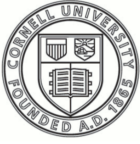

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New York State Public Employment Relations Board (PERB)

1-22-1987

State of New York Public Employment Relations Board Decisions from January 22, 1987

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from January 22, 1987

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),

Respondent,

-and-

CASE NO. U-8216

COUNCIL 82, AFSCME, AFL-CIO,

Charging Party.

JOSEPH M. BRESS, ESQ. (RICHARD J. DAUTNER, ESQ., of Counsel), for Respondent

PETER HENNER, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the State of New York (Department of Correctional Services) (State) to the decision of the Administrative Law Judge (ALJ) sustaining the charge filed by Council 82, AFSCME, AFL-CIO (Council 82) and determining that the State violated §209-a.1(d) of the Act when it unilaterally terminated the practice of furnishing State-owned vehicles for transportation of certain employees from the Auburn Correctional Facility (ACF) to their work site at the Upstate Medical Center (UMC) in Syracuse and terminated certain other economic benefits.

Such change was made when the State changed the location at which these employees reported for work. The facts on which the ALJ's determination was made were stipulated by the parties at the hearing held in this matter.

FACTS

In 1983 the State created six fixed-post assignments at the UMC which were filled by unit employees by bid made on the basis of seniority. Until June 1985 these employees reported first to ACF, stood roll call, attended briefings and secured their weapons. Thereafter the State provided round-trip transportation to and from UMC, which travel time took approximately two hours and was considered hours worked. In addition to providing such transportation, the State paid these employees overtime for the additional two hours over and above their regular eight-hour shift at UMC.

Effective June 19, 1985, the employees were instructed to report directly to the UMC. The State no longer transported them but reimbursed them for the use of their own vehicles. The State no longer compensated the employees for the travel time to and from UMC. Other benefits claimed to have been lost by the change include workers compensation coverage and contractual leave benefits if injured during the trip.

Although the parties' representatives at the local level discussed the changes prior to their implementation,

the State admits that it never offered to negotiate and that Council 82 consistently objected to the changes.

ALJ'S DECISION

To the extent that this charge may have involved a change in work location, the ALJ agreed with the State that work location is a nonmandatory subject of negotiation. He concluded, however, that the State did not change the work location of the affected employees but changed their reporting location. A change in reporting location, he said, may principally affect the employees' terms and conditions of employment and, therefore, be viewed as a mandatory subject of negotiation. But even if a change in reporting location is considered a nonmandatory subject of negotiation, there are circumstances, he concluded, where the principal and predominant effects of the employer's unilateral decision are on the employees' terms and conditions of employment.

He found that the State's change in reporting location in this case did not involve substantial managerial interests in that it did not affect the nature or level of the State's services at UMC. Rather, its decision to change the reporting location stemmed entirely from a desire to save money through the elimination of the costs of certain economic benefits of employees. He concluded that the predominant effect of the State's action in this case was on

the employees' terms and conditions of employment and that, consequently, the State's unilateral action constituted a violation of its duty to bargain.

The ALJ rejected the State's argument that it is privileged to effect a uniform reduction of hours and concomitant compensation, because such reduction was not accompanied by a reduction or change in the nature or level of the State's services. The ALJ also rejected the State's reliance on affirmative defenses relating to its contract with Council 82. In particular, he rejected the State's reliance upon provisions of that contract which appear to give authority to make changes in shift schedules and job assignments.

The ALJ ordered the State to reinstate its practice relating to "transportation, compensation and benefit entitlement" and make the affected employees whole for any loss of wages or benefits.

EXCEPTIONS

In its exceptions, the State asserts that there is no factual basis in the record for the ALJ's distinction between work location and reporting location. It urges that if that distinction is to be used, the stipulation of fact is incomplete and the Board should remand to permit the development of the record. The State also argues that this case does not call for the application of the predominant interest test but even if such test is applicable, the ALJ

applied it erroneously. It also urges that the ALJ erred in rejecting the State's reliance on its contract with Council 82. Finally, it contends that the ALJ improperly excluded certain evidence offered by the State regarding procedures at other locations.

In its response to the State's exceptions, Council 82 argues that the result reached by the ALJ is correct. In its view, this case involves the State's unilateral elimination of existing terms and conditions of employment. It contends that the parties' contract gives the State no right to do what it did.

DISCUSSION

We affirm the decision of the ALJ.

The ALJ noted that the parties differ as to the proper analysis of the record. The charging party argues that the primary effect of the changes made by the State is to require unit employees to spend two hours traveling to a work location without being compensated for their travel time, as had previously been the practice. It urges that these economic benefits can not be changed unilaterally because they are mandatory subjects of negotiation. The State, on the other hand, asserts that it has only changed the work location of these employees and that any changes in benefits are simply a necessary concomitant of that change. Alternatively, it argues that it has simply reduced the tour

of duty of these employees, which decision is not subject to mandatory negotiations.

In response to the State's arguments, the ALJ sought to distinguish work location from reporting location. The State urges that there is no factual basis in the record for such a distinction. It requests that we remand the matter to permit the development of the record on this point. We conclude that such a remand is unnecessary since our analysis of the record leads us to conclude that the distinction made by the ALJ is not necessary to a proper disposition of this matter.

When we say that work location is a nonmandatory subject of negotiation, we mean that the decision as to where work is to be done relates significantly to the mission and the level and quality of services that the employer chooses to offer. But the underlying inquiry is always whether a particular decision must be left to management because it involves primarily the employer's right to determine its mission and its level and quality of services. The same inquiry must be made here. Simply to label the State's decision here as a change in work location or reporting location does not end the inquiry if we cannot find that the change effected by the State relates in any significant way to its right to determine its mission or level and quality of services.

Thus, the decision that six fixed-post assignments must be established at UMC clearly relates to the mission of the State. That decision was made in 1983. These employees have been assigned to those posts since then. No change in that assignment has been made. The only change that has now been made is the location of certain activities - roll call or line-up, pre-shift briefings and weapons exchange. The State agrees that the chief purpose of the change in location of these activities was to reduce the amount of overtime that was available in conjunction with the former procedures. The State urges that management has a substantial interest in the efficient use of overtime, since use of overtime affects the deployment of personnel and the level of services that may be provided. The inefficient or unnecessary use of overtime, it urges, necessarily diminishes its resources and ability to provide security in some other manner.

The State's argument amounts to a contention that its interest in effecting cost savings should be recognized as part of its prerogative to determine the nature and level of services. If we were to accept such contention, almost any decision could be considered a nonmandatory subject of negotiation. In this situation, however, the savings were effected solely through the elimination of economic benefits enjoyed by the employees. Apart from such savings, we

cannot find that the change in location of these activities affected the nature or level of the State's services at UMC. On the other hand, the curtailment of the employees' economic benefits was both the principal intention of the State and the predominant effect of its action. That there is no statutory or contractual right to overtime does not detract from the fact that a practice had been established by the State to afford these employees compensation for travel time, as well as the use of an employer-owned vehicle for travel between ACF and UMC. We agree with the ALJ that the provisions of the parties' contract, including its management rights clause, do not warrant any different conclusion.

We conclude, therefore, that the State improperly terminated the employees' transportation from ACF to their work site and other economic benefits.

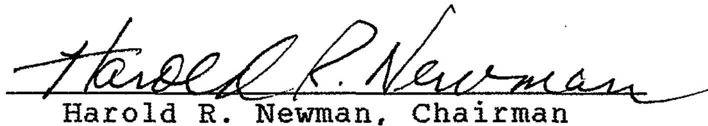
Accordingly, the State is hereby ordered to:

1. Reinstate the practices as they existed prior to June 10, 1985 with respect to the transportation, compensation, and benefit entitlement of employees assigned to the posts at UMC;[1/]

1/We agree with the ALJ that rescission of the change in reporting location is not necessary to effectuate this determination.

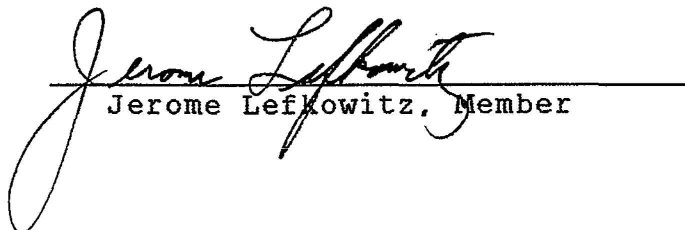
2. Make employees assigned to the posts at UMC whole for any wages or benefits lost as a result of the change in reporting location and procedures with interest on any sum owing at the maximum legal rate of interest;
3. Negotiate in good faith with Council 82 with respect to the terms and conditions of employment of unit employees;
4. Post notice in the form attached in all locations at which any affected unit employees work or report in places ordinarily used to post notices of information to unit employees.

DATED: January 22, 1987
Albany, New York



Harold R. Newman, Chairman

Walter L. Eisenberg, Member



Jerome Lefkowitz, 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 All employees in the unit represented by Council 82, AFSCME, AFL-CIO (Council 82) that the State of New York (Department of Correctional Services) (State) will:

1) Reinstate the practices as they existed prior to June 10, 1985 with respect to the transportation, compensation, and benefit entitlement of employees assigned to the posts at Upstate Medical Center (UMC);

2) Make employees assigned to the posts at UMC whole for any wages or benefits lost as a result of the change in reporting location and procedures with interest on any sum owing at the maximum legal rate of interest;

3) Negotiate in good faith with Council 82 with respect to the terms and conditions of employment of unit employees.

State of New York (Department of Correctional Services)

....

Dated...................... **By**...
(Representative) (Title)

10782

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

In the Matter of

UNATEGO CENTRAL SCHOOL DISTRICT,

Respondent,

-and- CASE NO. U-8425

UNATEGO NON-TEACHING ASSOCIATION,

Charging Party.

In the Matter of

UNATEGO CENTRAL SCHOOL DISTRICT,

Respondent,

-and- CASE NO. U-8538

UNATEGO TEACHERS ASSOCIATION,
NYSUT, AFT,

Charging Party.

HOGAN & SARZYNSKI (JOHN B. HOGAN, ESQ. of Counsel), for Respondent

PETER BLOOD, for Unatego Non-Teaching Association

BRIAN L. LAUD, for Unatego Teachers' Association

BOARD DECISION AND ORDER

These proceedings come to us on the exceptions of the Unatego Central School District (District) to the decision of the Administrative Law Judge (ALJ) sustaining the improper practice charges filed by the Unatego Non-Teaching

Association (UNTA) (U-8425) and the Unatego Teachers Association, NYSUT, AFT (UTA) (U-8538).

UNTA alleged that the District violated §209-a.1(d) of the Act by unilaterally discontinuing two health insurance plans that had been provided pursuant to a past practice, the Statewide Plan and the Group Health Insurance Option (GHI), and replacing them with the Empire Plan, effective January 1, 1986. UTA alleged that the District violated §209-a.1(d) by unilaterally discontinuing GHI and replacing it with the Empire Plan, also effective January 1, 1986.[1/] Both organizations alleged in their charges that coverage, carriers, benefit structures and employee costs were unilaterally changed by the District.

FACTS

At the time of the change in health insurance plans, collective bargaining agreements were in effect with both UNTA and UTA. The health insurance provision in the 1984-86 District-UTA agreement provides that the District shall offer the "New York State Health Insurance Plan with Major Medical Coverage." The agreement also provides that the District shall pay 90 percent of the cost for individual

---

[1/]Employees in UTA's unit had also been provided with the Statewide Plan, and for these, too, it was replaced. UTA's charge did not complain about this because the Statewide Plan had been provided pursuant to a collective bargaining agreement. Accordingly, UTA addressed this issue in a grievance.

coverage and 85 percent of the cost for dependent coverage.The UNTA agreement for 1984-87 does not identify any particular plan. It only provides for the District to pay 90 percent of the cost of individual coverage and 85 percent of the cost for family coverage.

In or about January 1982, the District unilaterally made a GHI program furnished by New York State available to members of both units and paid the full cost of such plan. The District also made the Statewide Plan available to the UNTA unit.

On October 16, 1985, representatives of the charging parties and the District attended a meeting sponsored by the Civil Service Department at which time the State explained that it was replacing the Statewide Plan and GHI with the Empire Plan. The State advised that, as a result of negotiations between New York State and the employee organizations representing its employees, the new Empire Plan would replace the Statewide Plan and GHI and that the President of the Civil Service Commission, pursuant to statutory authority, determined that only the Empire Plan would be available to participating employers after January 1, 1986.

The Civil Service Department also advised that, by virtue of an amendment to §163-a of the Civil Service Law, participating employers with collective bargaining contracts made before July 1, 1985 "are required to provide the Empire

Plan 'Core plus Enhancement' level of benefits for the term of the negotiated agreement." On the other hand, the District could have obtained the same GHI program hitherto furnished by the State directly from GHI.

On October 30, 1985, the District's Superintendent notified all employees that the Statewide and GHI programs were merging into one plan effective January 1, 1986. In his memorandum of that date, the District's Superintendent also advised that the District had no say or control over the change. The memorandum also states that, since the District is a participating employer in the State Health Insurance Program, the District "will remain as part of this program as of January 1, 1986 until we decide to stay with the new program or make a change." On November 5, 1985, the District advised its employees that premium contributions for the Empire Plan would be deducted from their paychecks beginning November 7, 1985.

There are substantial differences between the Empire Plan and both the Statewide Plan and GHI. These differences involve the specific benefits afforded by the specific plans, their costs chargeable to employees, and their administration.

On November 8, 1985, the UTA filed a grievance on behalf of its employees who had been enrolled in the Statewide Plan. It filed its charge herein on January 22, 1986. UNTA filed its charge on November 20, 1985.

ALJ DECISION

The ALJ determined that the benefits provided by a health insurance plan are mandatorily negotiable. He further determined that the difference in benefits, costs and carriers between GHI and the Statewide Plan, on the one hand, and the Empire Plan, on the other, are significant. He also found that the District unilaterally eliminated the Statewide Plan and GHI and unilaterally imposed the Empire Plan. He found that such unilateral change violated its duty to negotiate. He rejected all of the defenses raised by the District.

The District argued that the Board should defer jurisdiction or should decline jurisdiction by virtue of the arbitration provisions in the collective bargaining agreement with UNTA and UTA. The ALJ rejected this defense because neither contract specifically refers to GHI, and the UNTA contract does not specifically refer to the Statewide Plan as well. Since UTA's charge relates only to the GHI change and UNTA's charge relates to the replacement of both prior plans, the ALJ concluded that the charges raise an issue of unilateral change in practices not covered by the contracts.

The District also argued that the charging parties waived their right to file the charges because neither demanded negotiations, after being notified of the prospective change to the Empire Plan. The ALJ held that the duty to initiate negotiations in these circumstances was on the employer.

Next, the District argued that if there was a duty to negotiate, it had satisfied that duty by holding two meetings with a UTA committee contemplated by its agreement with UTA. The ALJ found that this committee was not established to negotiate changes but only to study alternative plans, and that the committee meetings did not constitute a waiver of UTA's right to negotiate.

Finally, the District urged that it did not make a unilateral change. It contends that it was obligated to substitute the Empire Plan for the Statewide and GHI plans in that it had no alternative but to comply with New York State's adoption of the Empire Plan since it was a participating employer in the State Health Insurance Program. The ALJ rejected this defense on the ground that even if a participating employer had no choice, there is nothing that obligated the District to remain a participating employer and purchase insurance through the Department of Civil Service after December 31, 1985.

EXCEPTIONS

The District's arguments may be summarized as follows:

1. The contract with UTA called for the "State Health Insurance Plan", and that is exactly what the District offered both before and after January 1, 1986. What was bargained for by the parties was a plan offered through New York State, not the specific coverage, benefits, provisions and costs of that plan. The ALJ decision requires the

District to obtain something no one bargained for: a hybrid of insurance coverages not offered by the State.

2. The District is a participating employer in the State Health Insurance Program and as such is confronted by the Civil Service Law and the Department's regulations. As such, it had no alternative but to comply with New York State's adoption of the Empire Plan. The changes in costs, benefits and administration were mandated by the State. None of these were fixed by the contracts with the charging parties or by any past practices.

3. Civil Service Law §163-a(3) mandates the adoption of the Empire Plan until the existing contract expires. The District concedes that the parties may then bargain for a new arrangement in a successor agreement. In effect, the District argues this statute supersedes the negotiations obligation under the Taylor Law. The District argues that the issue is one of timing; must negotiations regarding health insurance take place mid-contract or can they await negotiation of a successor contract?

4. The ALJ ignored the provisions of the Civil Service Law dealing with health insurance and the authoritative construction of that statute by the Department of Civil Service.

5. The District did not take any unilateral action. The State changed the plan on January 1, 1986. The District simply went along with the change.

In their responses, both UTA and UNTA urge that benefit levels were established by past practice, that the plans represent specific benefit levels and coverages and that the District changed those benefits unilaterally. They urge that there was no obligation to initiate bargaining at any time, that the duty rested with the District to seek to negotiate any change in plans.

DISCUSSION

We reverse the decision of the ALJ and dismiss the charges in their entirety.

In City School District of the City of Corning, 16 PERB ¶3056 (1983), we dealt with a unilateral change in the insurance carrier and claim administrator where the parties' expired contract provided that the "health insurance plan will meet the specifications of the Blue Cross 360-Day plan and the Blue Shield UCRI with the following riders . . . ." We found that the benefit and protection differences between the former program and the new program were significant and that the District's unilateral change in the kind and level of benefits enjoyed by the unit employees disadvantaged the unit employees. We concluded that the District failed to afford the employees benefits that met the specifications of the Blue Cross/Blue Shield program - which was the pre-existing term and condition of employment. In City of Batavia, 16 PERB ¶3092 (1983), we held that a unilateral change from carrier-provided insurance to employer-provided

self-insurance violated §209-a.1(d) of the Act because there are fundamental differences between the kind of protection provided by an insurance carrier and by self-insurance.

In both cases we determined that the employers unilaterally changed preexisting terms and conditions of employment. In neither case did we hold that a change in health insurance plan must be negotiated under all circumstances. The first step in any analysis must be a determination as to the preexisting terms and conditions of employment.

The record shows that the District initially elected to participate in the State Employees Health Insurance Plan in 1965. In 1982, the District elected to offer the GHI comprehensive benefit package as an option available to its employees in accordance with a program of the State Employees Health Insurance Plan. Neither employee organization offered any formal objection. UTA did not seek incorporation of the GHI Plan in its contract during subsequent negotiations. UNTA did propose to include in its subsequent contract specific reference to the "Statewide Health Insurance Plan plus Major Medical coverage." The proposal did not include specific reference to the GHI option. UNTA withdrew the proposal when the District refused to agree to specify any plan in the contract.

Based on our review of the record, giving particular attention to the circumstances surrounding the District's actions in both providing and withdrawing GHI coverage, we conclude that the past practice established by the District was its participation in the State Employees Health Insurance Plan, whatever the specific benefits, costs and administrative machinery that plan happened to entail. The charging parties have presented nothing to us which would warrant the conclusion that the specific benefits and administrative machinery available through the Statewide Plan and the GHI option on December 31, 1985, should be considered the past practice for the purposes of this case.

It follows, therefore, that the District is correct when it asserts that both before and after January 1, 1986, it provided the same term and condition of employment to the affected employees, i.e., participation in the State Employees Health Insurance Plan. Accordingly, no unilateral change in these employees' terms and conditions of employment took place on January 1, 1986. Based on this record we find that so long as this District remains as a participating employer in the State Employees Health Insurance Plan, changes in what that plan offers cannot be deemed a unilateral change by the District in the employees' terms and conditions of employment. The parties remain free, of course, to negotiate whatever health insurance coverage they can agree upon, including specifications of benefits, supplements to the plan's coverage and removal

from the plan. The burden of initiating such negotiations rests upon the parties seeking to change the past practice.

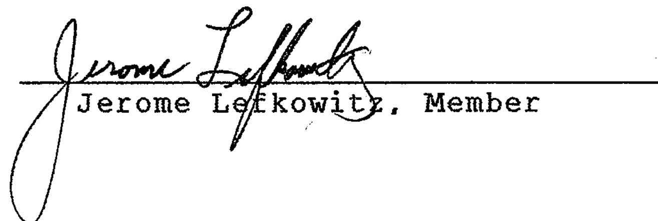
In view of this analysis it is not necessary, nor do we consider any other issues raised by the parties.

NOW, THEREFORE, WE ORDER that the charges in these proceedings be, and they hereby are, dismissed in their entirety.

DATED: January 22, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member


Jerome Lefkowitz, Member