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5-8-1989

## State of New York Public Employment Relations Board Decisions from May 8, 1989

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from May 8, 1989

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

Petition of Uniformed Firefighters  
Association of Greater New York to  
Review Decision No. B-4-89 and  
Decision No. B-11-89 of the Board  
of Collective Bargaining of the  
City of New York.

CASE NO. N-0003

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COHEN, WEISS AND SIMON, ESQS. (MICHAEL E. ABRAM,  
ESQ. AND CHRISTOPHER N. SOURIS, ESQ., of Counsel),  
for Petitioner, Uniformed Firefighters Association  
of Greater New York

FRANCES MILBERG, ESQ., Deputy Director and General  
Counsel, Office of Municipal Labor Relations of the  
City of New York, for Respondent, City of New York

BOARD DECISION AND ACTION

Pursuant to the provisions of §205.5(d) of the Civil  
Service Law (hereinafter "CSL"), the Uniformed Firefighters  
Association of Greater New York (hereinafter "UFA") has filed  
a petition, dated April 14, 1989, requesting this Board to  
review two decisions of the Board of Collective Bargaining of  
the City of New York (hereinafter "BCB") dated, respectively,  
February 24, 1989 and March 30, 1989 (Decision No. B-4-89 and  
Decision No. B-11-89 issued in Docket No. BCB-1117-88  
(I-193-88)). Both decisions dealt with petitions filed by  
UFA and the City of New York seeking a determination as to  
whether certain demands raised during negotiations between  
the parties were mandatory subjects of bargaining within the

meaning of §12-307 (formerly §1173-4.3) of the New York City Collective Bargaining Law. A previous petition, dated March 14, 1989, filed by UFA seeking review of the BCB's February 24, 1989 decision, has been withdrawn by UFA.

~~A threshold jurisdictional question is presented by~~ UFA's petition. The Office of Municipal Labor Relations of the City of New York urges that we do not have subject matter jurisdiction over the petition since the BCB decisions sought to be reviewed were not issued in an improper practice proceeding.

CSL §205.5(d) reads, in pertinent part, as follows:

The board shall exercise exclusive nondelegable jurisdiction of the powers granted to it by this paragraph; provided, however, that this sentence shall not apply to the city of New York. The board of collective bargaining established by section eleven hundred seventy-one of the New York city charter shall establish procedures for the prevention of improper employer and employee organization practices as provided in section 1173-4.2 of the administrative code of the city of New York, provided, however, that a party aggrieved by a final order issued by the board of collective bargaining in an improper practice proceeding may, within ten days after service of the final order, petition the board for review thereof. Within twenty days thereafter, the board, in its discretion, may assert jurisdiction to review such final order.

Clearly, the statute authorizes this Board's review only of BCB decisions issued in improper practice proceedings

authorized by former §1173-4.2 (now §12-306).<sup>1/</sup> The question is presented whether proceedings leading to scope of bargaining determinations rendered by the BCB pursuant to the provisions of former §1173-4.3 of the Administrative Code of the City of New York (hereinafter "Code") may be regarded as improper practice proceedings within the intent of CSL §205.5(d). We conclude that they are not and that CSL §205.5(d) does not authorize review by us of scope of bargaining determinations made by the BCB pursuant to §1173-4.3 of the Code.

Section 1173-4.2 of the Code--the only section specified in CSL §205.5(d)--defines prohibited improper employer and employee organization practices in a manner substantively consistent with CSL §209-a. (Organization of Staff Analysts, 18 PERB ¶3067 (1985).) Section 1173-4.3 of the Code, however, defines the scope of collective bargaining, including a specification of management rights. The Rules of the Office of Collective Bargaining of the City of New York (hereinafter "OCB") deal separately with a petition alleging an improper practice in violation of §1173-4.2 (OCB Rules §7.4) and a petition seeking a determination with regard to a dispute over the scope of collective bargaining under §1173-4.3 (OCB Rules §7.3). The final order in the latter

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<sup>1/</sup>Inasmuch as CSL §205.5(d) refers to the former enumeration, we shall, for the purposes of this decision, use that enumeration.

proceeding is a determination in the nature of a declaratory ruling with no remedial order.<sup>2/</sup> This separation of improper practice and scope of bargaining proceedings existed under the Code prior to the enactment of the review provisions of CSL §205.5(d).<sup>3/</sup> We conclude that specific reference in CSL §205.5(d) to proceedings under §1173-4.2 was deliberate and was not intended to authorize our review of scope of bargaining proceedings under §1173-4.3.

Our decision in Organization of Staff Analysts, supra, does not require a different result. There, we asserted jurisdiction to review a BCB decision issued in an improper practice proceeding and held that the proper standard of review is substantive consistency between BCB and PERB decisions in improper practice cases. It is evident that the Legislature, in amending §205.5(d) to provide for our review only of BCB improper practice decisions, did not mandate substantive consistency between BCB and PERB decisions in scope of bargaining cases. This legislative judgment is consistent with our decision in City of New York (PBA), 9 PERB ¶13031 (1976), rendered prior to the 1978 enactment of the review provisions of CSL §205.5(d), at a time when that statute granted exclusive nondelegable jurisdiction to this Board over improper practices by the City of New York. In

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<sup>2/</sup>It may be noted that we have recently adopted a declaratory ruling procedure for scope of negotiation disputes as an alternative to the improper practice proceeding.

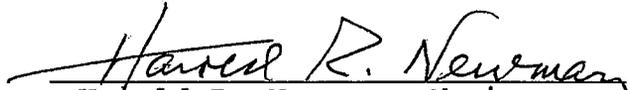
<sup>3/</sup>Laws of 1978, c. 291.

that decision, we held that while we had jurisdiction over an improper practice charge that raised scope of bargaining issues, we would nevertheless accept prior BCB scope of bargaining decisions even if they might differ from our own.

In reaching this conclusion, we relied, among other reasons, upon the unique status granted to OCB under CSL §212, the unique negotiating problems confronting New York City and the expertise of OCB in dealing with such problems. These reasons continue to warrant leaving scope of bargaining determinations to the judgment of the BCB.

ACTION TAKEN: Jurisdiction refused.

DATED: May 8, 1989  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

JOSEPH WERNER,

Charging Party,

-and-

CASE NO. U-9182

MIDDLE COUNTRY TEACHERS ASSOCIATION,  
NYSUT, AFL-CIO,

Respondent.

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JOSEPH WERNER, pro se

JAMES R. SANDNER, ESQ. (J. CHRISTOPHER MEAGHER, ESQ.,  
of Counsel), for Respondent

BOARD DECISION AND ORDER

The Middle Country Teachers Association, NYSUT, AFL-CIO (Association) excepts to two aspects of a remedial order issued by an Administrative Law Judge (ALJ) in connection with a decision on a charge brought by Joseph Werner (Werner) holding that the Association violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it failed to place in escrow (or segregate by some other method, such as a "cushion" payment) funds reasonably in dispute under the Association's 1986-87 agency shop refund procedure. The Association's exceptions do not contest the finding of a violation, but challenge the ALJ's recommended order to refund to Werner his entire agency shop fee for 1986-87 and to mail notice of the ALJ's decision and recommended order to the last known residence of all unit employees.

The Association argues first that the requirement that an escrow account be established for agency fees reasonably in dispute was first established in March 1986 by the U.S. Supreme Court in Chicago Teachers Union v. Hudson, 475 U.S. 292, 19 PERB ¶7502 (1986), after the Association established its 1986-87 agency shop fee refund procedure. However, the Hudson decision predated the Association's implementation of its advance reduction and collection procedures for the 1986-87 fiscal year, and no claim is made that, as required by Hudson, the fees in dispute could not have been placed in escrow when collected. Thus, and consistent with our conclusion in other cases<sup>1/</sup> where an agency fee refund procedure fails to meet the minimum requirements of §208.3(b) of the Act, refund of the agency fees collected for the at-issue fiscal year will be ordered, in keeping with our powers of equity relief under §205.5(d) of the Act. The Association's first exception is denied.

Turning to the second Association exception, it is our determination, consistent with our previous holding in Middle Country Teachers Association (Werner and Verdon), supra, that, as asserted by the Association, the mailing of a notice to all bargaining unit members is not warranted by the circumstances of this case. We there held that a direct mailing of the required

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<sup>1/</sup>See, e.g., UUP (Barry, Eson and Gallup), 20 PERB ¶3039 (1987), conf'd in part and remanded in part, UUP v. Newman \_\_\_\_\_ A.D.2d \_\_\_\_\_, 22 PERB ¶7012 (April 27, 1989); Middle Country Teachers Association (Werner and Verdon), 22 PERB ¶3004 (1989).

notice to all bargaining unit members was not necessary in order to address the problem of agency fee payers not receiving actual notice of this Board's findings because of the likelihood that agency fee payers would not read employee organization bulletin boards, where such notices are normally posted. That problem was addressed there, and is addressed here, by directing the posting of the required notice in the customary manner and by directing the inclusion of the notice prominently in the next available issue of the Association's newspaper, if the Association issues a newspaper directly to all bargaining unit members. If it does not, the Association is directed to both post the required notice and mail it to all agency fee payers identified in the payroll deduction list immediately preceding such mailing.

Except as so modified, the ALJ decision is affirmed.

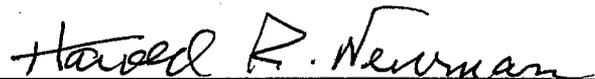
Accordingly, the Association IS HEREBY ORDERED to:

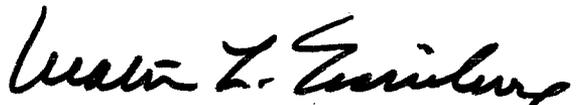
1. Refund forthwith to Werner the total amount of agency fees deducted from his salary for the 1986-87 fiscal year, with interest at the maximum legal rate.
2. Amend its agency fee refund procedure, for 1986-87 and future fiscal years, to provide for placing the amount of agency fees reasonably in dispute in an interest bearing escrow account while challenges are pending, or for the addition of a 10% cushion to the advance reduction payment.
3. Post forthwith the attached notice at all work locations ordinarily used by the Association to

communicate information to bargaining unit employees.

4. Include such notice prominently in the next available issue of an Association newspaper which is distributed directly to all bargaining unit members, or, in the alternative, mail the attached notice to the last known residence address of all agency fee payers in the Association unit, based upon the most recent payroll deduction list prior to such mailing.

DATED: May 8, 1989  
Albany, New York

  
Harold R. Newman, Chairman

  
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 Middle Country Teachers Association, NYSUT, AFL-CIO (Association) that the Association will:

1. Refund forthwith to Joseph Werner the total amount of agency fees deducted from his salary for the 1986-87 fiscal year, with interest at the maximum legal rate.
2. Amend its agency fee refund procedure, for 1986-87 and future fiscal years, to provide for placing the amount of agency fees reasonably in dispute in an interest bearing escrow account while challenges are pending, or for the addition of a 10% cushion to the advance reduction payment.

Middle Country Teachers Association  
NYSUT, AFL-CIO

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.*

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

VILLAGE OF MAMARONECK,

Charging Party,

-and-

CASE NO. U-10138

VILLAGE OF MAMARONECK POLICE  
BENEVOLENT ASSOCIATION,

Respondent.

---

RAINS & POGREBIN, P.C. (TERENCE M. O'NEIL, ESQ.,  
of Counsel), for Charging Party

KRUSE & McNAMARA, ESQS. (RAYMOND G. KRUSE, ESQ.,  
of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of both the Village of Mamaroneck (Village) and the Village of Mamaroneck Police Benevolent Association (PBA) to an Administrative Law Judge (ALJ) decision which found that the PBA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting certain nonmandatory subjects of negotiation to compulsory interest arbitration, and which dismissed the remainder of the Village's charge. The charge filed by the Village alleges, first, that the PBA improperly submitted to the interest arbitration panel a demand that Article XIII(D) of the parties' expired collective bargaining agreement be continued. That Article provides for continuation of the

same medical insurance coverage for retirees and their families as is provided to members of the Village's Police Department and their families. Second, the charge alleges that the PBA has improperly pursued to interest arbitration numerous demands which make reference to or modify sections of the expired collective bargaining agreement, at Articles IX(B), X(C), XI, XIII(D), XIV(E), XV(A) and (B [1,2,3]) and add a new unnumbered article. The Village asserts that each of these PBA proposals is a nonmandatory subject of bargaining.

ALJ DECISION

During the course of the proceeding before the ALJ, the PBA withdrew its demands concerning Articles XI, XIV(E) and the new unnumbered article. The Village, accordingly, withdrew so much of its charge as alleged violations of the Act with respect to those articles, and they are not now before us.

The PBA also withdrew its demands concerning Articles IX(B) and XIII(D). However, the PBA made the assertion during the proceedings before the ALJ that, in its opinion, withdrawal of these demands from interest arbitration would result in their continuing in effect following issuance of the interest arbitration award. The PBA argued that the expired agreement continues in effect except insofar as it is modified by negotiations or by an arbitration award which

resolves those issues submitted by the parties to the arbitration panel. In view of these assertions to the ALJ, the Village refused to withdraw the portions of its charge which allege violations of the Act by the PBA in connection with Articles IX(B) and XIII(D).

Notwithstanding the Village's refusal to withdraw these aspects of its charge, the ALJ dismissed a portion of the charge upon the ground that the PBA no longer insists upon submission of Articles IX(B) and XIII(D) to interest arbitration.

As to Article X(C), which relates to an election by employees of compensatory time off in lieu of overtime compensation, the ALJ found the demand to be nonmandatory.

He did so on the basis of a finding that the Fair Labor Standards Act requires that compensatory time off be utilized within the pay period it was earned and that the election of compensatory time off, unfettered by any management control, could accordingly affect staffing levels and the ability of the Village to deliver its services.

As to Article XV(A), which seeks to set a maximum number of days employees will be required to work during the work year, together with a tour of duty consisting of four days on followed by three days off duty, the ALJ found the demand to be mandatorily negotiable.

Articles XV(B)[1],[2] and [3] require the Village to assign specific officers to fill vacancies caused by the absence of superior officers, and to pay employees so assigned premium pay for out-of-title work. The ALJ found that although the latter aspect of the demand is mandatorily negotiable, the former is not. Treating the demands as a single unitary demand, the ALJ concluded that the existence of nonmandatory material in the demand renders the entire demand a nonmandatory subject of negotiation.

EXCEPTIONS

Articles IX(B) and XIII(D)

The Village contends that, notwithstanding the PBA's withdrawal of these demands from interest arbitration, the PBA is engaged in improper insistence upon negotiation of these articles because it takes the position that the terms of the expired agreement continue in effect unless modified by the parties' agreement or by the interest arbitration award.<sup>1/</sup> At the outset, we note that the Village's charge is limited to the allegation that the PBA "has insisted in interest arbitration" on inclusion of these items in the arbitration award and/or a successor agreement. The ALJ found, however, and we agree, that the PBA is not now

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<sup>1/</sup>The PBA's petition for interest arbitration does not seek as a demand to be decided by the panel the continuation of all terms of the parties' expired agreement not modified by agreement or award.

insisting upon submission of these items to interest arbitration. The PBA also is not insisting upon further negotiation of these items. Rather, its position is that, unless affirmatively negotiated out of the expired agreement, or unless modified by an interest arbitration award as a result of submission of proposed modifications to the panel, the terms of the expired agreement continue in effect by operation of law. It is this legal argument to which the Village objects and concerning which it now seeks a determination.

In the context of this case, the request for a determination concerning the merit of the PBA's legal argument which constitutes its motivation for withdrawal of demands alleged in the Village's charge to be nonmandatory subjects of bargaining is not an appropriate part of the matter before us. Notwithstanding its argument, the record does not establish that the PBA is now pursuing to interest arbitration or insisting upon negotiating nonmandatory subjects of bargaining as the charge alleges. The fact that the PBA presents an argument concerning the effect of a failure to negotiate or modify an expired agreement (primarily relying upon §209-a.1(e) of the Act), does not give rise to a cognizable charge under §209-a.2(b) of the Act. We, accordingly, do not reach the question of the

status of items in an expired agreement which have not been affirmatively renegotiated or modified.

We find, however, that the parties are entitled to a determination concerning whether these two articles constitute mandatory or nonmandatory subjects of bargaining.<sup>2/</sup> PBA's Article IX(B) would provide that "Vacations shall be spread from January 1 through December 31." The Village argues that this demand is nonmandatory because it could be construed to limit the discretion of management to determine its manpower needs and staff deployment, "essentially stating on its face that any police officer may take a vacation at any time" (Village brief, p. 21). We do not construe the demand so broadly, and treat it as a demand that procedures applicable to use of vacation time will apply throughout the calendar year, rather than be limited to a portion of the calendar year. As such, the demand does not constitute an interference with management prerogatives, and is a mandatory subject of bargaining.

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<sup>2/</sup>The Village's exceptions include the claim that an ALJ finding, in dicta, that Article IX(B) is a mandatory subject of bargaining is erroneous, while the PBA's exceptions include the claim that the ALJ finding, in dicta, that Article XIII(D) is a nonmandatory subject of bargaining is erroneous. The fact that the PBA stated, at the pre-hearing conference, and thereafter in writing, its intention to withdraw these two demands from interest arbitration does not serve to moot the issue raised by the Village's charge. See City of Schenectady, 21 PERB ¶3022, at 3045-46 (1988).

Article XIII(D) would require the Village to continue to make payments for medical insurance premiums on behalf of retirees and their families in the same fashion as are made on behalf of bargaining unit members and their families. We have previously held that negotiation of health insurance benefits for persons who are unit members, but who retire during the term of a collective bargaining agreement is a mandatory subject of bargaining.<sup>3/</sup> However, because persons who have already retired are not members of a collective bargaining unit, an employer may not be compelled to engage in negotiations for benefits applicable to them.<sup>4/</sup> This PBA demand is held to be nonmandatory.

Article X(C) of the PBA demand eliminates the requirement of approval of the Chief of Police before an election may be made by a police officer between compensatory time off and overtime compensation for overtime work. The ALJ found that the Fair Labor Standards Act renders the demand nonmandatory, because a requirement contained therein that compensatory time be utilized during the pay period following which it is earned would limit the Village's discretion to maintain staffing levels. As the PBA points out, however, the Fair Labor Standards Act now permits the

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<sup>3/</sup>Sewanaka Central High School District, 17 PERB ¶3049 (1984).

<sup>4/</sup>Troy Uniformed Firefighters Association, Local 2304, IAFF, 10 PERB ¶3015 (1977).

election of compensatory time off and accumulation for police officers of up to 320 hours of actual overtime worked, or 480 hours at the time and one-half rate. (See Fair Labor Standards Act, §7(O); 29 CFR 553.21, 553.22). In view of ~~this authorization for accumulation of compensatory time,~~ the issue of election by a bargaining unit member of compensatory time off in lieu of overtime compensation is a mandatory subject of negotiation.

Article XV(A) provides as follows: "No member of the unit shall be required to work more than 232 days in any calendar year. Those employees assigned to rotating shifts shall work a 4 and 72 schedule." The ALJ found the demand to be mandatory, notwithstanding the claim made by the Village that the limitation of 232 days violates its right to determine its manpower and staff deployment needs. As we have previously held, however, in Town of Blooming Grove, 21 PERB ¶3032, at 3069 (1988), while "the right of the Town to establish its manpower needs by establishing levels of coverage for each day of the week constitutes a management prerogative about which the Town was not obligated to bargain [footnote omitted]", an employer is obligated to negotiate the method by which its manpower needs will be met in terms of tours of duty. (See also City of White Plains, 5 PERB ¶3008 (1982); City of Buffalo, 14 PERB ¶3053 (1981).) The length of the employees' work year and tours of duty are

mandatory subjects of bargaining. The Village's charge is accordingly dismissed with respect to Article XV(A).

Article XV(B) [1, 2, and 3] specifies the subordinate officers who will fill vacancies caused by the absence of superior officers from duty, directs that those vacancies will be filled by such subordinate officers, and establishes the pay rate at which they shall be paid. As the ALJ found, because the demands would compel the Village to fill vacancies on a shift, the demands, which are unitary in nature, are nonmandatory, notwithstanding the existence of some portions which, if separate, would be mandatory. The ALJ decision in connection with Article XV(B) [1, 2 and 3] is accordingly affirmed.

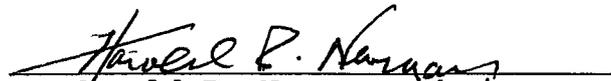
Based upon the foregoing, the ALJ decision is affirmed, except as modified herein.

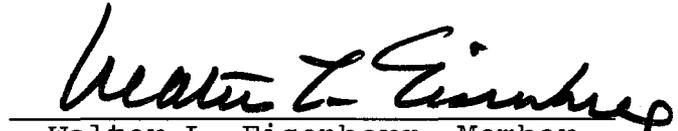
By submitting for interest arbitration demands identified as Article XIII(D) and XV(B) [1, 2 and 3], which are nonmandatory, the PBA has violated §209-a.2(b) of the Act. In all other respects, the Village's charge is dismissed.

IT IS THEREFORE ORDERED that the PBA withdraw those demands found herein to be nonmandatory from its petition for interest arbitration.

IT IS FURTHER ORDERED that the PBA cease and desist from insisting upon further negotiations concerning the demands found herein to be nonmandatory.

DATED: May 8, 1989  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
STEPHEN Nwasokwa,

Charging Party,

-and-

CASE NO. U-9836

NEW YORK CITY TRANSIT AUTHORITY and  
CHAPTER 2 CIVIL SERVICE TECHNICAL GUILD,  
LOCAL 375, AFSCME, AFL-CIO,

Respondents.

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STEPHEN Nwasokwa, pro se

ROBERT PEREZ-WILSON, ESQ. (ROSARIO R. ESPERON, ESQ.,  
of Counsel), for Chapter 2 Civil Service Technical  
Guild, Local 375, AFSCME, AFL-CIO

BOARD DECISION AND ORDER

Stephen Nwasokwa excepts to the dismissal of his improper practice charge against Chapter 2 Civil Service Technical Guild, Local 375, AFSCME, AFL-CIO (Local 375), which alleges a violation of §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by its failure to process a meritorious grievance concerning Nwasokwa's termination from employment by his employer, the New York City Transit Authority (Authority).<sup>1/</sup> In particular, Nwasokwa alleges that Local 375 breached its duty of fair

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<sup>1/</sup>The Administrative Law Judge (ALJ) dismissed the portion of Nwasokwa's charge which alleged violations of the Act by the Authority. That dismissal is not the subject of exceptions, and the Authority is not party to the proceedings before us.

representation when it failed to process a grievance on his behalf or otherwise assist him in connection with his termination from employment. The ALJ found, and the record before us clearly establishes, that Melvin Levy, President of Local 375, investigated the matter of Nwasokwa's termination, and learned that Nwasokwa, a Civil Engineer, had been appointed provisionally and accordingly had no disciplinary hearing rights upon his termination by the Authority.<sup>2/</sup> The ALJ credited Levy's testimony that he informed Nwasokwa of the Authority's right to terminate him at will due to his provisional status, and that there was no further action which Local 375 could take on his behalf in connection with his termination.<sup>3/</sup>

Nwasokwa's charge rests upon his claim that his appointment to a Civil Engineer position with the Authority was not provisional, but was probationary, and that he achieved permanent status upon the expiration of a one-year probationary period, such that he was in fact entitled to the

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<sup>2/</sup>The parties' collective bargaining agreement provides that disciplinary procedures involving bargaining unit employees will be conducted in accordance with §75, Civil Service Law. Section 75 disciplinary procedures are available only to persons having permanent status.

<sup>3/</sup>Nwasokwa also contends that Local 375 improperly failed to assist him in obtaining a cash payment for accumulated vacation and sick leave. However, the record establishes that Local 375 did in fact assist him in obtaining those leave credits to which he was entitled. That aspect of the charge was accordingly properly dismissed by the ALJ for the reasons set forth in her decision. See 22 PERB ¶4501 (1989).

protections of §75 Civil Service Law. Notwithstanding this contention, the record is devoid of evidence to support it. For example, there is no evidence that Nwasokwa took or passed a civil service examination for the position, that he was on an eligible list at the time of his appointment, or that his appointment was from such a list. Indeed, no documentary evidence was produced to support the claim of probationary or permanent status. The ALJ properly found that the investigation conducted by Local 375 into Nwasokwa's termination disclosed that he was not entitled to disciplinary procedures prior to his termination due to his provisional status and that it accordingly properly refused to process a grievance which it concluded would have been nonmeritorious.

It is well settled that an employee organization is under no duty to process all grievances by bargaining unit members, and that it is entitled to a wide range of discretion and reasonableness in determining the merit of grievances which it will pursue.<sup>4/</sup>

The record amply supports the ALJ's determination that Nwasokwa has failed to meet his burden of establishing any breach

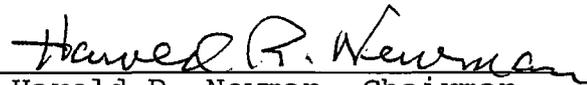
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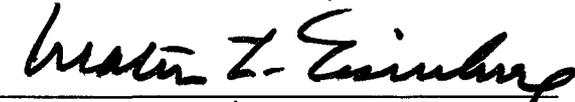
<sup>4/</sup>City Employees Union Local 237, 20 PERB ¶3042 (1987); Nassau Educational Chapter of the Syosset CSD Unit, CSEA, Inc., 11 PERB ¶3010 (1978); Scio-Allentown Teachers Association, 10 PERB ¶3050 (1977).

of the duty of fair representation under §209-a.2(a) of the Act by Local 375, and the dismissal of the charge is, accordingly, affirmed.

IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: May 8, 1989  
Albany, New York

  
\_\_\_\_\_  
Harold R. Newman, Chairman

  
\_\_\_\_\_  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Charging Party,

-against-

CASE NOS. U-9480,  
U-10340, U-10257 &  
U-10468

COUNTY OF NASSAU,

Respondent.

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

BEE, DE ANGELIS and EISMAN, ESQS. (PETER A. BEE, ESQ.,  
of Counsel), for Respondent

INTERIM BOARD DECISION AND ORDER

The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) moves for permission to appeal a decision on motion issued by the Director of Public Employment Practices and Representation (Director), which directed the consolidation of four<sup>1/</sup> improper practice charges (Case Nos. U-9480, U-10257, U-10340 and U-10468) filed by CSEA against the County of Nassau (County). Each of the charges alleges violations of §209-a.1(d) of the Public Employees' Fair Employment Act (Act). In particular, each of the charges alleges that the County entered into subcontracts

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<sup>1/</sup>A fifth charge, U-10133, was not consolidated, and neither party has excepted to that aspect of the Director's decision.

with different subcontractors for the performance of bargaining unit work in various departments and facilities of the County at different points in time and for the performance of different services. The County moved to consolidate these charges upon the grounds of common parties, common legal issues and, in part, common facts, particularly with regard to its affirmative defense of contractual waiver.

Although CSEA concedes that the proof with respect to the issue of contractual waiver will be the same for all cases, other issues, such as the timeliness of the charges, whether the work subcontracted was exclusively unit work, and the facts and circumstances surrounding each subcontract are dissimilar. It asserts in its motion for permission to appeal the Director's decision that review by this Board should be had at this time, and that the Director's decision to consolidate should be reversed.

As a general rule, this Board will not review the interlocutory determinations of the Director or an Administrative Law Judge until such time as all proceedings below have been concluded, and review may be had of the entire matter.<sup>2/</sup> It is only when extraordinary circumstances are present and/or in which severe prejudice would otherwise result if interlocutory review were denied that we will

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<sup>2/</sup> See §204.7(h) of PERB's Rules of Procedure (Rules) with regard to improper practices and §201.9(c)(3) for representation matters.

entertain a request for such review. See County of Rockland, 21 PERB ¶3055 (1988); State of New York (Division of Military and Naval Affairs), 18 PERB ¶3084 (1985); Village of Geneseo, 17 PERB ¶3026 (1984).

In this case, it is apparent that if we do not review the Director's consolidation of these matters at this time, they will proceed to hearing and determination on a consolidated basis. If the Director's decision to consolidate is erroneous, such a finding after the fact would be essentially meaningless. In Business Council of New York State, Inc. v. Cooney, 102 A.D.2d 1001 (3d Dep't 1984), the Appellate Division considered an interlocutory appeal from the denial of a motion to consolidate actions pending in two counties. The Court concluded that the interlocutory decision denying consolidation was appropriate for appellate review and issued a decision on the merits. The same result is appropriate here, because review at the conclusion of the consolidated proceedings would, if reversal occurred, require us to either order no relief or to direct the parties to conduct hearings again on a severed basis. Neither of these alternatives is acceptable.

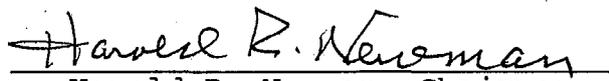
Turning to the merits of the Director's determination, we apply the standard of review enunciated by the Court in Business Council of New York State, Inc. v. Cooney, supra. In that case, the Court stated the principle as follows:

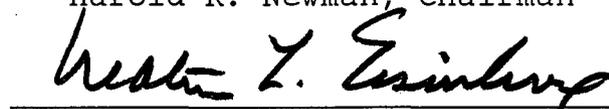
It is a general principle that cases which involve identical parties and issues may be tried together in the sound discretion of the court (CPLR 602, subd[a]; Siegel, N.Y. Prac, §§128-129). The exercise of that discretion will be disturbed only when an appellate court finds that it may result in substantial prejudice to one or more of the parties. ~~The burden is on the party resisting the~~ motion to demonstrate that it would prejudice him (Matter of Vigo S.S. Corp. [Marship Corp. of Monrovia], 26 N.Y.2d 157, cert den sub nom. Frederick Snare Corp. v. Vigo S.S. Corp., 400 U.S. 819). 102 A.D.2d 1001, 1002.

It is our determination that the Director did not abuse his discretion in determining to consolidate the four pending improper practice charges filed by CSEA against the County, and that CSEA has not met its burden of establishing prejudice to it as a result of consolidation.

Based upon the foregoing, the decision of the Director on motion consolidating these matters for hearing is hereby affirmed, and they are remanded to the Director for further proceedings not inconsistent herewith.

DATED: April 26, 1989  
Albany, New York

  
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Harold R. Newman, Chairman

  
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Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

LOCAL 200B, SEIU, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3498

NORTH SYRACUSE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

NORTH SYRACUSE FOOD SERVICE ASSOCIATION,

Intervenor.

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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,

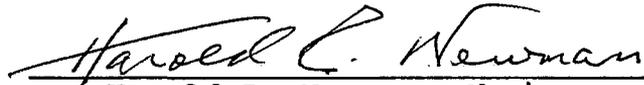
IT IS HEREBY CERTIFIED that Local 200B, SEIU, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

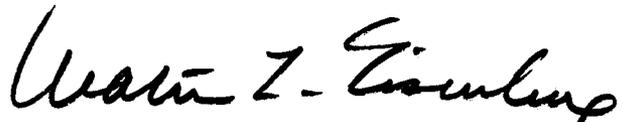
Unit: Included: All full and part time food service workers, including cooks, cook managers, bakers, cashiers, dishwashers, line people, and drivers.

Excluded: Supervisors and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 200B, SEIU, 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: May 8, 1989  
Albany, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member