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State of New York Public Employment Relations Board Decisions from December 9, 1987

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 9, 1987

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ADIRONDACK COMMUNITY COLLEGE

CASE NOS. E-1337
and E-1338

Upon the Application for Designation of
Persons as Managerial or Confidential.

PAUL E. ARENDS, for Petitioner

JERRY FABIANO, for the Faculty Association of
Adirondack Community College Classified Service
Employees, Secretarial Unit

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Adirondack Community College (College) to the dismissal of two timely-filed applications seeking the confidential designations of Bonnie O'Leary, Typist for the Director of Facilities and Maintenance (Case No. E-1337), and Margaret Johnson, Stenographer in the Office of Continuing Education (Case No. E-1338), pursuant to §201.7(a) of the Public Employees Fair Employment Act (Act). Both positions are currently represented by the Faculty Association of the Adirondack Community College Classified Service Employees, Secretarial Unit (Unit), which opposes both designations.

The Director dismissed the application as to the position of Typist for the Director of Facilities and

Maintenance upon the ground that the incumbent of the position (who is currently working half-time as Secretary to the Director of Facilities and Maintenance and half-time as a switchboard operator) does not actually currently perform duties which are confidential in nature. The claim made to the Director by the College is that Ms. O'Leary's split duties will, in the future, be eliminated, and she will perform work on a full-time basis as Secretary to the Director of Facilities and Maintenance and, accordingly, will, at some point in the future, perform confidential work. However, the Director determined that an employee may be designated confidential based only upon duties actually performed, rather than those which may reasonably be expected in the future, citing our decisions in Watervliet Housing Authority, 18 PERB ¶3079 (1985), City of Binghamton, 12 PERB ¶3099 (1979), and other cases.

In its exceptions, the College asserts not that Ms. O'Leary will become Secretary to the Director of Facilities and Maintenance, but that the College anticipates hiring a personnel officer, and that a clerical employee will be needed when such a position is created and filled. The exceptions make no mention of the role which Ms. O'Leary would play when and if these new positions are created.

The College argues that our requirement that the confidential application be based upon the duties actually

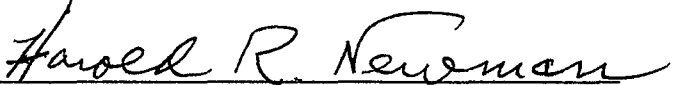
performed rather than the duties anticipated to be performed places it in the untenable position of having to assign confidential work to bargaining unit employees, with the risks attendant thereto, before application can be made for the confidential designation. However, the policies in favor of our consideration only of actual duties performed are necessary in order to avoid basing confidential designations on speculation, anticipation, plans or hopes of the applicants, rather than upon evidence which is subject to scrutiny and contradiction. These policies are particularly apparent when considered in light of the College's exceptions. The College appears to suggest that, at some point in the future, a personnel officer position may be created and, if that occurs, a clerical position will be needed to support that personnel officer, and that the personnel officer will perform managerial work, such that the clerical support staff person reporting to him or her will warrant designation as confidential. These plans and expectations are simply too remote and speculative to form the basis for a confidential designation at this time, particularly since the application originally sought confidential status for the Typist supervised by the Director of Facilities and Maintenance on a half-time basis, and not by a personnel officer. The Director's dismissal of the application numbered E-1337 is accordingly affirmed.

The second position sought by the College to be designated as confidential is that of the Stenographer and Secretary to the Associate Dean for Continuing Education. While finding that the Associate Dean's position is managerial in nature, because its incumbent is a member of the College President's Executive Committee, the Director nevertheless dismissed the application because no evidence was offered that Johnson, the incumbent in the position, ever performed any work relating to the Executive Committee. The work performed by Johnson involves the typing of contract letters, setting forth terms and conditions of employment for full- and part-time, noncredit faculty (all of whom are unrepresented), and faculty and student course evaluations. The Director determined that none of this work concerns confidential labor relations matters or collective bargaining and that the application as to the Stenographer in the Office of Continuing Education should also be dismissed.

In its exceptions to this dismissal, the College disputes the factual findings made by the Director. However, the College does not point to anything in the record which indicates that that the Director's factual findings are erroneous, and our consideration is and must be limited to the facts placed before the Director and relied upon by him. The Director's dismissal of the application numbered E-1338 is, accordingly, also affirmed.

IT IS, THEREFORE, ORDERED that the applications be, and they hereby are, dismissed.

DATED: December 9, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PART TIME INSTRUCTIONAL AND RESEARCH
STAFF UNION,

Petitioner,

-and-

CASE NO. C-3174

CITY UNIVERSITY OF NEW YORK

Employer,

-and-

PROFESSIONAL STAFF CONGRESS/CUNY,

Intervenor.

SIPSER, WEINSTOCK, HARPER & DORN, ESQS. (SUSAN
MARTIN, ESQ. and STEPHEN E. APPELL, ESQ., of
Counsel), for Petitioner

DAVID B. RIGNEY, ESQ. (JANE DENKENSOHN, ESQ., of
Counsel), for Employer

GUAZZO, PERELSON, RUSHFIELD & GUAZZO, ESQS.
(STEPHEN PERELSON, ESQ., of Counsel), for
Intervenor

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Part
Time Instructional and Research Staff Union (PTU) to the
dismissal of its petition seeking certification as the
negotiating agent for approximately 2,800 employees of the
City University of New York (CUNY) who are currently in a

unit represented by the Professional Staff Congress/CUNY. The Director of Public Employment Practices and Representation (Director) dismissed the petition upon the ground that it was not accompanied by a showing of interest of at least 30 percent of the petitioned-for unit, as required by §201.3 of PERB's Rules of Procedures (Rules).

The PTU argues that its failure to produce a 30 percent showing of interest in connection with its decertification petition was caused by improper denial of reasonable access to unit employees by CUNY, and that its time to meet the 30 percent showing of interest requirement should therefore be extended.

The Director, citing our decision in CSD of the City of Schenectady, 20 PERB ¶3008 (1987), found that the requirements relating to the filing and processing of a certification or decertification petition, including the requirement that the petition be accompanied by a 30 percent showing of interest, must be strictly applied, and that it is only within the context of an improper practice charge proceeding that the showing of interest requirement can be extended. See County of Erie, 13 PERB ¶3105 (1980), conf'd sub nom. Eiss v. PERB, 14 PERB ¶7004 (Sup. Ct. Alb. Co. 1981). In that case, as in Levittown UFSD, 17 PERB ¶3084, aff'g 17 PERB ¶¶4034 and 4582 (1984), we held that the time for filing a showing of interest may be extended only in extraordinary circumstances, and, in particular, where an

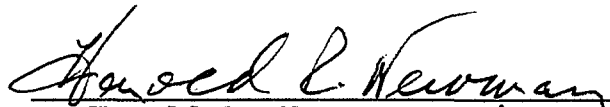
employer's denial of access has been found to constitute an improper practice within the meaning of §209-a of the Public Employees' Fair Employment Act (Act).

It is only in the context of an improper practice charge proceeding, where the issues relating to the propriety of the employer's action can be fully and properly litigated, that it can be determined whether or not a denial of access took place in violation of §209-a of the Act. To deal with allegations of commission of improper practices in the context of representation petition proceedings would unduly complicate and delay those proceedings, particularly since there is no mechanism in our Rules for placing a party on notice of an allegation of an improper practice in that context. The more appropriate means of dealing with improper practices alleged to have been committed prior to the filing of a decertification petition is to file improper practice charges within four months of the actions complained of, and not to await rejection of a petition by the Director as deficient before making claims of improper practices previously committed.


Based upon the foregoing, we conclude that the Director correctly dismissed the petition in the instant case without prejudice to a subsequent motion to reopen should the PTU prevail in its pending improper practice charge alleging improper denial of access by CUNY.

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

DATED: December 9, 1987
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED TEACHERS OF NORTHPORT NYSUT, AFT,
AFL-CIO,

Petitioner,

-and-

CASE NO. C-2955

NORTHPORT-EAST NORTHPORT UNION FREE
SCHOOL DISTRICT,

Employer.

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 United Teachers of Northport 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.

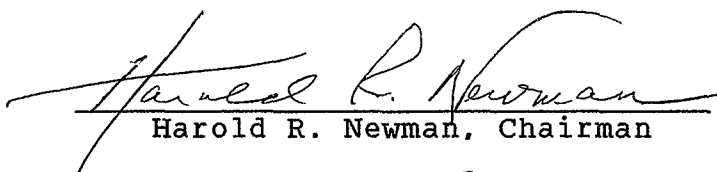
Unit: Included: All per diem substitutes who have received a reasonable assurance of continuing employment for the 1985-86 school year as referenced in §201.7(d) of the Civil Service Law.

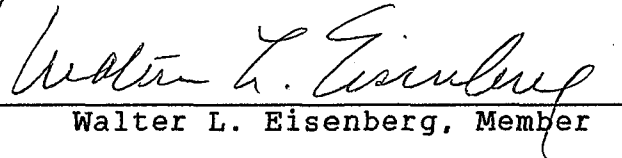
Excluded: All other employees.

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FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Teachers of Northport, NYSUT, AFT, AFL-CIO. The duty to negotiate collectively includes the 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. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 9, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

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HAROLD R. NEWMAN
CHAIRMAN
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

50 WOLF ROAD
ALBANY, NEW YORK 12205

December 17, 1987

Malcolm D. MacDonald
Deputy Chairman
New York City Office of
Collective Bargaining
110 Church Street
New York, NY 10007

Dear Malcolm:

At a meeting on October 21 at your office, you and members of your staff raised with us the issue of whether an interest arbitration award should be deemed to constitute a negotiated agreement within the meaning of §209-a.1(e) of the Taylor Law. At that time, you expressed the view that interest arbitration awards should be so treated, and you suggested that our Board reconsider its position on the issue.

As you know, in County of Niagara (16 PERB ¶3071 (1983), rev'd sub nom., County of Niagara v. Newman, 22 Misc. 2d 749, 17 PERB ¶7003 (Sup. Ct. at Niagara Co. 1984), Rev'd 104 A.D.2d 1, 17 PERB ¶7021 (4th Dep't 1984)), it was held that legislative determinations do not constitute negotiated agreements within the meaning of §209-a.1(e) of the Act. This determination was based upon the language of the statute as further clarified by legislative history.

Subsequently, in City of Kingston, 18 PERB ¶3036 (1985), we held, based upon the same legislative history and language, that an interest arbitration award is not the equivalent of a negotiated agreement pursuant to §209-a.1(e) either. Having so recently and definitively reached this conclusion, Walter Eisenberg and I agree that making the change you suggest by Board decision would not only be inappropriate, but would also be unlikely to survive judicial scrutiny.

Malcolm D. MacDonald
December 17, 1987

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The only viable alternative for making your suggested change, then, appears to be the passage of legislation modifying §209-a.1(e) of the Act. However, the chances of passage of such legislation are remote, in view of the substantial likelihood of universal opposition from employee organizations, and from police and firefighter organizations in particular. Additionally, we have long taken the position that legislation of this type is not appropriately within PERB's purview to propose, but should come instead from constituents interested in the substantive statutory changes which would benefit them most. You may wish to suggest to any of your constituents who are interested in the modification of §209-a.1(e) that they seek legislation to that effect.

I regret that we cannot be more helpful to you with respect to this matter. If you feel that further discussion concerning it would be useful, please do not hesitate to give me a call.

Best wishes for a fine holiday season.

Sincerely,

Harold

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