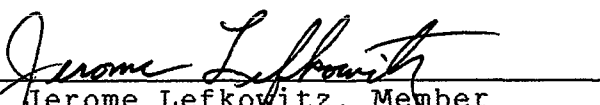
The issue is presented, therefore, whether such reading was performed exclusively by the LMS. The only witnesses were the two library aides, whose testimony fully supports the ALJ's conclusion that reading to elementary school children for their entertainment was a regular part of the aides' duties when they dealt with elementary school children. On this record we cannot find that such reading activities were performed exclusively by unit employees. Accordingly, we affirm the decision of the ALJ.

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

DATED: October 27, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member


Jerome Lefkowitz, Member

1/Niagara Frontier Transportation Authority, 18 PERB ¶3083, at p. 3182 (1985).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW
YORK,

Respondent,

-and-

CASE NO. U-8696

CHARLES LOIACONO,

Charging Party.

THOMAS P. RYAN, ESQ., (BARBARA A. JACCOMA, ESQ. of
Counsel), for Respondent

BRUCE K. BRYANT, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Charles Loiacono to a decision of the Administrative Law Judge (ALJ) dismissing his improper practice charge against the Board of Education of the City School District of the City of New York (District) as untimely. The charge alleges that the District terminated the charging party's probationary services as principal in retaliation for his having filed a grievance. The termination of such probationary services was effective December 29, 1978. Thereafter, the charging party utilized the District's internal review procedures as well as pursuing his grievance through arbitration and subsequent court review. At the conclusion of these proceedings, seven years

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later, on January 9, 1986, the Chancellor reaffirmed the discontinuance of probationary services as of December 29, 1978. The instant charge was filed on April 23, 1986.

The ALJ determined that the four-month period of limitations imposed by §204-a.1 of the Board's Rules of Procedure began to run from December 29, 1978, the date on which occurred "the definitive act which effectively changed his employment." Consequently, he dismissed the charge as untimely. In doing so, the ALJ also rejected the charging party's contention that the Board's four-month period of limitations should be tolled pending exhaustion of the internal administrative review procedures.

In his exceptions, the charging party reiterates his contention that the period of limitations should begin to run only after what he characterizes as the Chancellor's "final determination" on January 9, 1986. The charging party further urges that we should hold that the period of limitations should not begin to run until "internal administrative remedies" have been exhausted. The District responds that the Chancellor's decision of December 29, 1978 effectively discontinued Loiacono's services. It points out that Loiacono has not held the position of high school principal since that date. It urges that the internal review proceedings do not affect the finality of the decision to terminate probationary services, which is no different than a denial of tenure. The Chancellor's reaffirmation on

January 9, 1986 was no more than denial of reconsideration, according to the District.

DISCUSSION

The charging party's argument raises two separate questions: 1) From what act does this Board's four-month period of limitations begin to run? and 2) Should the four-month period be tolled pending Loiacono's use of the internal review procedures? As to the first question, the period begins to run from the act which effectively terminated his employment as principal. If the charging party continued to be employed as principal pending the review proceedings then it could not be said that the termination took place on December 29, 1978. It is clear, however, that the termination was effective on that date. The review proceedings did not suspend that termination. While the review proceedings might have resulted in the reversal of the decision, with consequent appropriate remedies, the act of termination took place on the earlier date and the Chancellor's action of January 9, 1986 was, in fact, no more than a denial of reconsideration of the District's action of termination.

The second question recognizes that the period of limitations might have begun to run from the decision taken on December 29, 1978, but that the period should be tolled pending completion of the internal review proceedings. The charging party argues that we should, at least as a matter of

policy, apply the doctrine of exhaustion of administrative remedies in our application of our Rule.

Application of the concept of exhaustion of administrative remedies might be appropriate if this Board were the proper forum to review the issues litigated in the internal review proceedings. But we have no jurisdiction to review the propriety of the decision to terminate the charging party's probationary services. The only issue that this Board can determine is whether such termination was improperly motivated within the meaning of the Taylor Law. At the same time, it must be noted that by virtue of our exclusive statutory jurisdiction, the internal review proceedings could not properly be the forum to litigate allegations of improper practices under the Taylor Law. It is clear, therefore, that there is no reason to delay the application of the improper practice provisions of the Act and our Rules until internal review proceedings are completed. For these reasons, the cases cited by the charging party for the proposition that internal review proceedings must be exhausted before judicial review may be instituted are inapposite to our functions.

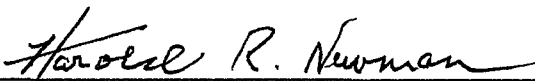
Furthermore, in the charge filed with us in 1986, the conduct alleged to constitute the improper practice took place on or before December 29, 1978. Since the charging

party alleges only that the decision made on December 29, 1978 was taken in retaliation for his having filed a grievance against his superior, it is clear that that issue was ripe for consideration by us at that time. The appropriate course of action would have been to file a charge with this Board at the same time that the internal review procedures were utilized to raise other issues.

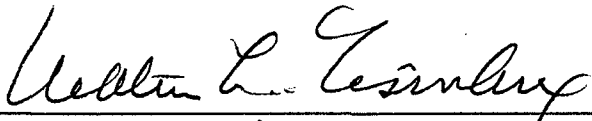
Accordingly, the ALJ's decision should be affirmed.

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

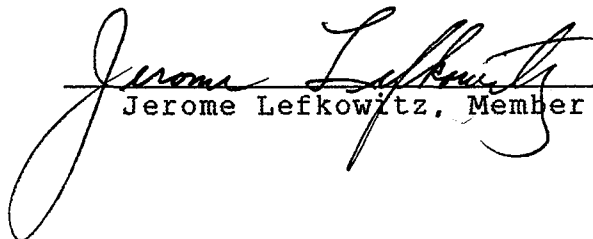
DATED: October 27, 1986
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member



Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
VILLAGE OF WOLCOTT,

Employer,

-and-

CASE NO. C-3088

TEAMSTERS UNION LOCAL 506, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that Teamsters Union Local 506, 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 regular full-time and part-time employees employed in the highway, water and sewer departments of the Village of Wolcott.

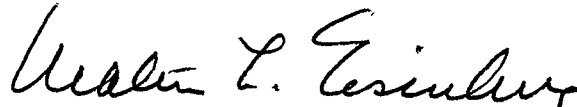
Excluded: Clerical employees, police and fire department employees, supervisors, building code enforcement officer and zoning enforcement officer.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Union Local 506, 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 27, 1986
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member



Jerome Lefkowitz, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF HEMPSTEAD HOUSING AUTHORITY,

Employer,

-and-

CASE NO. C-3056

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

Petitioner.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., 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 non-exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All Town of Hempstead Housing Authority employees, including Laborer, Clerk-Typist I, Clerk-Typist II, Clerk-Typist III, Store Keeper I, Store Keeper II, Store Keeper III, Accountant I, Accountant II, Accountant III, Maintenance Mechanic I, Maintenance

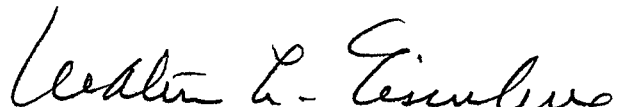
Mechanic II, Custodial Worker I,
Custodial Worker II, Maintenance
Carpenter Foreman, Maintenance Plumber
Foreman, and Maintenance Electrician
Foreman.

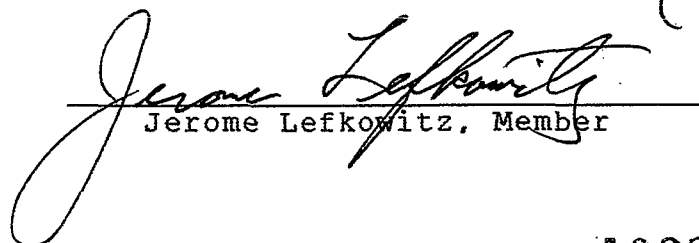
Excluded: Executive Director, Assistant Director
of Maintenance, and Secretary to the
Director.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., 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: October 27, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member


Jerome Lefkowitz, Member