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State of New York Public Employment Relations Board Decisions from April 26, 1989

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 26, 1989

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MUTUAL AID ASSOCIATION OF THE PAID FIRE
DEPARTMENT OF THE CITY OF YONKERS, NEW
YORK, INC., LOCAL 628, I.A.F.F., AFL-CIO,

Charging Party,

-and-

CASE NO. U-10357

CITY OF YONKERS,

Respondent.

DeSOYE & REICH, ESQS., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exception of the Mutual Aid Association of the Paid Fire Department of the City of Yonkers, New York, Inc., Local 628, I.A.F.F., AFL-CIO (Local 628) to the dismissal, as deficient, of its improper practice charge against the City of Yonkers (City). The charge alleges that the City violated §§209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when, after submitting an amended response to Local 628's amended petition for compulsory interest arbitration, the City reneged upon and withdrew the salary proposal contained in its amended response.

The Director of Public Employment Practices and Representation (Director) dismissed the charge upon the ground that because an interest arbitration panel had been established pursuant to §209.4 of the Act, PERB lacks jurisdiction over actions which might otherwise give rise to improper practice

charges. In so finding, the Director relied upon language contained in this Board's decision in Fairview Professional Firefighters Association, Inc., 13 PERB ¶3102 (1980). That case addressed allegations of improper ex parte communication attempted by a party with the chair of the interest arbitration panel convened by this Board pursuant to §209.4 of the Act. We there held that the allegations of the improper practice charge were appropriately under the exclusive jurisdiction of the arbitration panel, since they related to conduct during the course of the arbitration proceedings.^{1/}

The Fairview decision, supra, is properly construed as holding, not that we lack jurisdiction over improper practice charges arising after a public interest arbitration panel has been convened, but that, as a general proposition, the conduct of parties before the arbitration panel is appropriately subject to the jurisdiction of the arbitration panel pursuant to Rules §205.8. This does not mean that this Board lacks jurisdiction in all respects over improper practice charges during the arbitration process. In fact, PERB's jurisdiction to hear and decide improper practice charges, pursuant to §205.5(d) of the Act, is exclusive and nondelegable. Indeed, in City of

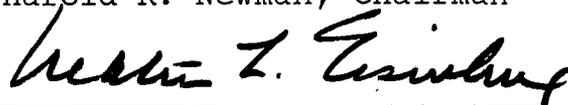
^{1/}Section 205.8 of PERB's Rules of Procedure (Rules) provides: "§205.8 Conduct of the Arbitration Proceeding. The conduct of the arbitration panel [sic] shall be under the exclusive jurisdiction and control of the arbitration panel. The conduct of the arbitration panel shall conform to the applicable laws."

Binghamton, 9 PERB ¶3072 (1976), jurisdiction was found to exist under circumstances substantially similar to the facts in this case. In that case, an employee organization filed a petition for interest arbitration which contained a salary demand lower than that which it had previously presented to the employer and to the fact finder. The City filed an improper practice charge alleging a violation of §209-a.2(b) of the Act, over which we exercised jurisdiction, and as to which we found a violation, based upon the employee organization's failure to communicate concessions to the employer which it was prepared to make, thereby frustrating the possibility of agreement prior to arbitration. Whether, as in City of Binghamton, supra, a party failed to communicate a concession, or whether, as here, a party has failed to communicate withdrawal of an offer, prior to interest arbitration, our jurisdiction to herein decide the case remains the same.

We accordingly reverse the dismissal of the charge and remand it to the Director for further proceedings not inconsistent herewith.

DATED: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CSEA, INC., LOCAL 1000, AFSCME, AFL-CIO,
BROOME COUNTY UNIT 6150,

Charging Party,

-and-

CASE NO. U-9641

COUNTY OF BROOME,

Respondent.

JOHN E. MURRAY, ESQ. (HARVEY D. MERVIS, ESQ., of
Counsel), for Respondent

NANCY HOFFMAN, ESQ. (JOSEPH E. O'DONNELL, ESQ., of
Counsel), for Charging Party

BOARD DECISION AND ORDER

The County of Broome (County) has filed exceptions to an Administrative Law Judge (ALJ) decision which holds that as charged by CSEA, Inc., Local 1000, AFSCME, AFL-CIO, Broome County Unit 6150 (CSEA), the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally eliminated three full-time ward clerk positions and replaced them with six part-time ward clerk positions at the County's Willow Point Nursing Home. The ALJ found, based upon a stipulated record, that when the County eliminated the three full-time ward clerk positions and replaced them with six part-time positions, it equally distributed among the part-time positions the hours of work and work assignments of the employees in the full-time

positions. No change accordingly took place in the hours or level of service provided by ward clerks at the facility.

In its exceptions, the County asserts that the ALJ erred in failing to find that the parties' collective bargaining agreement authorizes the County, or reserves to it the right, to eliminate full-time positions and create part-time positions. The County thus argues that CSEA either negotiated, or waived the right to negotiate, concerning the County's at-issue actions and that in either event, its actions were not taken without negotiation.

The County's second exception relates to the portion of the remedial order issued by the ALJ which directs the payment of back pay to unit employee Evelyn Bezuskho. The County asserts that the record establishes not only that Bezuskho accepted a position as a part-time ward clerk, but that she was offered a full-time position similar to the ward clerk position she had held prior to the elimination of the full-time ward clerk positions by the County, and that an award of back pay for the difference between full-time and part-time ward clerk duties is accordingly inappropriate.

In support of its first exception, the County points to Articles 3 and 18 of its collective bargaining agreement with CSEA. Article 3 (entitled "Reciprocal Rights") contains general statements of management rights, including the following:

CSEA recognizes the right of the Public Employer to retain and reserve unto itself all rights, powers, authority, duties and responsibilities conferred upon and vested in it by the Laws and Constitution of the State of New York and/or the United States of America. The exercise of these rights, powers, authority, duties and responsibilities by the Public Employer and the adoption of such rules, regulations and policies as it may deem necessary will, as they apply to the employees covered by this Agreement and represented by CSEA, be limited only by the specific and express terms of this Agreement. It is understood by the parties hereto that some portions of the County operations are comparatively small and scattered, and that several different kinds of work are performed, in many cases, by the same person; and that reasonable flexibility in interpreting the provisions of this Agreement is applied, so that the Public Employer can meet the requirements of its special operating conditions. It is mutually understood and agreed by both parties to this Agreement that the management of the County operation and the direction of the working forces, including the right to determine standards of service to be offered by various agencies and to regulate work schedules, to hire, suspend, discharge for proper cause, promote, demote and transfer and other rights to relieve employees from duty because of lack of work or for other proper and legitimate reasons is vested and reserved in the Public Employer, subject to the limitations provided in the Law and this Agreement.

The County argues that this statement of management rights entitles it to both eliminate positions and create positions, and that its substitution of six part-time employees for three full-time employees is nothing more than the exercise of each of these rights in sequence.

Article 18 of the Agreement (entitled "Basic Work Week") contains numerous provisions relating to the work schedules of full-time employees. Notwithstanding the County's claim that Article 18 authorizes it to "set working hours", we read Article 18 as establishing certain limits within which the

County may alter working hours. In any event, we find that the asserted right of the County to create part-time positions and to establish working hours for such positions is not dispositive of the matter before us. What is before us is whether the County may, without collective bargaining, convert three full-time positions to six half-time positions at the same level of service and hours of work. We agree with the ALJ's finding that it may not. In so finding, we reject the County's contention that any of the cited articles of the collective bargaining agreement establish that the parties have already engaged in negotiation on this subject, or that CSEA waived its right to negotiate concerning the subject.^{1/} This is so because, although the County may have the right to curtail service and to lay off employees,^{2/} and to make a determination to create part-time positions, it does not follow that it has the right to merely substitute part-time employees for full-time employees where there is no change in the level or nature of services being provided. It is this substitution which is challenged by CSEA and which we find constitutes a mandatory subject of bargaining. There being no claim that the parties specifically agreed that the

^{1/}A waiver of the right to negotiate must be "clear, unmistakable and without ambiguity". CSEA v. Newman, 88 A.D.2d 685, 15 PERB ¶7011, at 7022 (3d Dep't 1982). Thus, general management rights clauses have been found by us not to give rise to a waiver of the right to negotiate. Cf. Sachem CSD, 21 PERB ¶3021 (1988).

^{2/}See, e.g., Lackawanna CSD, 13 PERB ¶3085 (1980).

County may substitute two part-time employees for each full-time employee in the bargaining unit represented by CSEA, or that CSEA waived the right to negotiate concerning such action, the ALJ's finding that the County violated §209-a.1(d) of the Act is affirmed.

In support of its claim that back pay for Evelyn Bezuskho was improperly granted, the County relies primarily upon its answer which provides, in relevant part, as follows:

C. CSEA requested the opportunity to have the incumbents work other half-time positions or transfer to other full-time positions. This request was honored, and would satisfy any negotiation necessary. (The necessity is questionable per points A and B.)

Notwithstanding the foregoing, the parties stipulated as follows:

Of the three full-time ward clerks, one employee was on maternity leave at the time of the change and was offered either another full-time position at the same grade, or a part-time ward clerk position. This employee never returned to work. A second employee, Evelyn Bezuskho accepted a position as a part-time ward clerk. A third employee resigned prior to the change.

The ALJ concluded, from the omission from the parties' stipulation of a statement that Evelyn Bezuskho was, like the employee on maternity leave, offered another full-time position with the County, that no such full-time position was offered and directed back pay for the difference between the part-time position she accepted and the full-time position which was eliminated.

Notwithstanding the County's contention, the record before us fails to establish that Bezuskho was offered and rejected full-time employment substantially equivalent to her full-time ward clerk position, as must be established if back pay liability is to be avoided.^{3/} However, neither the

"Details of Charge" of the improper practice charge form nor Part 204 of our Rules of Procedure requires the parties to factually plead or even to identify the relief alleged to be appropriate in the event of a finding of a violation. Furthermore, during the course of our improper practice proceedings we do not encourage lengthy litigation on questions of damages and mitigation thereof.^{4/} While the stipulation cannot be read as establishing that the County made an offer, it need not be read as establishing that such, in fact, did not occur. Because of this ambiguity and the other aforementioned factors, we deem it appropriate to afford the parties an opportunity to present evidence on the question of entitlement of monetary relief to Bezuskho. We

^{3/} See, e.g., Spencer-Van Etten CSD, 21 PERB ¶3015 (1988); Hilton CSD, 14 PERB ¶3038 (1981).

^{4/} See Uniondale UFSD, 21 PERB ¶3044 (1988). In most cases, it is unnecessary to litigate the nature and scope of relief because the appropriate relief is apparent from the scope of the violation found. In any event, we have historically encouraged litigants to focus on the merits of their cases before us, leaving the issue of remedy to the assigned ALJ, or in those unusual circumstances in which a dispute exists, as here, concerning the appropriate relief, bifurcating the proceedings. In this manner, litigation concerning relief is limited to those cases in which it is, in fact, necessary.

accordingly remand this matter to the assigned ALJ for the limited purpose of determining whether full-time employment was offered to Bezuskho which was substantially equivalent to the full-time ward clerk position she had held prior to her acceptance of a part-time ward clerk position.

With the exception of the remand of this matter for the limited purpose of determining the appropriateness of back pay relief, the decision of the ALJ is affirmed.

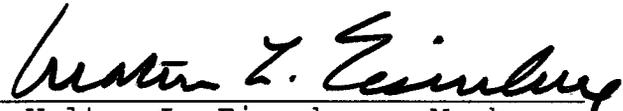
IT IS THEREFORE ORDERED that the County:

1. Restore the three full-time ward clerk positions, as they existed prior to their elimination on June 2, 1987.
2. Make Evelyn Bezuskho whole for any loss of salary or benefits occasioned by the elimination of her full-time position with interest on any sum owing at the maximum legal rate calculated from June 2, 1987, unless she was offered and rejected full-time employment substantially equivalent to her full-time ward clerk position.
3. Offer reinstatement as full-time ward clerks with full benefits to those employees in the positions prior to June 2, 1987.
4. Negotiate in good faith with CSEA with respect to terms and conditions of employment of unit employees.

5. Post notice in the form attached in each location ordinarily used to post notices of interest to unit employees.

DATED: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

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 the County of Broome to:

1. Restore the three full-time ward clerk positions, as they existed prior to their elimination on June 2, 1987.
2. Make Evelyn Bezuskho whole for any loss of salary or benefits occasioned by the elimination of her full-time position, with interest on any sum owing at the maximum legal rate calculated from June 2, 1987, unless she was offered and rejected full-time employment substantially equivalent to her full-time ward clerk position.
3. Offer reinstatement as full-time ward clerks with full benefits to those employees in the positions prior to June 2, 1987.
4. Negotiate in good faith with CSEA with respect to terms and conditions of employment of unit employees.

COUNTY OF BROOME

Dated

By
(Representative) (Title)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN THOMAS MC ANDREW,

Charging Party,

-and-

CASE NOS. U-9913 &
U-10147

PORT JERVIS TEACHERS ASSOCIATION,

Respondent.

JOHN THOMAS MC ANDREW, pro se

ROBERT KLEIN, for Respondent

BOARD DECISION AND ORDER

We have before us exceptions to the dismissal of two improper practice charges filed by John Thomas McAndrew against the Port Jervis Teachers Association (Association). These matters have been consolidated at the request of McAndrew because, although issued by two different Administrative Law Judges (ALJs), the decisions were reached upon the same ground.

Case No. U-9913 alleges a violation of §209-a.2(a) of the Public Employees' Fair Employment Act (Act) by the Association arising out of the alleged refusal of the Association to process, upon the ground of untimeliness, a contract grievance on McAndrew's behalf concerning the denial of 1987 sabbatical leaves by McAndrew's employer, the Port Jervis City School District. The second charge, Case No. U-10147, also alleges a violation of §209-a.2(a) of the Act by the Association based

upon the Association's filing of its own contract grievance, which sought to reverse a paid sabbatical leave for 1988, granted to McAndrew by the employer.

These matters were scheduled for hearing before different ALJs. The record establishes that both ALJs made significant efforts to accommodate the wishes of the parties in connection with the scheduling of hearing days, and that hearing days were ultimately scheduled without objection of the parties. The record further establishes that McAndrew informed both ALJs that his employer had denied him leave with pay to attend the hearings and expressed his intention not to appear at hearings unless and until the issue of his entitlement to leave with pay for such hearing dates had been resolved. Finally, the record establishes that McAndrew chose not to apply to his employer for leave without pay, and that if requested, such leave would have been granted, so that his attendance at the scheduled hearings before the assigned ALJs would not have been on a paid leave basis, but would nevertheless have been authorized and would not have subjected him to disciplinary action for insubordination or absence without authorization. It is undisputed that McAndrew believes the denial of leave with pay by his employer is violative of his rights under the collective bargaining agreement between the Association and the employer and that contractual and possibly other remedies for the denial of leave with pay were available to McAndrew and have been pursued by him.

In separate decisions, dated December 8, 1988 and December 6, 1988 respectively, Case Nos. U-9913 and U-10147 were dismissed, after notice and direction to appear, for McAndrew's continued failure to appear and prosecute his charge pursuant to §204.7(b) of the Rules of Procedure (Rules).^{1/}

McAndrew excepts to the dismissal of his charges, asserting that the employer's denial of leave with pay to attend the hearings scheduled in these matters violated his contractual and other rights, and that his attendance at the hearings would have jeopardized his employment, a risk he should not have been compelled to take. As to the former contention, McAndrew's remedy was to file claims against his employer, which he has done.^{2/} However, even if McAndrew is correct in his contention that the employer's denial of leave with pay was improper, his

^{1/}Section 204.7(b) Rules provides as follows:

The hearing will not be adjourned unless good and sufficient grounds are established by the requesting party, who shall submit to the administrative law judge an original and four copies of the application, on notice to all other parties, setting forth the factual circumstances of the application and the previously ascertained position of the other parties to the application. The failure of a party to appear at the hearing may, in the discretion of the designated administrative law judge, constitute ground for dismissal of the absent party's pleading.

^{2/}McAndrew asserts in his exceptions that the Association has filed a contract grievance on his behalf challenging the employer's failure to grant him leave with pay for his attendance at the hearings in these matters, and he has filed an improper practice charge against his employer in relation to these incidents, which is now pending.

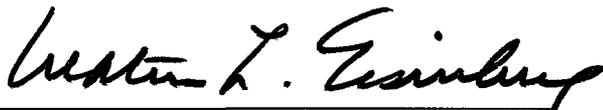
remedy is receipt of back pay for days taken without pay; it is not to fail and refuse to appear at scheduled hearings on dates previously established with the parties.

Notwithstanding McAndrew's second contention in support of his exceptions, the record simply does not support his claim that he was in jeopardy with respect to his employment, or would have been risking disciplinary charges for his attendance at PERB hearings. The sole basis asserted by McAndrew to the assigned ALJs before whom hearings were scheduled for his failure to appear was that he wished to be assured of payment for his absences from work before he would commit himself to attending hearings. The record adequately establishes that McAndrew would have received, if he had requested it, leave without pay, authorizing him to attend the PERB hearings. We concur with the findings of the ALJs that McAndrew's dispute with his employer concerning payment for the days in question does not constitute an adequate justification for his failure to appear and prosecute his charges after he was informed that the consequence of his failure to appear might be dismissal of the charges. Certainly, a different result might have followed if McAndrew's employment would in fact have been jeopardized by his attendance at the hearings. However, such a risk has not been established in this case.

Based upon the foregoing, the dismissals of the charges in Case No. U-9913 and Case No. U-10147 are hereby affirmed, and the charges are dismissed in their entirety.

DATED: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOSEPH S. JUSZCZAK,

Charging Party,

-and-

CASE NO. U-9798

CSEA, INC., LOCAL 1000, AFSCME, AFL-CIO,
LOCAL 815

Respondent.

JOSEPH JUSZCZAK, pro se

NANCY HOFFMAN, ESQ. (JEROME LEFKOWITZ, ESQ., of
Counsel), for Respondent

BOARD DECISION AND ORDER

In a letter dated December 13, 1988 to the Director of Public Employment Practices and Representation (Director), Joseph Juszczak commented upon a decision issued on November 17, 1988 by an Administrative Law Judge (ALJ) which dismissed a charge filed by Juszczak against the CSEA, Inc., Local 1000, AFSCME, AFL-CIO, Local 815 (CSEA) alleging a violation of §209-a.2(a) of the Public Employees' Fair Employment Act (Act). Juszczak alleged in his charge that CSEA breached its duty of fair representation either by failing to challenge his employer's payment, in 1980 and 1981, of 50 cents per hour more than the contractual rate for work performed by a unit employee on a special project and/or for failing to process a grievance filed by him in 1987,

following his discovery of the employer's alleged 1980-81 overpayment. The ALJ dismissed the charge on its merits, finding that the employee receiving the additional 50 cents per hour in 1980-81 did so for the performance of foreman duties on the project, that the arrangement had not been made in secret and that the hearing failed to disclose evidence of improper motivation by CSEA in its failure to process Juszczak's grievance, filed six years later,^{1/} as untimely.^{2/}

CSEA has raised a threshold question before us, in the form of a motion to dismiss, whether Juszczak has filed exceptions to the ALJ decision in compliance with PERB's Rules of Procedure (Rules). Our Rules require that exceptions be filed with the Board within 15 working days after receipt of the ALJ's decision and recommended order, together with proof of service of a copy of such exceptions and brief upon all other parties (Rules §204.10[a]). Juszczak's purported exceptions were filed with the Director, rather than with the Board, were not accompanied by proof of service of a copy upon CSEA, do not appear in fact to have been timely served upon CSEA, do not conform to the

^{1/}The parties' collective bargaining agreement requires the filing of a contract grievance within ten days after the occurrence complained of.

^{2/}In his submission, Juszczak questions the appropriateness of CSEA's failure to prevent or stop the alleged overpayment in 1980-81 when CSEA was aware of it. However, this issue was not before the ALJ and in light of our holding, it is neither necessary nor appropriate for us to address it.

requirements of Rules §204.10(b),^{3/} and appears not to have been filed with the Director within 15 working days following receipt of the ALJ decision. Recognizing that Juszczak's appearance before the ALJ and this Board is pro se and that some latitude in meeting the requirements of our Rules was warranted, he was given the opportunity to establish compliance with the timeliness and service requirements of our Rules and directed, by letter dated December 29, 1988, to provide to the Board, within five working days an affidavit setting forth the date of receipt of the ALJ decision and the date of service of a copy of the letter of exceptions upon CSEA.

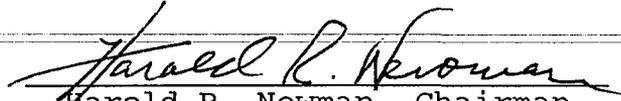
Juszczak has failed to produce the information requested by this Board, and has otherwise failed to respond to CSEA's motion to dismiss. In view of the apparent untimeliness of the exceptions, and their other deficiencies, and in view of Juszczak's failure to even proffer requested evidence

^{3/}Section 204.10(b) of the Rules provides as follows:

The exceptions shall: (1) set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) identify that part of the administrative law judge's decision and recommended order to which objection is made; (3) designate by page citation the portions of the record relied upon; and (4) state the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

sufficient to establish the timeliness of the exceptions, the exceptions are hereby dismissed.^{4/}

DATED: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

^{4/}Section 204.14(b) of the Rules provides that, in the absence of a timely exception, the decision below "will be final".

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN THOMAS McANDREW,

Charging Party,

-and-

CASE NO. U-10494

PORT JERVIS CITY SCHOOL DISTRICT,

Respondent.

JOHN THOMAS McANDREW, pro se

BOARD DECISION AND ORDER

John Thomas McAndrew excepts to the decision of the Director of Public Employment Practices and Representation (Director), dismissing, as deficient, his improper practice charge which alleges that the Port Jervis City School District (District) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) by entering into a "secretly negotiated memorandum" with his bargaining agent, the Port Jervis Teachers Association (PJTA).

In particular, McAndrew alleges that while his contract grievance concerning denial of a summer 1987 sabbatical leave was pending, the District and the PJTA improperly executed a memorandum entitled "Clarification Concerning Sabbatical Leaves". McAndrew objects to the portion of the clarification memorandum which provides as follows:

I trust that these clarifications address and are satisfactory replies to your concerns as expressed in grievances 401, 410 and any similar PJTA grievances. As such, your agreement to withdraw the above arbitration requests is acceptable and is appreciated.

~~McAndrew surmises that his then-pending contract grievance~~
(numbered 416) was deemed settled as a result of execution of this memorandum, and that he was thus deprived of the opportunity to participate in a Stage III Board of Education hearing pursuant to the District's collective bargaining agreement with the PJTA.

In addition to these claims, however, McAndrew asserts that his grievance was dismissed at Stage II as untimely, that he withdrew his request for a Stage III hearing before the Board of Education upon the ground that it had not been timely scheduled, and that the PJTA rejected his request that his grievance be processed to stage IV (arbitration), not because his grievance was deemed settled, but because it was found by the PJTA to be untimely.

The Director's dismissal of the charge is based upon the failure to set forth facts therein which, if proven, would establish a prima facie claim of violation of the Act. In so finding, the Director determined that McAndrew's assertion that the District might apply the clarification memorandum to his case, deeming it settled, was speculative at best, and that no improper motivation, nor any factual support

therefor, was alleged for the District's conduct in entering into the clarification memorandum.

Based upon these factors, together with McAndrew's other assertions that he withdrew his request for a Stage III hearing and that his grievance was denied on the ground of untimeliness rather than settlement, the decision of the Director dismissing the charge should be affirmed. IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CSEA, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

CASE NOS. C-3276,
C-3277, C-3278,
C-3279, C-3280,
C-3281, C-3282,
C-3283, C-3284

-and-

STATE OF NEW YORK - UNIFIED COURT
SYSTEM,

Employer.

NANCY E. HOFFMAN, ESQ. (PAMELA NORRIX-TURNER, ESQ.,
of Counsel), for Petitioner

HOWARD A. RUBENSTEIN, ESQ. (LEONARD R. KERSHAW,
ESQ., of Counsel), for Employer

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the CSEA, Inc., Local 1000, AFSCME, AFL-CIO (Petitioner) and cross-exceptions of the State of New York - Unified Court System (Employer) to a decision of the Director of Public Employment Practices and Representation (Director) which dismissed nine petitions filed by CSEA seeking to add the currently unrepresented title of Family Court Hearing Examiner (Examiner) to existing negotiating units of nonjudicial employees for which it is the authorized bargaining agent.

The Director based his dismissal of the petitions upon an advisory opinion issued by the Employer's Advisory Committee on Judicial Ethics (Opinion 88-44) which determined that Examiners, although nonjudicial employees, are subject to the Code of Judicial Conduct and, in particular, Canon 7 thereof.^{1/}

According to the Opinion, Canon 7 prohibits covered persons

^{1/}Canon 7 of the Code of Judicial Conduct provides, in general, that a judge should refrain from political activity inappropriate to his judicial office, and in this regard prohibits the following:

A. Political Conduct In General

(1) A judge or a candidate for election to a judicial office should not:

- (a) act as a leader or hold any office in a political organization;
- (b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
- (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) The judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, identify himself as a member of a political party, and contribute to a political party or organization

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice. (Code of Judicial Conduct Canon 7).

from joining or participating in^{2/} an organization which engages in political activity, that the petitioner is such an organization, and that Family Court Hearing Examiners are accordingly prohibited by Canon 7 of the Code of Judicial Conduct from joining, or being represented by, the petitioner.

Section 201.7(a) of the Act excludes from the definition of public employee "judges and justices of the unified court system", among others. However, it is conceded by both parties that Family Court Hearing Examiners are nonjudicial employees and do not fall within this statutory exclusion from the Act's coverage. It is also undisputed that at the time the Legislature established the position of Family Court Hearing Examiner by enactment of Chapter 809, §14 of the Laws of 1985, it failed to add the position to the list of positions excluded from the Act's coverage. Furthermore, although the Employer cross-excepts to the Director's finding that no significant difference exists between the terms and conditions of employment of Family Court Hearing Examiners and others in the negotiating units to which the Petitioner seeks their addition,

^{2/}Although Canon 7 is framed in terms of a judge's personal/individual engagement in political activity, the Advisory Committee opinion appears to construe the Canon as prohibiting membership in an organization which engages in political activity, even if the judge does not personally participate in the organization's political activity. It is unclear whether, for example, a judge is prohibited by this interpretation from being a member of a political party, which obviously engages in political activity, although he or she does not personally engage in such activity.

the Employer does not appear to take the position that the differences identified by it between the Examiners and other bargaining unit personnel constitute a basis for the exclusion of Examiners from the units asserted by the Petitioner to be appropriate.^{3/} The employer asserts two significant differences between unit personnel and examiners. First is that Examiners are the only nonjudicial employees having authority to hear and decide matters which are binding (although subject to a family court judge's review) upon litigants (§439(e) Judiciary Law) and second is that Examiners are appointed for three-year terms renewable at the discretion of the Chief Administrative Judge. As the Director found, however, these differences do not outweigh the community of interest and mission which Examiners share with other attorneys, including those having quasi-judicial functions, in the unit. The record does not disclose whether other unit members having quasi-judicial functions, such as Law Clerks to Supreme Court Judges and Law Assistant-Referees, are deemed to be subject to the Code of Judicial Conduct.

Finally, there is no claim before us that Examiners are appropriately excluded from the Act's coverage by virtue of

^{3/}The Employer has provided factual information to the Director concerning the duties of the position and ethics opinions, but has announced that it takes no position with respect to the petitions, although it has cross-expected, as indicated, supra, to certain factual findings made by the Director.

managerial or confidential duties. Accordingly, there being no dispute that Examiners are public employees within the meaning of the Act, their coverage is required unless the opinion of the Advisory Committee on Judicial Ethics compels their exclusion from coverage.

It is our determination that, notwithstanding the Advisory Opinion which finds that Examiners are subject to the requirements of Canon 7 of the Code of Judicial Conduct, and notwithstanding its determination that membership in an employee organization which has a political organization component may violate Canon 7, the Director's decision must be reversed. This is so because the scope of this Board's authority is to administer and enforce the Act. Having found that the Examiners are public employees who are not statutorily excluded from coverage by the Act, we must conclude that they are indeed covered. It is not for us to decide whether these employees should, as a matter of public policy or judicial ethics, be excluded from coverage, but whether the Act extinguishes the collective bargaining rights which they otherwise have thereunder.

The remaining issue before us is whether, by virtue of the Advisory Committee Opinion, exclusion of Examiners from the existing units, otherwise appropriate to them, is

warranted.^{4/} To so find would require us to make a uniting decision, not on the community of interest of titles in the unit, but on the nature and activities of the employee organization now representing the unit. Such a consideration is not included among the criteria contained in §207.1 of the Act for the making of uniting decisions.^{5/}

The Director's decision is accordingly reversed and the

^{4/}The Director made reference to employee preferences with respect to their placement in the units sought by the petitioner. Employee preference is not, however, a factor in the determination whether employees are subject to the Act's coverage and unit placement. Additionally, the Director gave weight to potential professional discipline for examiners in reaching his decision. We note, however, that many bargaining unit members are members of licensed professions who could be targeted for discipline and censure, under various codes of professional responsibility, as well as the Code of Judicial Conduct. Administrative Law Judges and other quasi-judicial officers in bargaining units have, for example, been deemed to be covered, at least in part, by the Code of Judicial Conduct. See, e.g. New York Public Interest Research Group, Inc. v. Williams, 133 Misc. 2d 116, 506 N.Y.S. 2d 509 (Sup. Ct. N.Y. Co. 1986).

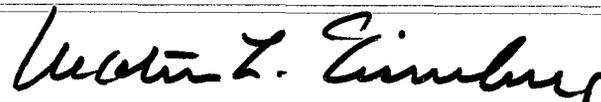
^{5/} Section 207.1 of the Act establishes the standards to be considered in determining appropriate units. These standards relate to the composition of the units and not to the bargaining agents for the units, and are listed as follows:

- §207.1 (a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;
- (b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate; and
- (c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.

petitions are remanded for further proceedings not
inconsistent herewith.

DATED: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3409

COUNTY OF DUTCHESS and DUTCHESS COUNTY
SHERIFF,

Joint Employer,

-and-

NEW YORK STATE FEDERATION OF POLICE, INC.,

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,

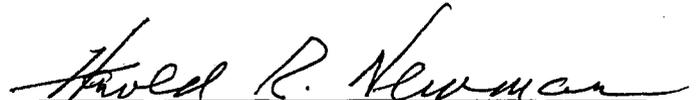
IT IS HEREBY CERTIFIED that the New York State Federation of Police, Inc. has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Accountant (SH), Account Clerk (SH), Chief Court Attendant, Clerk (SH), Correction Corporal, Correction Officer, Correction Officer - Building Maintenance Mechanic, Correction Officer - Building Maintenance Supervisor, Correction Officer - Cook, Correction Officer - Cook Manager, Correction Sergeant, Court Attendant, Deputy Sheriff, ~~Deputy Sheriff Lieutenant, Deputy Sheriff Sergeant~~, Education Program Coordinator, Inmate Activities Coordinator, Principal Account Clerk (SH), Registered Professional Nurse (SH), Senior Account Clerk (SH), Senior Account Clerk-Typist (SH), Senior Building Maintenance Mechanic, Senior Stenographer (SH), Senior Typist (SH), Sheriff Aide, Stenographer (SH), Supervisor of Nurses (SH), Typist (SH).

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Federation of Police, Inc. 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: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HAUPPAUGE SCHOOL UNIT, SUFFOLK EDUCATIONAL
LOCAL 870, CSEA LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3472

HAUPPAUGE UFSD,

Employer,

-and-

UNITED INDUSTRY WORKERS, LOCAL 424,
HAUPPAUGE CUSTODIAL WORKERS,

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 United Industry Workers, Local 424, Hauppauge Custodial Workers 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.

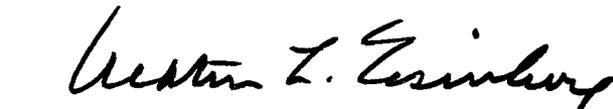
Unit: Included: Custodian, Guards/Driver Messenger, Custodial Worker II, Warehouseworker, Asst. Head Custodian MS, Head Custodian - elementary, grounds/maintenance, maintenance man, Painter, Storekeeper, ~~Head Custodian MS/HS, Lead~~ Maintenance, Head Grounds, Chief Custodian HS, Head Maintenance, Head Driver, Bus Drivers, Cafeteria Monitors, Hall Monitors, Security and Lead Security.

Excluded: All managerial and confidential titles and all other titles.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Industry Workers, Local 424, Hauppauge Custodial Workers. 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: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCKLAND BOCES, NEA,

Petitioner,

-and-

CASE NO. C-3469

BOARD OF COOPERATIVE EDUCATIONAL
SERVICES OF ROCKLAND COUNTY,

Employer,

-and-

BOARD OF COOPERATIVE EDUCATIONAL
SERVICES STAFF ASSOCIATION, NYSUT,

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 Board of Cooperative Educational Services Staff Association, NYSUT 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: Professional employees, Teaching Assistants, Teacher Aides, Senior Occupational Therapists, Occupational Therapists, Senior Physical Therapists, Physical Therapists, Physical Therapist Assistants provided said persons are licensed, Occupational Therapist Assistants.

Excluded: Supervisors and Administrators of the BOCES in teaching and related activities, Adult Education and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Board of Cooperative Educational Services Staff Association, NYSUT. 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: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WHEATLAND-CHILI EDUCATION ASSOCIATION,
NYSUT, AFT,

Petitioner,

-and-

CASE NO. C-3458

WHEATLAND-CHILI CENTRAL SCHOOL DISTRICT,

Employer,

-and-

WHEATLAND-CHILI NON-TEACHING ASSOCIATION,

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 Wheatland-Chili Education Association, NYSUT, AFT 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

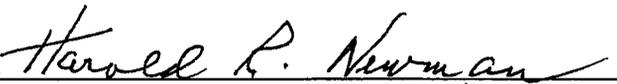
exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Clerical personnel, school nurses, and aides, teacher aides, clerk typists, school aides, telephone operator, payroll clerk and registered nurse, who are employed ten (10) or more months per year.

Excluded: All other employees employed by the District.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Wheatland-Chili Education Association, NYSUT, AFT. 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: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NISSEQUOGUE VILLAGE POLICE ASSOCIATION,
Petitioner,

-and-

CASE NO. C-3444

INCORPORATED VILLAGE OF NISSEQUOGUE,
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 Nissequogue Village Police Association 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 the representative of the employees in such unit who are members^{1/} of the Nissequogue Village Police Association for the purpose of collective negotiations and the settlement of grievances.

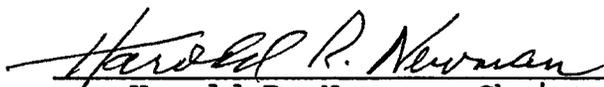
^{1/} Because of the absence of agreement to "exclusivity" by the Incorporated Village of Nissequogue, the right of representation is on a members only basis.

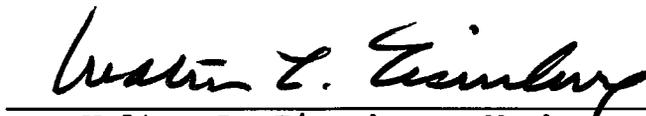
Unit: Included: All full-time police officers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Nissequogue Village Police Association. ~~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: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
STATE OF NEW YORK,

Employer/Petitioner,

-and-

CASE NO. C-2827

SECURITY UNIT EMPLOYEES, COUNCIL 82,
AFSCME, AFL-CIO,

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,

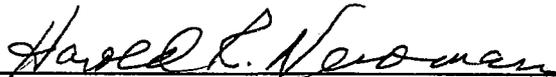
Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Security Unit Employees, Council 82, AFSCME, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer in the Security Supervisors Unit as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Security Unit Employees,

Council 82, AFSCME, 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: April 26, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member