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1-8-1987

## State of New York Public Employment Relations Board Decisions from January 8, 1987

New York State Public Employment Relations Board

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# State of New York Public Employment Relations Board Decisions from January 8, 1987

**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

ADDISON CENTRAL SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-8354

ADDISON TEACHERS' ASSOCIATION,

Charging Party.

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SAYLES, EVANS, BRAYTON, PALMER & TIFFT, ESQS.  
(CYNTHIA S. HUTCHINSON, ESQ., of Counsel), for  
Respondent

JOHN B. SHAMEL, JR., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Addison Teachers' Association (Association) to the decision of an Administrative Law Judge (ALJ) dismissing its charge that the Addison Central School District (District) violated §209-a.1(d)<sup>1/</sup> of the Public Employees' Fair Employment Act (Act).<sup>2/</sup> The gravamen of the charge is that the

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<sup>1/</sup>Claimed violations of §§209-a.1(a) and (c) of the Act were withdrawn by the Association.

<sup>2/</sup>The District's response to the exceptions asserts that they were not filed within the time permitted by §204.10 of PERB's Rules of Procedure. The ALJ's decision was served upon the Association on November 21, 1986. The exceptions, mailed on December 12, 1986, are timely.

District deducted outside earnings from the salary of a teacher it had suspended pending disciplinary proceedings pursuant to Education Law §3020-a, without first negotiating the procedures to be used in determining the amount and timing of the deduction.

The District admitted the essential allegations of the charge and the parties submitted a stipulation of facts in lieu of a hearing.

On the basis of the record, the ALJ determined that PERB lacked jurisdiction over the matter. The ALJ relied upon the following language in the contract that was in existence between the District and the Association at all relevant times:

1. A tenured teacher against whom charges have been filed pursuant to Section 3020-a of the Education Law may waive his/her rights to a 3020-a procedural hearing and choose a hearing in accordance with the American Arbitration Association expedited Labor Arbitration Rules as modified below. Once a choice of forum is made, the affected employee waives all rights to proceed in any other forum.

\* \* \*

- C. If the teacher chooses the American Arbitration Association expedited arbitration as the forum for litigating his/her case and the teacher has been suspended, such suspension will be without pay and benefits after this article. However, if the expedited arbitration procedure is delayed as to cause the matter not to be resolved within the twenty (20) work days from the filing of the initial charges and the delay is caused by the District, the teacher's suspension shall continue, but with pay and benefits.

- D. If the teacher is absolved or acquitted of all charges filed against him/her, he/she shall be repaid any salary and benefits that were withheld to (sic) paragraph C above, less any unemployment, disability or job interruption insurance received, and less any income earned.

The ALJ reasoned that the above provisions covered the subject of disciplinary procedures. Since Education Law §3020-a, which contains provisions relating to suspension, was incorporated into the contract, the ALJ concluded that the matter was a contract dispute over which PERB has no jurisdiction.<sup>3/</sup>

The ALJ also concluded that PERB has no jurisdiction to enforce §3020-a of the Education Law, which the Association claimed the District violated.

The Association claims in its exceptions that the matter is not a contractual one. It argues, in essence, that the provision authorizing a choice between Education Law §3020-a and arbitration was intended to create a contract right to arbitration of discipline as an alternative to the statutory procedures. It was not intended to make §3020-a a contractual right. The Association goes on to assert that §3020-a requires a tenured teacher to be suspended with pay and that the District could not offset outside earnings without first negotiating.

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<sup>3/</sup>CSL §205.5(d).

The Association also argues that even if the teacher owes the District money because of his outside employment, the District could not unilaterally withhold it from his salary but must negotiate the method of calculating the amount due and method of payment.<sup>4/</sup>

We affirm the decision of the ALJ. As found by her, the dispute involves contractual salary and certain contract provisions taken from Education Law §3020-a, the latter having been incorporated by the District and the Association into their agreement.<sup>5/</sup> This being so, CSL §205.5(d) divests PERB of jurisdiction.<sup>6/</sup>

Even if the matter were not a contractual one, we would find, as did the ALJ, that there is no violation. The Association seeks to claim a Taylor Law violation by framing

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<sup>4/</sup>The Association also asserts that the District, by withholding two paychecks while ascertaining what the offset should be, demonstrated that it was improperly motivated. This assertion raises an issue under §209-a.1(a) and (c) of the Act and not under §209-a.1(d). The Association originally alleged a violation of §209-a.1(a) and (c) but withdrew it. Accordingly, we do not deal with this exception.

<sup>5/</sup>With respect to the incorporation of §3020-a into the contract, we note particularly the contractual language which bars proceeding in any other forum once a choice of forum is made.

<sup>6/</sup>See, e.g., County of Nassau, 16 PERB ¶3043 (1983).

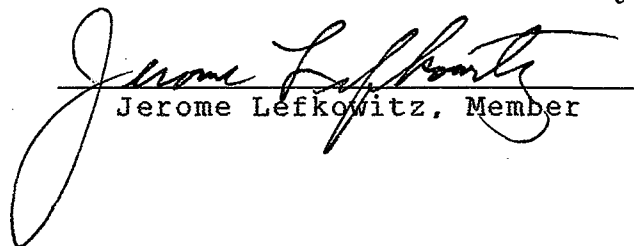
the issue as the withholding of the teacher's salary without first negotiating with the union. The Association's claims, however, are bottomed on what it perceives to be the teacher's rights under Education Law §3020-a.<sup>7/</sup> PERB is not the forum in which to adjudicate such rights.

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

DATED: January 8, 1987  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

  
Jerome Lefkowitz, Member

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<sup>7/</sup>That section, as construed by the Courts, requires that suspension pending disciplinary action be with pay, but permits offset of outside earnings. Matter of Jerry v. Board of Education of the City of Syracuse, 35 N.Y. 2d 534 (1974).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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

-and-

CASE NO. C-3028

MINEOLA CLERICAL ASSOCIATION,  
Petitioner,

-and-

NASSAU EDUCATIONAL CHAPTER, CIVIL  
SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 865,

Intervenor,

-and-

MINEOLA UNION FREE SCHOOL DISTRICT  
CLERICAL/SECRETARIAL EMPLOYEES  
ASSOCIATION,

Intervenor.

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ROEMER & FEATHERSTONHAUGH, P.C. (CLAUDIA R. MC KENNA,  
ESQ., of Counsel), for Intervenor Nassau Educational  
Chapter, Civil Service Employees Association, Inc.,  
Local 865

LAW OFFICE OF RONALD A. FRIEDMAN (JOHN CIAMPOLI, ESQ.,  
of Counsel), for Intervenor Mineola Union Free School  
District Clerical/ Secretarial Employees Association

BOARD DECISION AND ORDER

This matter comes to the us on the exceptions of the  
Nassau Educational Chapter, Civil Service Employees



Association, Inc., Local 865 (CSEA) to the decision of the Director granting the motion of the Mineola Union Free School District Clerical/Secretarial Employees Association (Association) to intervene in this representation proceeding.

The petition was filed by the Mineola Clerical Association (MCA). It was a timely filed petition to decertify CSEA, and was supported by 44 of a unit of 49 employees. At the pre-hearing conference held on January 28, 1986, the Administrative Law Judge (ALJ) conducting the conference informed the parties that a petition to decertify is not sufficient if the petitioner also wants certification. The ALJ indicated, moreover, that MCA would not be permitted to amend its petition at that late date because the showing of interest accompanying the petition did not support a request for certification of MCA.

On February 5, 1986, 32 of the employees who had supported MCA met and formed the Association. On February 11, the newly formed Association filed its motion to intervene, seeking to be certified in any election to be held in the proceeding. The Association obtained dues authorization cards from 46 of the 49 unit members.

CSEA made three arguments in opposition to the motion: 1) the Association is not an employee organization; 2) the Association is the "alter ego" of the MCA, formed only to circumvent the Rules regarding timely filing of a petition

for certification; and, alternatively, 3) the petition should be dismissed since MCA ceased to exist upon creation of the Association.

In his decision, the Director rejected CSEA's first argument, finding that the Association's purposes and its attendant efforts to intervene in this proceeding establish it as an employee organization cognizable under the Act. He rejected CSEA's second argument, finding that the Association is not merely an alter ego of MCA, notwithstanding that each has the same president and enjoys a substantial identity of supporters. He found that these circumstances did not evidence control of the Association by MCA, and that it was immaterial that the Association was formed by unit members only after discovering that MCA could not amend its petition. Finally, he rejected CSEA's third argument, finding that the proof did not establish that MCA ceased to exist with the formation of the Association. Furthermore, the Director concluded that, in any event, the unit members should not be held hostage to the organizational status of the entity which commenced the proceeding.

In its exceptions, CSEA restates its original three arguments. It asserts that the Association is not an employee organization but was created solely for the purpose of defrauding this Board and circumventing the time limitations established by our Rules. It contends that MCA

and the Association are not now acting as two separate organizations, but are in reality one organization, and that the Director's decision in effect permits that organization to file a petition for decertification which would otherwise be time barred. It also urges that we find either that MCA was not an employee organization at the time the petition was filed or that it no longer exists as an employee organization.

The Association responds that the evidence establishes that it is an employee organization as defined by the Act, that both it and the MCA exist as separate entities, and that CSEA's arguments are simply an effort to prevent the employees in the unit from exercising their statutory right to choose a new representative.

Neither MCA nor the District has filed a response to CSEA's exceptions.

#### Discussion

We reverse the Director and deny the Association's motion for intervention.

Based upon our review of the record, we find that the Association was formed only because MCA could not timely amend its petition to seek certification. There can be no question that both organizations represent the interests of the same people, who are the real party in interest. As such, we must look beyond the formal trappings of these organizations and conclude that these two organizations are,

in reality, one.

We conclude that the creation of the Association was simply a device to accomplish belatedly and indirectly what the supporters of MCA did not do earlier and directly. MCA cannot now file a timely amendment of its original petition to seek certification. Neither MCA nor the Association can now file a timely petition for certification. We cannot permit an intervention which constitutes nothing more than an attempt to circumvent the time limitations of our Rules.<sup>1/</sup>

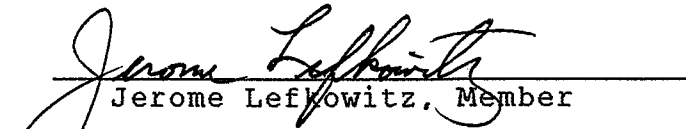
Accordingly, we conclude that the intervention sought in this case would be inimical to the purposes of the Act.

NOW, THEREFORE, WE ORDER that the Association's motion for intervention be denied and we remand the matter to the Director for further appropriate action.

DATED: January 8, 1987  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

  
Jerome Lefkowitz, Member

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<sup>1/</sup>This case also raises an issue, which we do not decide, whether an intervention which would convert a decertification proceeding into a certification proceeding unduly changes and enlarges the original scope of the proceeding. It is not necessary for us to consider this question at this time.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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

-and-

CASE NO. C-3089

ELMONT ELEMENTARY TEACHERS ASSOCIATION,  
NYSUT, AFT, 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 Elmont Elementary Teachers Association, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All Food Service Helpers.

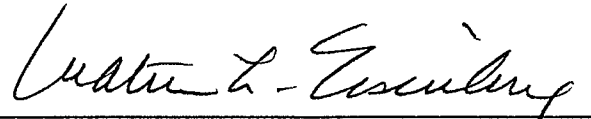
Excluded: All other employees.

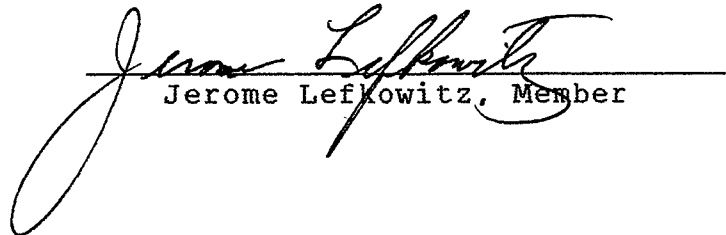
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Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Elmont Elementary Teachers Association, NYSUT, AFT, AFL-CIO and enter into a written agreement with such employee organization with regard to terms and 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: January 8, 1987  
Albany, New York

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

  
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Walter L. Eisenberg, Member

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
TOWN OF DAVENPORT,

Employer,

-and-

CASE NO. C-3115

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LOCAL 338, 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 Local 338, 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 in the following titles: Deputy Supervisor, Mechanic and Truck Driver/Laborer.

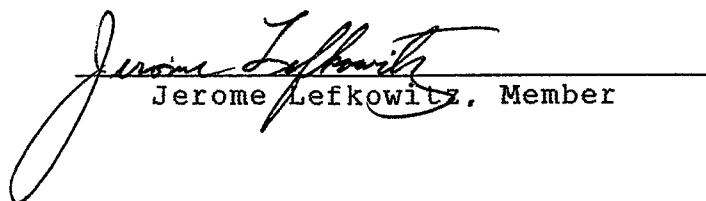
Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 338, 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: January 8, 1987  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

  
Jerome Lefkowitz, Member