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State of New York Public Employment Relations Board Decisions from June 7, 1989

New York State Public Employment Relations Board

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Keywords
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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNION LOCAL 65, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

CASE NO. C-3383

-and-

VILLAGE OF DRYDEN,

Employer.

JAMES N. MC CAULEY, for Petitioner

HARRIS, BEACH & WILCOX (PETER J. SPINELLI, ESQ., of Counsel), for Employer

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Village of Dryden (Village) to a decision of the Director of Public Employment Practices and Representation (Director) which, inter alia, found the Village's part-time police officers to be covered employees. The petitioner, Union Local 65, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT) has filed a response in opposition to the Village's exceptions.

The Director rejected the Village's argument that its six part-time police officers were noncovered casuals, finding that the employment characteristics of their year-round positions evidenced regular and continuous employment. The Village argues

that the Director erred in multiple respects in concluding that the part-time officers were covered employees.

Several of the Village's exceptions relate to the Director's use of employment records for the first quarter of 1988-89. The Village argues that only pre-petition information can be used and, in any event, that the information for the first quarter of 1988-89 is not a reliable indication of the hours which might be worked later that year.

Regarding the employment records considered by the Director, evidence which is otherwise relevant to the disposition of a representation question is not to be rejected simply because it is developed after a petition is filed. The Act's application to a group of putative employees is central to the administration of the Act and all evidence which bears upon that issue is necessarily and properly considered.

As to the reliability of the information, no challenge is made to the data itself, only to the conclusions which can be properly drawn therefrom. The evidence before the Director shows that the part-time police officers worked, on monthly average per position, 13.3 hours in 1986-87, 21.3 hours in 1987-88 and 35 hours for the first quarter of 1988-89. Whether this be denominated a "sharply upward trend", as characterized by the Director, is largely immaterial. The statistics themselves, which are not in dispute, establish that the part-time officers, as a group, currently hold regular and continuous employment. Contrary to the Village's allegation, the Director did not make

any predictions regarding the future composition or structure of part-time police work.

In reaching the determination that the part-time officers hold regular and continuous employment, the Director correctly declined to apply the seasonal employment tests.[1/] As the Village itself concedes, the part-time officers are not seasonals. No matter how else one may characterize their employment, the Director properly recognized that the number of hours worked is but one of several factors to be considered in assessing the regularity and continuity of the employees' employment relationship.

The Village's remaining exceptions claim that the Director erred in considering several other factors relevant to a determination regarding the employees' coverage. We find, in agreement with the Director, that the Village does have expectations, however minimal, regarding the acceptable number of hours to be worked by the part-time officers, the performance of work as scheduled, and the steps necessary to ensure that its expectations are satisfied. The record further establishes that the Village has fully integrated its part-time and full-time police force to the point where the part-time officers are primarily responsible for the delivery of the Village's police services.

[1/] State of New York, 5 PERB ¶¶3022 and 3039 (1972).

Based upon the foregoing, the decision of the Director is affirmed, and IT IS HEREBY ORDERED that the most appropriate unit is as follows:

Included: All full-time and part-time police officers

Excluded: Chief of Police and all other employees

IT IS FURTHER ORDERED that an election by secret ballot shall be held under the Director's supervision among the employees in the above unit, unless IBT submits, within 30 days of its receipt of this decision and order, evidence sufficient to satisfy the requirements of §201.9(g)(1) of the Board's Rules of Procedure for certification without an election.

IT IS FURTHER ORDERED that the Village shall submit to the Director and to IBT, within 30 days of receipt of this decision and order, an alphabetized list of all employees within said unit on the payroll date immediately preceding the date of this decision.

DATED: June 7, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

-and- CASE NO. U-9257

STATE OF NEW YORK (DIVISION OF HUMAN RIGHTS),

Respondent.

MARK BERBERIAN, for Charging Party

WALTER J. PELLEGRINI, ESQ. (MARIE D. DUKES, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the State of New York (Division of Human Rights) (Division) to an Administrative Law Judge (ALJ) decision which found that the Division violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it reassigned Rosamond Prosterman to a different unit within the Legal Bureau of the Division in retaliation for her protected activities as an officer and representative of her bargaining agent, the Public Employees Federation, AFL-CIO (PEF).

In summary, the ALJ found that Prosterman, an attorney then having 19 years of service with the Division, was reassigned from the Appeals and Litigation Unit to the

Administrative Hearings Unit of the Legal Bureau on the afternoon of October 14, 1986, effective the following day, by the Division's General Counsel, Margarita Rosa. The ALJ further found that Prosterman had engaged in representation activity on behalf of PEF for some period of time prior to the reassignment, and that in her representative capacity at two particular labor-management meetings (May 13 and October 7, 1986) she expressed heated vocal opposition to certain staffing decisions made by the General Counsel, which, Prosterman contended, inappropriately interfered with the maintenance of career ladders for attorneys in the Division. The ALJ concluded that it was Prosterman's engagement in such protected activity which prompted the General Counsel to select her for reassignment to the Administrative Hearings Unit when a need arose for such reassignment. The ALJ rejected the claim by the Division that the reassignment was based on nothing more than operational need and a determination by Rosa that Prosterman was the best suited attorney in the Bureau to meet the need. In so finding, the ALJ determined that the Administrative Hearings Unit is a less favorable assignment than the Appeals and Litigation Unit, that a pattern of placing newly hired (as compared to experienced) attorneys in the Administrative Hearing Unit had been established, that involuntary reassignment of an

attorney from the Appeals and Litigation Unit to the Administrative Hearings Unit was unprecedented, and that the precipitousness of the reassignment was unjustified by operational need, particularly in light of the subsequent determination to allow Prosterman to continue to work on an Appeals and Litigation Unit matter, to the exclusion of Administrative Hearings, for a period of more than two months after the reassignment took place.

In its exceptions, the Division asserts, among other things, that the ALJ improperly shifted the burden of proof to it when she evidently relied upon the failure by Rosa to disclaim knowledge of the heated remarks made by Prosterman on October 7, 1986, one week prior to the reassignment, about Rosa's staffing/career ladder decisions, as a basis for concluding that Rosa was aware of the remarks made by Prosterman, and that such remarks prompted her to reassign Prosterman to a less favorable assignment. We agree with the Division that the charging party has the burden of establishing, by a preponderance of the evidence, that the individual allegedly discriminated against was engaged in protected activity, that the protected activity was known to the respondent, and that adverse action would not have been taken but for the protected activity. It is not the burden of the respondent to disprove, at the outset, knowledge of

the protected activity or any of the other elements of the charging party's prima facie case. In the instant case, however logical it might be to assume that Rosa was informed of the events of the October 7, 1986 meeting by her colleagues who attended the meeting, her knowledge of Prosterman's statements at the meeting remains an assumption upon which we may not rely.[1/][2/]

Based upon the foregoing, we grant that portion of the Division's exceptions which asserts that the ALJ improperly relied upon a failure to disclaim knowledge of the events of the October 7 meeting by Rosa in support of a determination that Rosa was aware of the events which transpired at that meeting.

Having so found, we must now determine whether, notwithstanding the absence of evidence that Rosa knew about

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[1/]The only testimony on the issue of Rosa's possible knowledge of Prosterman's statements at the October 7 meeting is that the management team, of which Rosa is a member, "sometimes" discussed agenda items in advance of labor management meetings, and the item previously discussed by Prosterman in Rosa's presence at the May 13 meeting was again on the agenda for the October 7 meeting; and that Rosa had discussion with Christine Abate, the Division's Executive Deputy Commissioner, concerning Prosterman's reassignment and Abate was present at the October 7 meeting. There is, however, no evidence that the agenda for the October 7 meeting was discussed, or that Abate and Rosa discussed the events of the October 7 meeting when they discussed Prosterman's reassignment.

[2/]City of Corning, 17 PERB ¶3022 (1984), conf'd, 116 A.D.2d 1042, 19 PERB ¶7004 (4th Dep't 1986).

Prosterman's conduct at the October 7, 1986 labor management committee meeting, the finding that her reassignment of Prosterman on October 14, 1986 was in retaliation for Prosterman's participation in protected activities is supported by the record.[3/] The remaining evidence of protected activity engaged in by Prosterman, which had been established to have been known by Rosa, consists of Prosterman's comments at the May 13, 1986 labor management meeting, her long-standing leadership status within PEF, and one or more conversations between Rosa and Prosterman concerning the attorney career ladder subsequent to the May 13 meeting. There is no independent evidence of anti-union animus, expression of anger toward Prosterman by Rosa for her remarks, or other affirmative evidence that Rosa considered Prosterman's protected activity in selecting her for reassignment. The ALJ did, however, find Rosa's explanation of the need to reassign Prosterman to be unsupported, not credible, and therefore pretextual.

It is our determination that, even without regard to Prosterman's activities of October 7, 1986, the ALJ was

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[3/] The only other activity engaged in by Prosterman in close temporal proximity to the October 14 reassignment is her participation in the handling of a particular grievance in late September. However, the ALJ found, and the finding is not a matter of exceptions before us, that there was no evidence introduced to establish that Rosa was aware of Prosterman's participation in that particular protected activity at the time the reassignment decision was made, and we accordingly do not consider it.

entitled to make credibility determinations that Prosterman was engaged in protected activity known to the Division representative responsible for making the reassignment, that the reassignment was indeed one generally perceived as less advantageous, and that the Division's explanation for selection of Prosterman for reassignment was pretextual. Based upon these determinations, the ALJ concluded that the reassignment would not have taken place but for the protected activity, and was therefore in violation of §§209-a.1(a) and (c) of the Act. We find no basis upon which such credibility determinations should be disturbed and the ALJ decision is accordingly affirmed. We have reviewed the remaining exceptions of the Division and, except to the extent granted herein, they are denied.

IT IS THEREFORE ORDERED that the Division:

1. Cease and desist from interfering with, restraining, coercing or discriminating against unit employees for the exercise of rights protected by the Act;

2. Immediately offer to reassign[4/] Prosterman to the Appeals and Litigation unit; and

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[4/]This order permits Prosterman, at her discretion, to accept or reject the offer.

3. Post notice in the form attached in all locations within the Division at which notices of information to unit employees are customarily posted.

DATED: June 7, 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 of the State of New York (Division of Human Rights) in the unit represented by the Public Employees Federation, AFL-CIO, that the State:

1. Will not interfere with, restrain, coerce or discriminate against unit employees for the exercise of rights protected by the Act; and

2. Will immediately offer Rosamond Posterman a reassignment from the Division's Administrative Hearings Unit to its Appeals and Litigation Unit.

STATE OF NEW YORK (DIVISION OF HUMAN RIGHTS)

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

In the Matter of

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

Charging Party,

-and-

CASE NO. U-9552

BROOKHAVEN-COMSEWOGUE UNION FREE SCHOOL DISTRICT,

Respondent,

-and-

BARBARA D'ADDARIO and MARLENE MERKEL,

Intervenors.

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

BLOCK, AMELKIN & HAMBURGER, ESQS. (RICHARD HAMBURGER, ESQ., of Counsel), for Respondent

PELLETREAU & PELLETREAU, ESQS. (KEVIN A. SEAMAN, ESQ., of Counsel), for Intervenors

BOARD DECISION AND ORDER

The Brookhaven-Comsewogue Union Free School District (District) excepts to an Administrative Law Judge (ALJ) decision which finds, as alleged by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), that the District violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally granted stipends to bargaining unit members and

which directs, among other things, recoupment of stipends already paid to unit members.

Of 15 employees offered stipends by the District, 7 accepted and 8 refused to accept the stipends. Two of the employees (D'Addario and Merkel), who accepted stipends and who are thus affected by the recoupment order, have moved to intervene in the proceeding before us. Their motion for intervention not only asks us to reject the portion of the ALJ's recommended order which directs recoupment, but also seeks reversal of the finding of a violation of the Act by the District upon the ground that the District had awarded stipends in conformity with its past practice and/or that CSEA waived its right to negotiate concerning the payment of stipends to bargaining unit members, so that no unilateral change in terms and conditions of employment was established. The District raised and argued both of these defenses to the charge throughout the proceedings before the ALJ and has raised them before us.

The motion papers and responses thereto adequately establish that the proposed intervenors were apprised of the filing and processing of the instant improper practice charge, and in fact voted at a general membership meeting on a proposal in settlement of the charge, prior to the time that the hearing was concluded on the merits of the charge, August 9, 1988. Therefore, the proposed intervenors had the opportunity to seek intervention in the proceedings before

the ALJ, and elected not to do so. The motion for intervention on the merits of the charge is now untimely.[1/] In any event, it is our determination that the proposed intervenors in the instant charge are not proper parties to the determination of its merits. The charge alleges, in essence, a violation by the District of CSEA's rights of representation and negotiation. Individual bargaining unit members, as we have previously held, do not have standing to either make or defend such a charge.

We do, however, find that limited intervention on the issue of remedy only is appropriate in this case. This is so because, as pointed out by the District and the proposed intervenors, recoupment was not requested by CSEA until its submission of its post-hearing brief, and the proposed intervenors are directly affected by the recommended order of recoupment. Based upon the foregoing, the motion of D'Addario and Merkel to intervene is granted on the issue of remedy only.

In support of its exceptions, the District asserts that CSEA waived its right to negotiate concerning payment of salary stipends by agreeing to contract language which prohibits the diminution of benefits granted by the District. It further contends that a past practice of unilaterally granting stipends to bargaining unit members was established,

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[1/] See §§200.5 and 204.5 of PERB's Rules of Procedure (Rules).

so that no unilateral change in terms and conditions of employment took place. As pointed out by the ALJ, however, waiver of the right to negotiate must be established by "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it."[2/] We agree with the finding of the ALJ that the cited contract language prohibiting diminution of salary and other benefits cannot be fairly read to grant to the District the right to issue salary increases. Furthermore, we find that the ALJ correctly determined that the District's presentation of two instances in which salary stipends were issued by the District fails to establish the existence of a past practice permitting the payment of stipends in the instant case. We so find because the evidence establishes that in both examples presented by the District, the stipends were paid as a result of negotiations with CSEA. The District thus failed to meet its burden of establishing the existence of a past practice of granting unilateral pay increases. The finding of violation of §§209-a.1(a) and (d) of the Act is, accordingly, affirmed.

We now turn to the issue of remedial relief. Having found that the District violated the Act by making payments to certain bargaining unit members in derogation of CSEA's

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[2/] City of New York v. State of New York, 40 N.Y.2d 659, 669, cited in CSEA v. Newman, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982).

bargaining rights, it is appropriate to restore the parties to the positions in which they would have been but for the statutory violation. While we consider recoupment of monies improperly paid to bargaining unit members to be an unusual remedy causing some hardship to affected bargaining unit members, we find that recoupment is appropriate in this case for the following reasons. First, the District was well aware of the opposition of CSEA, based upon a vote taken of its general membership to the payment of stipends to selected employees before it made the decision to issue the stipends. Second, the affected employees were also aware of CSEA's position that the unilateral payment of the stipends would constitute a violation of the Act and would be subject to an improper practice charge, before they accepted the stipends. Indeed, 8 of the 15 employees offered stipends over CSEA's opposition declined to accept them, apparently for that reason. The employees accepting the stipends accordingly did so with the knowledge that CSEA believed them to be improper, and was considering legal action to oppose them. Third, an order directing the District to pay a stipend to all bargaining unit members equal to the stipends paid to certain members would be inappropriate in this case, given the large number of employees and the size of the stipends (which ranged from $1,500 to $3,000 each). Finally, the District's authorization and payment of the stipends directly in the face of notification by CSEA of its decision

not to consent to the stipends as proposed, compels us to conclude that allowing those unit members who elected to receive the stipends to keep them, over CSEA's request for recoupment,[3/] would so seriously undermine its bargaining position as to negate the effect of our finding that a violation of the Act occurred. Failure to direct recoupment under these circumstances would also seriously and adversely affect those employees who were offered stipends and declined them in what may be inferred to be a gesture of CSEA support.

Based upon the foregoing, the ALJ decision is affirmed in its entirety. IT IS THEREFORE ORDERED that the District:

1. Cease and desist from unilaterally granting salary stipends to employees within the CSEA bargaining unit;
2. Cease and desist from interfering with its employees in the exercise of their rights guaranteed by Article 14 of the Act;

[3/]On due process grounds, the District and intervenors assert that CSEA's failure to request recoupment until submission of its post-hearing brief should bar it from doing so now. The ALJ's decision and recommended order (Rules, §204.9) to which the District and intervenors have had an opportunity to respond and whose responses we have considered before accepting the ALJ's recommendation does not limit the Board or preclude it from taking "such affirmative action as will effectuate the policies of [the Act]" (Act, §205.5(d), Rules §204.14(c)). Due process requirements have been met.

3. Negotiate in good faith with CSEA regarding the terms and conditions of employment of unit employees;

4. Return to the status quo ante which contemplates the District's recoupment of all salary stipends it was found to have improperly granted; recoupment shall be accomplished by deducting not more than 10% of the affected employees' wages per pay period, unless an alternate schedule of repayment is agreed to by CSEA; and

5. Post the attached notice in all locations normally used to communicate with employees in CSEA's bargaining unit.

DATED: June 7, 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 Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, that the Brookhaven-Comsewogue Union Free School District:

1. Will not unilaterally grant salary stipends to employees within the CSEA bargaining unit;

2. Will not interfere with its employees in the exercise of their rights guaranteed by Article 14 of the Public Employees' Fair Employment Act;

3. Will negotiate in good faith with CSEA regarding the terms and conditions of employment of unit employees; and

4. Will return to the status quo ante which contemplates the District's recoupment of all salary stipends it was found to have improperly granted; recoupment shall be accomplished by deducting not more than 10% of the affected employees' wages per pay period, unless an alternate schedule of repayment is agreed to by CSEA.

BROOKHAVEN-COMSEWOGUE UNION FREE SCHOOL DISTRICT

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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

In the Matter of

ARLINGTON HOURLY TEACHING ASSISTANT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3513

ARLINGTON CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that the Arlington Hourly Teaching Assistant 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 their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All elementary and secondary hourly teaching assistants.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Arlington Hourly Teaching Assistant 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: June 7, 1989
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member