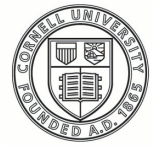
Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Board Decisions - NYS PERB

New York State Public Employment Relations Board (PERB)

8-6-1987

State of New York Public Employment Relations Board Decisions from August 6, 1987

New York State Public Employment Relations Board

Follow this and additional works at: http://digitalcommons.ilr.cornell.edu/perbdecisions
Thank you for downloading an article from DigitalCommons@ILR.
Support this valuable resource today!

This Article is brought to you for free and open access by the New York State Public Employment Relations Board (PERB) at DigitalCommons@ILR. It has been accepted for inclusion in Board Decisions - NYS PERB by an authorized administrator of DigitalCommons@ILR. For more information, please contact hlmdigital@cornell.edu.

State of New York Public Employment Relations Board Decisions from August 6, 1987

Keywords
NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

Comments
This document is part of a digital collection provided by the Martin P. Catherwood Library, ILR School, Cornell University. The information provided is for noncommercial educational use only.

This article is available at DigitalCommons@ILR: http://digitalcommons.ilr.cornell.edu/perbdecisions/359

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GEORGE CANTRES,

Charging Party,

-and- CASE NO. U-8862

CITY EMPLOYEES UNION LOCAL 237,

Respondent.

CARLOS A. FERREIRA, ESQ., for Charging Party

FISHER & FISHER, ESQS. (MICHAEL J. VOLLBRECHT, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City Employees Union Local 237 (Local 237) from an Administrative Law Judge's (ALJ) decision which found it to have violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act), by failing to represent properly George Cantres, Charging Party, in connection with certain disciplinary proceedings brought against him by his employer, the Board of Education of the City School District of the City of New York (District). The ALJ found that Local 237 breached its duty of fair representation to the Charging Party when it failed to communicate adequately with him and failed to investigate adequately his disciplinary case at the first step of the grievance procedure, when it failed to properly present and pursue the grievance at subsequent step(s) of the grievance

procedure, and when it excluded Charging Party from a Step II hearing following his statement that he was going to retain an attorney. The ALJ found that as a result of the failure of Local 237 to process properly his disciplinary grievance, Charging Party was terminated by the District without having had an opportunity to present witnesses in his own behalf. The ALJ directed that Local 237 promptly seek to reopen Charging Party's disciplinary case and have a hearing scheduled, and that it promptly notify Charging Party that, if he wishes, it will represent him at such hearing. Local 237 excepts to the findings of fact, conclusions of law, and order of the ALJ.

FACTS

Charging Party, a school safety officer employed by the District, was reassigned, on or about April 21, 1986, from his usual work location, Brandeis High School, to the District's borough office pending an investigation of certain allegations of misconduct on his part involving female students, which allegedly occurred on April 18. Between April 21 and May 6, 1986, when Charging Party was suspended without pay, he made numerous attempts to reach his local representative, Lundy, by telephone and through his shop steward. All of these attempts were unsuccessful. Following his suspension, Charging Party made numerous additional attempts to reach his local representative by telephone, all of which were unsuccessful. On May 20 or 21, 1986, Charging Party visited Local 237's

office and saw Lundy. Lundy indicated that she was not prepared to discuss the charges until a copy of the written charges was received from the District. On May 22, Charging Party received a copy of the charges against him, which alleged that he "violated the Rules and Procedures of the Office of School Safety by engaging in undue fraternization with students at Brandeis H.S.," and that he "used abusive language towards female students." According to the notice of charges, a Step I hearing was to be held on May 29, 1986, at 10:00 a.m. Between May 22 and May 29, Charging Party attempted to reach Lundy by telephone, to discuss the charges and prepare for the hearing, but was unable to reach her, and received no answering call.

According to Charging Party's testimony, Lundy arrived at the May 29 hearing approximately fifteen minutes late and informed Charging Party that there was no time prior to the hearing to discuss the case. At the hearing, Lundy cross-examined the District's sole witness, a student at Brandeis High School. Also at the hearing, Charging Party provided to Lundy six written statements he had collected from teachers and others at the high school on or before May 6, when he was suspended. Two persons provided general positive work references, and the other four asserted that Charging Party was in attendance at a basketball game at the high school on the afternoon that Charging Party was informed that an incident involving female students at the high school had

occurred. Lundy placed these statements in the record, but made no attempt to call any of the persons who had provided statements, or others whose names were suggested by Charging Party as witnesses.

On June 6 or 7, Charging Party called the District and was informed that he had been terminated. He contacted Lundy, but was unable to reach her and his call was not returned. Thereafter, he received a letter, dated June 11, 1986, from Illery, assistant director of the city-wide division of Local 237, stating that Local 237 had determined that "there are no merits in your case that would have any value for a Step III Appeal Review."

Thereafter, at Charging Party's request, Local 237 reconsidered its decision not to pursue his grievance further, and ultimately, on July 1, 1986, a Step II hearing was scheduled. Illery was to handle the hearing at that stage and, prior thereto, conducted an investigation of Charging Party's case by interviewing the persons who had written the statements in support of Charging Party, as well as some other individuals, and by reviewing some reports and statements obtained from the District by Lundy. Illery requested three individuals to testify on behalf of Charging Party at the July 1 hearing, but learned, either before or at the time of the hearing, that they would not, for various reasons, be appearing to testify. When Charging Party met with Illery outside the hearing room on July 1, he learned for the first

time that witnesses would not be called on his behalf. He requested a postponement so that witnesses could be brought in to testify on his behalf. When Illery refused to request a postponement (stating that they should go into the hearing and find out "what the District had"), Charging Party asked, "What if I get an attorney?". Illery responded that Local 237 would remove itself from the case if Charging Party opted to be represented by an attorney and Charging Party, after some hesitation, decided he wanted to proceed with his own attorney. Illery then went into the hearing room without Charging Party to conduct the Step II hearing on behalf of another employee, Edwards. Because the hearing room door locked behind Illery, Charging Party was excluded from the hearing room. Thereafter, the Step II appeal was denied by the District and no further appeal was filed or attempted to be filed, either by Charging Party or Local 237, to Step III of the grievance procedure.[1/]

According to the terms of the collective bargaining agreement between Local 237 and the District, an employee is entitled to be represented by Local 237 or a unit member, but there is no authorization for an employee to be represented by an attorney at least at the first two steps of the

---

[1/] There is no record evidence, and it is not alleged, that Local 237 improperly failed or refused to process the grievance to the third step or that there was even a request by the Charging Party or his attorney to do so.

disciplinary grievance procedure. There is no apparent bar to attorney representation at the third and fourth steps of the procedure.

DISCUSSION

It is well settled that a bargaining agent has a duty under the Act to perform its representative function without improper motivation, gross negligence or irresponsibility.[2/] In essence, Charging Party alleges that Local 237 acted in a grossly negligent or irresponsible manner in its handling of his disciplinary case.

The preponderance of Charging Party's allegations relate to the handling of his disciplinary matter by Lundy at and before the first step of the disciplinary grievance procedure. Charging Party's testimony, which was unrefuted since Lundy did not appear to testify, was that he placed numerous telephone calls to Lundy in an effort to provide her with information about his case and witnesses' statements, and to obtain information from her. Although it appears that Lundy did in fact perform some investigatory work on the

---

2/Brighton Transportation Association, 10 PERB ¶3090 (1977); Nassau Educational Chapter of the Syosset CSD Unit, CSEA, Inc., 11 PERB ¶3010 (1978).

case, since the file delivered to Illery in preparation for the second step hearing contained a number of reports and statements collected by Lundy, Charging Party's unrefuted testimony with reference to Lundy was properly given greater weight by the ALJ. Thus, it appears that Lundy's handling of Charging Party's disciplinary case, prior to and at the Step I hearing, constitutes gross negligence by reason of her failure to communicate with him, failure to communicate with potential witnesses, and failure otherwise to prepare for the hearing, and we affirm the decision of the ALJ in this regard.

In his amended charge, Charging Party also asserted that Local 237 breached its duty of fair representation in two respects at the second step hearing conducted on July 1, 1986. He alleged first that Illery's handling of his case was improper due to the existence of an inherent conflict of interest, in that Illery's daughter had assisted in the investigation which gave rise to the disciplinary charges against him. The ALJ found, and we agree, that the existence of this relationship, without specific evidence of bias or impropriety, is insufficient to support any finding of bad faith or other wrongdoing.

The second allegation made by Charging Party concerning Local 237's handling of his case at the second step is that Illery improperly refused to request a postponement of the hearing in order to obtain the presence of witnesses

unavailable on July 1. While we accept as fact Illery's assertion that the Step II appeal hearing is not intended to constitute an evidentiary hearing, it is clear that there is no prohibition against calling witnesses. Illery, in fact, made diligent efforts to produce witnesses for the second step hearing, requesting their presence and making follow-up calls to ascertain their whereabouts on the day of the hearing. In view of the fact that no witnesses at all were called on behalf of Charging Party at the first step hearing, Local 237's responsibility to present evidence on behalf of Charging Party at Step II increased. Despite this increased responsibility, we do not find that the failure to produce witnesses at the Step II hearing constituted a per se breach of the duty of fair representation. Similarly, we also do not find improper the refusal to request a postponement of the hearing to obtain witnesses. A union is entitled to wide latitude in evaluating a case and determining how it should be presented, and there is no evidence that Illery's judgment in this regard amounted to gross negligence or irresponsibility. Illery's stated intentions of wanting to proceed quickly with the Step II hearing in view of the suspension of the affected employees, including Charging Party, and wanting to "see what the District had", presumably in preparation for a full evidentiary hearing at the third or fourth step of the grievance procedure, were well within his discretion. We accordingly also affirm the portion of the ALJ decision which

dismissed the charge that Local 237 violated §209-a.2(a) of the Act when it failed to request a postponement of the Step II hearing for the purpose of obtaining witnesses.

The ALJ's finding that Local 237 violated the Act at the Step II hearing was based upon testimony adduced at the hearing that Charging Party was excluded from the hearing room by Illery, following Charging Party's decision to retain an attorney to represent him, and that Local 237 abandoned the processing of Charging Party's case by failing to seek an adjournment so that an orderly transfer of the matter to counsel could occur. In so finding, the ALJ concluded that Illery indicated to Charging Party that he could come into the hearing room if he wanted Local 237 representation but, if he wanted attorney representation, he could not enter the hearing room. In reviewing the record of this case, we perceive the testimony somewhat differently. In essence, Illery informed Charging Party that the hearing would proceed on that day if he wished to have Local 237 represent him, but if he wanted to retain private counsel, the hearing would not proceed. It would, therefore, not be necessary for him to appear in the hearing room. In view of Charging Party's decision to retain counsel, a decision which he was entitled to make, no hearing was conducted on his behalf on July 1, and the only hearing which was conducted was the hearing for another employee, Edwards. Based upon the foregoing, we reject the finding of

the ALJ that Charging Party was in some manner prevented from attending his disciplinary hearing at the Step II level, since no disciplinary hearing relating to him was held on that date.

The only remaining question that needs to be decided is whether Charging Party was improperly denied the opportunity to request a postponement of his hearing in order to obtain the services of an attorney, or whether Illery improperly failed to make such a request for him. As to this point, Illery testified, without contradiction, that he and Frank Scarpinato, Local 237 Secretary-Treasurer, had, at Local 237's office prior to the scheduling of the Step II hearing, informed Charging Party that, at least at the first two steps of the grievance procedure, an employee could not elect to be represented by an attorney, and that if he insisted upon obtaining one, Local 237 would not represent him further. Charging Party was accordingly on notice that he was not entitled to an attorney at Step II of the hearing procedure. In fact, Illery testified that, after he went into the hearing room on July 1 without Charging Party, a colloquy occurred, which he related as follows:

> Q. Did the Hearing Officer ask where Mr. Cantres was?
>
> A. Yes. He did.
>
> Q. What did you tell him?
>
> A. I told him he wanted to get his own attorney.
>
> Q. Did the Hearing Officer make a response to this do you recall?

A. He said, "Well does he know that the attorney cannot come into the hearing or the attorneys cannot represent him" or something to that effect, and I said, "We told him but he still wanted his own attorney," and he said, "OK".

Judge Comenzo: You said that you told him that an attorney could not represent him?

The Witness: Yes.

Judge Comenzo: When was that?

The Witness: When he was at the union office.

In view of the foregoing, it is reasonable to conclude that a request for a postponement in order for Charging Party to obtain private counsel, whether made by Illery or by Charging Party himself, would have been rejected by the hearing officer upon the ground that Charging Party was not entitled to attorney representation at Step II of the grievance procedure.

There is, in any event, no record evidence of any likelihood that an adjournment of the Step II hearing would have been granted, if requested, in view of the prohibition against the use of attorneys at the second step of the grievance procedure.[3/] The Charging Party, therefore, failed to meet his burden of proving that his exclusion from the hearing room was improper, or that an adjournment to

---

[3/] In fact, neither the charge nor the amended charge alleges that Local 237 violated the Act when it excluded Charging Party from the hearing room or when it failed to request, or afford him the opportunity to request, a postponement for the purpose of retaining private counsel.

obtain private counsel would have been granted by the hearing officer if requested. A union is under no duty to perform futile acts on behalf of its members.[4/]

The Charging Party was free, following his determination to obtain private counsel, to appeal the adverse second step determination to the third and then the fourth step of the grievance procedure, with the assistance of private counsel. However, there is no evidence that he either attempted to file such appeals himself, or by his attorney, nor is there any evidence that he requested Local 237 to do so. The final implementation of the penalty of termination took place, therefore, as a result of Charging Party's failure to proceed to the third and fourth steps of the grievance procedure, and not as a result of a failure to request a postponement of the second step hearing in order to obtain private counsel. We therefore reverse so much of the ALJ decision as finds that Illery's actions at the Step II level violated §209-a.2(a) of the Public Employees' Fair Employment Act. We do find, however, as did the ALJ, that the failure to investigate, communicate, and/or prepare for the Step I hearing violated §209-a.2(a) of the Act. However, finding, as we do, that the failure to properly process the disciplinary grievance at the first step of the procedure is not the proximate cause of

---

[4/] Elmira Teachers Association, 14 PERB ¶3047 (1981).

Charging Party's ultimate termination, the appropriate remedy is, of necessity, narrow in scope. In view of our finding that, despite the violation at Step I, the violation was not a proximate factor in the Charging Party's termination, we reject so much of the ALJ's recommended order as directs Local 237 to seek a new hearing for Charging Party and offer to represent him.

IT IS THEREFORE ORDERED that City Employees Union Local 237 appropriately investigate disciplinary cases for which it provides representation, that it communicate on a reasonably prompt basis with bargaining unit members seeking assistance, advice and information concerning their disciplinary cases, that it appropriately prepare such disciplinary cases for hearing, and that it post notice in the form attached at all locations ordinarily used by Local 237 for written communications to unit employees. In all other respects, the charge is dismissed.

DATED: August 6, 1987
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Board of Education of the City School District of the City of New York within the unit represented by City Employees Union Local 237 that City Employees Union Local 237 will:

1. Appropriately investigate disciplinary cases for which it provides representation;

2. Communicate on a reasonably prompt basis with bargaining unit members seeking assistance, advice and information concerning their disciplinary cases; and

3. Appropriately prepare such disciplinary cases for hearing.

City Employees Union Local 237

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.

11111

#3A-8/6/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-3211

SUBSTITUTE UNIT OF THE PLAINVIEW CONGRESS OF TEACHERS, NEA/NY,

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 Substitute Unit of the Plainview Congress of Teachers, NEA/NY 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 per diem substitute teachers who have a reasonable assurance of continuing employment as referred to in s201.7(d) of the Civil Service Law.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Substitute Unit of the Plainview Congress of Teachers, NEA/NY. To negotiate collectively is the performance of their mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 6, 1987
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

#3B-8/6/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF NEW HARTFORD,

Employer,

-and-

CASE NO. C-3214

NEW HARTFORD POLICE OFFICER'S
BENEVOLENT ASSOCIATION,

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 New Hartford Police Officer's Benevolent Association has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time and part-time employees in the following titles: sergeant, lieutenant and patrolman.

Excluded: Chief of police, clerk (dispatcher) and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the New Hartford Police Officer's Benevolent Association. To negotiate collectively is the performance of their mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 6, 1987
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

11115

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF SULLIVAN,

Employer,

-and-

CASE NO. C-3221

TEAMSTERS LOCAL 445, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

SULLIVAN COUNTY DEPARTMENT OF PUBLIC WORKS SUPERVISORY UNIT,

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 the Teamsters Local 445, International Brotherhood of Teamsters has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive

representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All probationary, provisional and permanent employees in the Sullivan County Department of Public Works Supervisory Unit as set forth in Appendix A.

Excluded: All other employees

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 445, International Brotherhood of Teamsters. To negotiate collectively is the performance of their mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 6, 1987
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

APPENDIX A

Auto Shop Supervisor
Civil Engineer
Road Maintenance Supervisor
General Construction Supervisor
Sr. Civil Engineer
Bridge Engineer
Building Maintenance Supervisor
Sign Shop Supervisor
Custodial Supervisor
Building Engineer
Equipment Supervisor