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State of New York Public Employment Relations Board Decisions from September 15, 1988

New York State Public Employment Relations Board

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Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEWBURGH ENLARGED CITY SCHOOL DISTRICT CASE NO. E-1417

Upon the application for designation of persons as managerial or confidential.

DAVID S. SHAW, ESQ. (DAVID S. SHAW, ESQ. and GARRETT L. SILVEIRA, ESQ., of Counsel), for Petitioner

MARJORIE E. KAROWE, ESQ. (JOSEPH E. O'DONNELL, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (Respondent) to a decision of the Director of Public Employment Practices and Representation (Director) which granted the application of the Newburgh Enlarged City School (District) for designation of Gail Clark, secretary to the Superintendent of Buildings and Grounds, as confidential in accordance with the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act).1/

The Director found, after hearing, that Clark is the only clerical employee in the Buildings and Grounds Department, which is supervised by Raymond Cox, Superintendent of Buildings and

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1/The designation of another employee, Rose Colbert, secretary to the Director of the Newburgh Public Library, as confidential, is not the subject of exceptions and, accordingly, is not addressed here.

Grounds, and which includes between 100 and 125 full- and part-time employees. The Director based his designation of Clark as a confidential employee upon Cox's responsibility for personnel administration, contract administration, and participation in negotiating processes. CSEA claims that the testimony fails to support a finding that Cox meets any of these three criteria for managerial status and that the application for Clark's designation as confidential must accordingly be denied.

In the area of personnel administration, Cox testified that he is responsible for recommending the hiring and firing of buildings and grounds personnel, usually in conjunction with recommendations from principals of schools within the District. Cox further testified that he gathers facts and makes recommendations to Alan DiCesare, Assistant Superintendent for Personnel, concerning possible disciplinary action against employees in the Buildings and Grounds Department, although notice of disciplinary action is issued by DiCesare. In those instances in which Buildings and Grounds employees are employed at specific schools, the principals of those schools prepare such recommendations themselves. Finally, with respect to personnel administration, Cox testified that he has been responsible for preparing documentation in support of a recommendation to create a new position, which would be submitted to the Assistant Superintendent for Business.

In the area of contract negotiations, Cox testified that he has, in conjunction with the most recent round of negotiations,

submitted some written recommendations for negotiation proposals relating to the Buildings and Grounds Department to the persons responsible for conducting negotiations, but that he does not participate directly in negotiations himself. He further testified that he has been asked on at least one occasion to comment on negotiation proposals which impact upon the Buildings and Grounds Department.

In the area of contract administration, the testimony establishes that Cox is responsible for issuing decisions at the first written step of the grievance procedure, which proceeds to DiCesare, as designee of the Superintendent of Schools, the Board of Education, and finally arbitration. The extent of Cox's involvement in contract administration beyond the first written step (the first step consisting of an oral grievance to the immediate supervisor), is the provision of additional detail and support to DiCesare for the position taken at the step handled by Cox within the Buildings and Grounds Department.

Cox's uncontroverted testimony establishes that Clark is the only person responsible for typing, filing, and transmitting written material to and from Cox in connection with the foregoing matters.[2/]

Section 201.7(a) of the Act instructs us that "employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees

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[2/]There is no testimony or argument that Clark assists or acts in a confidential capacity to any other person, such as DiCesare.

described in clause (ii)." Clause (ii) provides that employees may be designated as managerial only if they are persons

> who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.

This statutory language, when taken together, clearly means that a person may be designated as confidential only if he or she assists and acts in a confidential capacity to a person who either has been designated managerial or would be entitled to such designation on the basis of the managerial employee's participation in collective negotiations, contract administration, or personnel administration. In order to prevail on this application, therefore, the District has the burden of proving that Cox is a managerial employee and that Clark assists and acts in a confidential capacity to him in the exercise of his managerial functions.

In State of New York, 5 PERB ¶3001 (1972), this Board examined and explicated the criteria for designation of an employee as managerial in some detail. Subsequent decisions issued by the Director, such as City of Binghamton, 12 PERB ¶4022 (1979), have followed our analysis in State of New York, supra.

As the Director stated in City of Binghamton, 12 PERB ¶4022, at p. 4035:

> To satisfy the second criterion, participation in collective negotiations, an employee must be a direct participant in the preparation of the employer's proposals and positions in collective negotiations and an active participant in the negotiating process itself. Acting as an observer or resource person either at the table or in caucuses is insufficient. Ibid at p. 4035. (emphasis added)

The evidence that Cox has, on occasion, made recommendations concerning possible negotiation proposals concerning the Buildings and Grounds Department and has, on occasion, commented upon proposals which affect the Buildings and Grounds Department is insufficient to establish the direct and active participation in the negotiating process required by §201.7(a)(ii) of the Act.

Similarly, the evidence that Cox deals with contract grievances at the first written level and may provide additional information to DiCesare for consideration at the second (Superintendent of Schools) level, fails to meet the criterion of exercising a major role in the administration of agreements, beyond that of a routine or clerical nature. As stated by the Director in City of Binghamton, supra, at p. 4035:

> [An employee] must have the authority to exercise independent judgement in effecting changes in the employer's procedures or methods of operation as necessitated by the implementation of agreements. Participation in the first level of the contract grievance procedures does not meet this criterion. (emphasis added).

There is no evidence that Cox, at the step of the grievance procedure for which he is responsible, has the authority to exercise this type of independent judgment.

Finally, with respect to the criterion of exercising a major

role in personnel administration, Cox's preparation of material and recommendations for hiring and disciplinary actions and for the creation of new positions is an inadequate basis upon which it can be said that he is a managerial, as opposed to a supervisory, employee. Although Cox testified, in general terms, that he has responsibility for personnel administration in his department, the lack of specificity and proofs on this point provides us with no satisfactory basis on which to conclude that he does indeed meet this criterion. See City of Binghamton, supra, at p. 4035, and discussion of Building and Maintenance Superintendent and other positions at pp. 4036-4037.

Having failed to establish, by a preponderance of the evidence, that Cox meets any of the criteria for designation as managerial, the District is not entitled to a determination that Clark should be afforded confidential status.[3/]

[3/]The District argues that even if the Director erred in determining that Cox is a managerial employee, the decision of the Director should be affirmed on the theory that Cox is a confidential employee and Clark should also be so designated since the secretarial position cannot reasonably be insulated from exposure to Cox's confidential work, citing our decision in Washingtonville CSD, 16 PERB ¶3017 (1983). To the extent that Washingtonville may be interpreted as indicating that a confidential designation may rest solely upon a finding that the person to be so designated assists and acts in a confidential capacity to another confidential employee, we decline to follow it. However, implicit in our finding in that case is the conclusion that the person sought to be designated as confidential was claimed to assist and act in a confidential capacity to a managerial employee to whom another employee, already designated, reported. The clear language of §201.7(a) of the Act requires a showing that the person sought to be designated as confidential shall assist and act in a confidential capacity to a managerial employee, not to another confidential employee.

Based upon the foregoing, the decision of the Director, insofar as it grants the District's application as to Gail Clark, Secretary to the Superintendent of Buildings and Grounds, is reversed.

IT IS HEREBY ORDERED that the application, insofar as it relates to said position, is denied.

DATED: September 16, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CONNETQUOT CENTRAL SCHOOL DISTRICT UNIT OF CSEA, LOCAL 870, AFSCME LOCAL 1000, AFL-CIO,

Charging Party,

-and- CASE NO. U-10092

CONNETQUOT CENTRAL SCHOOL DISTRICT,

Respondent.

MARJORIE E. KAROWE, ESQ. (MARILYN S. DYMOND, ESQ., of Counsel) for Charging Party

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER & REICH, ESQS. (JOHN H. GROSS, ESQ., of Counsel) for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Connetquot Central School District Unit of CSEA, Local 870, AFSCME Local 1000, AFL-CIO (CSEA) to the dismissal of a charge against the Connetquot Central School District (District) which alleges that the District violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) in that at a certain meeting, District "officials stated that they were not going to adhere to the contract language because that language provides for a payment that was not contemplated by the parties during

negotiations."[1] The Director of Public Employment Practices and Representation (Director) dismissed the charge as deficient upon the ground that the charge raises nothing more than an alleged breach of a collective bargaining agreement, and is accordingly beyond the jurisdiction of this Board as limited by §205.5(d) of the Act.[2]

In its exceptions, CSEA alleges that the determination of the District not to make certain payments allegedly required by the collective bargaining agreement executed by the parties on or about March 15, 1988, amounts to a repudiation of the agreement, and that the repudiation of an agreement violates the duty to negotiate in good faith. CSEA observes that where a repudiation of an agreement is found, this Board has consistently held it to constitute a violation of §209-a.1(d) of the Act.[3]

At issue before us, then, is whether the Director correctly construed the District's actions, as set forth in the charge, as a statement of intention to breach a collective bargaining agreement or whether, as alleged by CSEA, the District's action constitutes a repudiation of an agreement.

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[1]CSEA does not except to the dismissal of the charge insofar as it alleges a violation of §209-a.1(a) of the Act.

[2]Section 205.5(d) of the Act provides in relevant part as follows: "[T]he Board shall not have authority to enforce an agreement...and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper...practice."

[3]See Copiague UFSD, 13 PERB ¶3081 (1980); Addison CSD, 17 PERB ¶3076 (1984); Honeoye CSD, 18 PERB ¶3085 (1985); City of Buffalo, 19 PERB ¶3023 (1986).

We find that the Director properly dismissed the charge as deficient because what is alleged by CSEA is that the District stated its intention at a meeting on March 18, 1988, not to comply with a specific term of the collective bargaining agreement concededly reached between the parties. What CSEA seeks in the charge before us is a determination that it is entitled to enforcement of the terms of its collective bargaining agreement with the District. Section 205.5(d) of the Act precludes the exercise of jurisdiction by this Board not only in those situations in which a difference of opinion exists between the parties concerning the proper interpretation of their agreement, but also in those situations in which mere enforcement of the agreement is sought. A contractual procedure for enforcement of a term of the collective bargaining agreement exists, and there is no claim that the District denies the existence of an agreement or its contractual obligation under circumstances demonstrating no colorable claim of contractual entitlement. In the absence of such claims, it cannot be said that the charge sets forth a claim of repudiation of an agreement over which this Board would have jurisdiction.[4/]

[4/]For the purpose of our determination, we rely exclusively upon the allegations contained in the charge, together with the written information submitted to the Director's designee by CSEA. In so doing, we place no reliance upon any factual allegations made by the District in support of the Director's decision, after the Director's decision was issued.

The decision of the Director is accordingly affirmed, and IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: September 16, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WAVERLY POLICE ASSOCIATION,

Charging Party,

-and- CASE NO. U-9052

VILLAGE OF WAVERLY,

Respondent.

JOHN B. SCHAMEL, for Charging Party

HOGAN & SARZYNSKI, ESQS. (EDWARD J. SARZYNSKI, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

On November 18, 1986, the Waverly Police Association (Association) filed an improper practice charge alleging, among other things not now before us, a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by the Village of Waverly (Village) by the unilateral adoption, on September 23, 1986, of a Police Officers Manual For Rules and Regulations Departmental Policy (Manual). The Administrative Law Judge (ALJ) found some of the items contained in the Manual to constitute mandatory subjects of bargaining and issued a Decision and Recommended Order accordingly. The Village does not except to any of the ALJ's findings with respect to the Village's duty to negotiate, but excepts to certain portions of the ALJ Decision and Recommended Order which provide for remedial relief. In

particular, the Village excepts to the order to expunge any material in the records of bargaining unit members relating to a failure to comply with portions of the Manual found to be mandatorily negotiable and to the order to post notice of the remedial relief required by the Decision and Recommended Order.

The Village bases its exceptions to the remedial portions of the ALJ decision on a stipulation which was entered into between the parties at a hearing held on January 14, 1988. The stipulation, recited by the ALJ for the record and specifically agreed to by the representatives for each party, provides, in relevant part, as follows:

> The Police Association will file with me, with a copy to Mr. Sarzynski, by February 5, a copy of the Rules and Regulations and a written listing of those items alleged to be "mandatory" by the Association. I will then set a date for the filing of briefs approximately February 19, in which the parties will put their legal arguments with respect to the mandatory nature of those items, and I will then issue a decision regarding which, if any, of the Rules and Regulations deal with mandatory subjects of negotiations. The parties have stipulated that once they receive that decision they will negotiate with respect to those [sic] items found to be [sic] mandatory. And the Village has further stipulated with respect to those items found by PERB to be mandatory, those items will be negotiated and will be rescinded from the Department Rules and Regulations at that time.

The Village asserts that it entered into the foregoing stipulation with the understanding that the ALJ decision would only "provide guidance" or constitute an advisory opinion to the parties about whether items contained in the

Manual are mandatory subjects of negotiations or not. It alleges that had it known that a Decision and Recommended Order would issue, it would have sought to proceed to a hearing instead of entering into a stipulation which limited the record to the at-issue Manual.

The issue before us, then, is whether the ALJ Decision and Recommended Order violates the terms of the parties' stipulation and, if so, whether the remedial relief recommended by the ALJ must be modified to accord with the stipulation. Alternatively, we can decide whether the parties' stipulation should be rescinded on the basis of mutual mistake, and the parties returned to their original positions prior to the January 14, 1988 stipulation.

At the outset, it is noted that a stipulation constitutes an agreement between the parties, not an agreement among the parties and this agency. Second, a stipulation entered into between the parties in an improper practice charge proceeding which would purport to limit PERB's authority to order remedial relief would be of questionable validity, in view of the statutory duty conferred upon PERB to order "such affirmative action as will effectuate the policies of this article . . ." (Section 205.5(d) of the Act).

Finally, even if such a stipulation could be binding upon PERB, the transcript of the hearing and documentary evidence in this case do not support the Village's claim that

an agreement was reached to limit the jurisdiction of the ALJ to a determination of whether certain subjects are mandatory or nonmandatory subjects of bargaining, with no authority to issue the remedial relief normally ordered upon such a determination. The fact that the stipulation speaks to rescission of the portions of the Manual found by PERB to be mandatory, and to negotiation on those subjects, does not compel the conclusion that the parties intended to preclude the ALJ from ordering the complete relief customary in such cases.

Indeed, in its brief to the ALJ, the Association specifically requested that specific remedial relief (including expungement and posting of a notice) issue upon a finding that any or all of the at-issue rules and regulations contained in the Manual are mandatory subjects of bargaining. Furthermore, the Association, in its response to the exceptions, denies that an agreement was reached between the parties which limited the jurisdiction of the ALJ to an advisory opinion only, or which would have limited the remedial relief to be granted in the event of a finding of a violation of the Act. From these documents, it does not appear that the Association agrees with the Village in its understanding of the scope, purpose and meaning of the stipulation. In the absence of evidence of mutual mistake

between the parties, rescission of the stipulation would not be appropriate.[1/]

Further, in the absence of exceptions by the Village to the ALJ's substantive findings concerning the mandatory nature of certain of the items contained in the Manual, we are not offered any grounds for a finding that the outcome of the instant charge would have been different had there been no stipulation between the parties. Accordingly, even accepting the Village's assertion that it would not have entered into the stipulation of January 14, 1988 had it known that a Decision and Recommended Order would issue, no basis is provided to indicate that the outcome would have been different.

We find that the stipulation entered into between the parties and recited by the ALJ is not fairly read to provide for the issuance of guidance or an advisory opinion only, but is framed in terms of the issuance of a "decision", as issued by the ALJ. Quite apart from any inappropriate limitation in a stipulation by the parties, we also find that the stipulation makes no implicit or explicit attempt to preclude the ALJ and/or this Board from ordering the relief contained in the ALJ decision.

[1/] See, generally, 37 NY Jur §5.

Based upon the foregoing, the Decision and Recommended Order of the Administrative Law Judge is affirmed in its entirety.

IT IS THEREFORE ORDERED that the Village of Waverly:

1. Rescind those sections of the Manual which deal with mandatory subjects of negotiation;
2. Expunge any documents in its files relating to the failure of any unit employee to comply with any section of the manual herein found to be a mandatory subject of negotiation;
3. Negotiate in good faith with the Association regarding mandatory subjects of negotiation;
4. Post the attached notice at places normally used to communicate information to unit employees.

DATED: September 16, 1988
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 in the unit represented by the Waverly Police Association that the Village of Waverly will

1. Rescind those sections of the Police Officers Manual for Rules and Regulations Departmental Policy which deal with mandatory subjects of negotiation;

2. Expunge any documents in its files relating to the failure of any unit employee to comply with any section of the Manual found to be a mandatory subject of negotiation;

3. Negotiate in good faith with the Association regarding mandatory subjects of negotiation.

Village of Waverly
.....

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.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EVERETT PEAKE, et al.,

Petitioners,

-and- CASE NO. C-3404

TOWN OF SWEDEN,

Employer,

-and-

S.E.I.U., LOCAL 200-C,

Intervenor.

BOARD DECISION AND ORDER

On May 25, 1988, Everett Peake, et al., filed a timely petition for decertification of S.E.I.U., Local 200-C (intervenor), the current negotiating representative for employees of the Town of Sweden in the following unit:

Included: All full-time working foremen, automotive mechanics, motor equipment operators, truck drivers and laborers.

Excluded: All other employees.

Upon consent of the parties, an on-site ballot election was held on August 22, 1988. The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of

collective negotiations by the intervenor.[1/]

THEREFORE, IT IS ORDERED that the intervenor be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: September 16, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

1/ All eight ballots cast were against representation.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOCES 2, MAINTENANCE ASSOCIATION, NEA/NY,

Petitioner,

- and -

CASE NO. C-3392

BOARD OF COOPERATIVE EDUCATIONAL SERVICES, SECOND SUPERVISORY DISTRICT, MONROE-ORLEANS COUNTIES,

Employer.

BOARD DECISION AND ORDER

On May 4, 1988, the BOCES 2, Maintenance Association, NEA/NY (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the negotiating representative of certain employees of the Board of Cooperative Educational Services, Second Supervisory District, Monroe-Orleans Counties (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

> Included: Maintenance Mechanic I, Maintenance Mechanic II, Maintenance Mechanic III, Custodian, Cleaner, Groundsman.
>
> Excluded: All supervisory employees and all other employees of the employer.

Pursuant to that agreement a secret-ballot election was held, on August 9, 1988, at which 3 ballots were cast in favor of

representation by the petitioner and 8 ballots were case against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: September 16, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member