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State of New York Public Employment Relations Board Decisions from October 31, 1989

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 31, 1989

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ST. LAWRENCE COUNTY UNIT #8400 OF THE
ST. LAWRENCE COUNTY LOCAL #845 OF THE
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-10187

COUNTY OF ST. LAWRENCE,

Respondent.

RICHARD WENDLING, ESQ., for Charging Party

CONBOY, MC KAY, BACHMAN & KENDALL, ESQS.

(WILLIAM MAGINN, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

The St. Lawrence County Unit #8400 of the St. Lawrence County Local #845 of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) excepts to the dismissal of its charge against the County of St. Lawrence (County), which alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, on March 31, 1988, it refused to execute a new collective bargaining agreement which did not contain a modification in the method of calculating the hourly rate of pay for 35-hour unit members, an item to which CSEA alleges the parties had not agreed in negotiations.

FACTS

The unit which CSEA represents includes both 35-hour per week employees and 40-hour per week employees. Under the terms of the expired agreement between the County and CSEA, 35-hour per week employees in fact worked "summer hours", consisting of 30 hours per week during the months of July and August. Under the expired agreement, the hourly rate for overtime compensation purposes for such employees and the hourly rate for part-time employees was calculated by dividing 1,776 hours into the annual salary of 35-hour per week employees. Apparently, the 1,776 divisor was arrived at based on an estimate of the total number of hours per year worked by 35-hour per week employees, which took into account the summer hours. In contrast, under the expired agreement, the hourly rate for 40-hour per week employees was calculated on the basis of 2,080 hours divided into annual salary for the purpose of computing overtime compensation and hourly rate for part-time employees performing the work of 40-hour per week employees.

During the course of negotiations for a successor collective bargaining agreement, the County sought the elimination of summer hours for 35-hour per week employees. In the early stages of bargaining on the issue, the County identified it as including "all related contractual changes." However, the County subsequently identified three contract

articles, in addition to the article granting summer hours, which would be affected by the elimination of summer hours. These articles related to changes in the rate of accrual of personal, vacation and sick leave which would take into account the increase in work week during the months of July and August. Article XVIII, Section 6 of the expired agreement, which establishes the method of computation of the hourly rate for both 40-hour per week employees and 35-hour per week employees, was not listed by the County as a section requiring change by virtue of the elimination of summer hours.

Notwithstanding its previous failure to identify Article XVIII, Section 6 as a section requiring modification by virtue of elimination of summer hours, the County presented to CSEA a proposed final agreement, following ratification of the tentative agreement by both parties, which eliminated the 30-hour week summer hours and established a year-round 35-hour work week, and changed the divisor applicable to 35-hour per week employees for determination of an hourly rate of pay from 1,776 to 1,820. The County asserts that this change is merely the result of a mathematical computation reflecting the increase in the length of the work year for 35-hour per week employees and is encompassed within the demand by the County for the elimination of summer hours "and all related contractual changes."

DISCUSSION

The assigned Administrative Law Judge (ALJ) determined, after hearing, that the change made by the County in the proposed collective bargaining agreement submitted to CSEA for execution reflecting an increase in the hourly divisor for determination of hourly rates of pay of 35-hour per week employees was merely a mathematical computation logically necessitated by the parties' agreement to increase the work year of such employees from approximately 1,776 to 1,820 hours resulting from the elimination of July and August summer hours. He further determined that failure to increase the hourly divisor would produce anomalous results, such as higher pay for part-time employees for the same number of hours of work as full-time employees, and a higher rate of overtime compensation for 35-hour per week employees than for otherwise equally paid 40-hour per week employees. Finding that maintenance of the 1,776 divisor would have required affirmative negotiations to produce such an unusual result, the ALJ concluded that the change made by the County in the proposed collective bargaining agreement from 1,776 to 1,820 was merely a technical rather than a substantive change not requiring specific negotiations. He accordingly dismissed CSEA's charge against the County.

In its exceptions, CSEA asserts, among other things, that the ALJ erroneously found that in exchange for the

elimination of summer hours, the 35-hour per week employees achieved an 11% salary increase during the first year of the tentative agreement, 6% more than all other unit employees, and that this additional salary, together with corrections in the rate of accrual of personal, vacation and sick leave during the months of July and August to reflect the increased work time constituted the quid pro pro for elimination of summer hours. CSEA alleges, and we agree, that the record does not support a finding that the 11% salary increase was limited to 35-hour per week employees, but was in fact an across-the-board salary increase for all unit members, although treated as compensation to the unit for loss by 35-hour employees of summer hours.^{1/}

While this finding of fact does tend to diminish the weight of the argument that 35-hour per week employees achieved special salary gains in exchange for loss of summer hours, and that maintenance of the 1,776 hour divisor was therefore neither intended nor expected by the parties to constitute an additional benefit in exchange for loss of summer hours, the ALJ's dismissal of the charge does not turn upon the gain of special salary benefits by 35-hour per week employees. In fact, the ALJ decision rests upon a finding

^{1/}Both parties referred to the first year 11% salary increase (in comparison to much smaller increases in the second and third years of the agreement) as the "summer hours buy back", although it applied to unit members who did not have or give up summer hours.

that "the absence of negotiations to maintain [the 1,776] divisor, where the condition upon which it was predicated has been removed in negotiations, establishes the parties' understanding that the method for calculating the divisor for all salaried employees would be based upon the same factors; the actual number of hours worked per week and the number of weeks in their work year (52)."^{2/} CSEA asserts that this finding is unsupported by the record, because there is no evidence that the parties affirmatively understood or agreed that the divisor would be changed to reflect the actual number of hours worked per year, and that the determination that the absence of negotiations indicates an intent to make an affirmative change is contrary to the operating principle that a party seeking to make a change has an affirmative responsibility to place the issue on the bargaining table. We find that the ALJ's dismissal of the charge should be affirmed, although on somewhat different grounds than those set forth in his decision.

We find that uncontroverted testimony was received, without objection, which establishes that the 1,776 hour divisor was arrived at by the parties under prior collective bargaining agreements based upon a "best estimate" of the number of hours per year actually worked by 35-hour per week employees, in the same fashion that the hourly divisor of

^{2/}See Saint Lawrence County, 22 PERB ¶4560, at 4652 (1989).

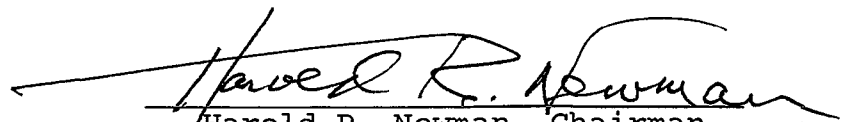
2,080 was arrived at for 40-hour per week employees. The manner in which both of these numbers were arrived at and agreed upon by the parties was by calculation of the actual number of hours worked during each week of the calendar year. The figures are "best estimates", because of the variation in any given calendar year in the actual number of work days encompassed by the calendar year and encompassed by the months of July and August. In any event, this negotiating history establishes that the hourly divisor for computation of overtime compensation and hourly paid employees was intended to, and was in fact, exclusively based upon actual numbers of hours worked per year. This fact, in conjunction with the affirmative agreement to modify the length of the work year of 35-hour per week employees, would render retention of the 1,776 hour divisor inconsistent with a negotiated change in length of work year and therefore subject to correction in the final agreement without additional negotiation. Yonkers Federation of Teachers, Local 860, AFT, AFL-CIO, 8 PERB ¶3020 (1975). Furthermore, as we held in Deer Park Union Free School District, 13 PERB ¶3048, at 3079 (1980): "We look to the intent of the parties, as determined by their established custom or by the reasonable implications of the language they have used to memorialize the agreement they reached in negotiations" to determine whether the collective bargaining agreement

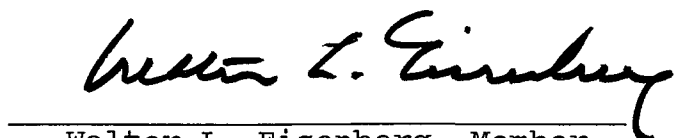
proffered for execution is in accordance with the terms of a memorandum of agreement reached by the parties.

Applying these principles to the instant case, we find that, given the negotiating genesis of the hourly divisor, ~~correction of the divisor based upon the increase in the work~~ year for 35-hour per week employees is nothing more than a technical correction which, if not made, would render separate sections of the collective bargaining agreement inconsistent with each other. CSEA's complaint that the County should have insured that it fully and correctly identified each article to be affected by the negotiated change is well founded and warrants correction as a matter of sound labor negotiation practice. However, the County's failure to do so in this particular case neither binds it to an agreement which contains the inconsistency found, nor does it amount to a violation of §209-a.1(d) of the Act.

IT IS THEREFORE ORDERED that the charge be, and it hereby is, dismissed.

DATED: October 31, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MADISON CENTRAL SCHOOL NON-INSTRUCTIONAL
EMPLOYEES' ASSOCIATION, NYSUT, AFT, #4512,

Charging Party,

-and-

CASE NO. U-10607

MADISON CENTRAL SCHOOL DISTRICT,

Respondent.

HELEN W. BEALE, for Charging Party

MELINDA BURDICK, for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Madison Central School District (District) to an Administrative Law Judge (ALJ) decision which finds it to have violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by insisting, beyond fact-finding, upon the continuation in a successor agreement of a nonmandatory subject of negotiation contained in the expired agreement between the District and the Madison Central School Non-Instructional Employees' Association, NYSUT, AFT, #4512 (Association).

In particular, the ALJ found that Article II, entitled "Negotiation Procedures," and which was contained in the expired collective bargaining agreement, is a nonmandatory subject of negotiation because it seeks to determine how the parties will negotiate. Citing our decisions in Town of Shelter Island,

12 PERB ¶3112 (1979); CSEA, Local 832, 15 PERB ¶3101 (1982), and County of Saratoga and Saratoga County Sheriff, 17 PERB ¶3033, conf'd sub nom. County of Saratoga and Saratoga County Sheriff v. Newman, 124 Misc.2d 626, 17 PERB ¶7010 (Sup. Ct., Sara. Co., 1982), the ALJ found that insistence on demands which seek to fix the manner in which the parties will negotiate violates the duty to negotiate in good faith, because these matters are preliminary and subordinate to the substantive negotiations between the parties.

The ALJ further found that insistence upon continuation of nonmandatory language in an expired agreement may give rise to a claim of violation of the Act in the same manner as a demand which proposes substantive changes or deletions. This finding is in accord with our decision in Dobbs Ferry Police Association, Inc., 22 PERB ¶3039 (1989) (appeal pending).

The District's first exception alleges, in essence, that the Association is barred by the principle of equitable estoppel from asserting a violation of the Act because it was the Association which first sought to negotiate a modification of Article II and the District merely responded to the proposed modification by seeking continuation of the expired language. Second, the District excepts to the ALJ finding of fact that it improperly insisted upon continuing the prior contract language, asserting that such a finding is unsupported by the record.

As to the first exception, it is our determination that the


question whether the Association violated §209-a.2(b) of the Act is not before us, and was not the subject of an improper practice charge by the District. Accordingly, we make no finding concerning whether the Association first or also violated the Act. Even if the District's allegation of violation by the Association were properly before us and proven, however, it would not constitute a defense to the charge before us. See Schenectady Patrolmen's Benevolent Association, 21 PERB ¶3022 (1988). We there stated, at 3045: "Commissions of improper practices by both sides (assuming that they took place) do not serve to cancel each other out." The District's first exception is accordingly denied.

As to the District's second exception, it is our determination that the ALJ's finding that the District sought continuation of Article II, "Negotiation Procedures," of the expired agreement is supported by the record. Although the District made no express demand relating to Article II, it did demand, in conjunction with a set of post fact-finding proposals, that "all other items remain status quo except those previously tentatively agreed to." The District asserts before us that this language was intended to relate exclusively to the contents of the fact finder's report. However, this assertion is not supported by evidence contained in the record and the ALJ reasonably construed the language of the District proposal as being framed in terms of amendments to the expired collective bargaining agreement.

Based upon the foregoing, it is our determination that the record adequately supports the ALJ's finding that the District sought to negotiate the continuation of Article II (Negotiation Procedures) of the expired agreement, a nonmandatory item, in a successor agreement beyond factfinding. The finding of violation of §209-a.1(d) of the Act is accordingly affirmed.

IT IS THEREFORE ORDERED that the Madison Central School District cease and desist from refusing to negotiate in good faith by demanding the continuation of Article II in a successor agreement.

DATED: October 31, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY ASSOCIATION OF PATROL OFFICERS,

Petitioner,

- and -

CASE NO. C-3402

COUNTY OF ERIE AND ERIE COUNTY SHERIFF,

Joint Employer,

- and -

TEAMSTERS, LOCAL 264,

Intervenor.

WYSSLING, SCHWAN & MONTGOMERY, ESQS. (SCOTT D. HARRIS,
ESQ., of Counsel), for Petitioner

MICHAEL A. CONNORS, ESQ. and DONALD EHINGER, Director,
Labor Relations, for Joint Employer

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES,
ESQS. (RONALD L. JAROS, ESQ., of Counsel), for
Intervenor

BOARD DECISION AND ORDER

The County Association of Patrol Officers (CAPO) excepts to the dismissal by the Director of Public Employment Practices and Representation (Director) of its petition which seeks to fragment an existing unit of all employees of the County of Erie and Erie County Sheriff (Joint Employer) now represented by Teamsters, Local 264 (Teamsters). In particular, CAPO seeks to separately represent a unit comprised of criminal deputies and ranking officers assigned

to road patrol and investigative services who are police officers, by removing them from a unit which includes civilian employees and peace officers. The peace officers are designated as deputy officers providing routine security and guard services at the County's holding center, in the County and State courts, at the Erie County Medical Center, and, in part, during the transport of prisoners.

The Director, in keeping with the standards enunciated by this Board for review of fragmentation petitions, conducted an investigation into the question whether a compelling need exists for fragmentation, as established by evidence of a conflict of interest between the employees within the petitioned-for unit and other unit members or inadequate representation of the petitioned-for unit members.^{1/}

Applying these standards to the facts in the instant case, the Director concluded that neither a conflict of interest nor inadequate representation had been sufficiently established to warrant fragmentation of the police officers from the remainder of the unit.

Among its exceptions, CAPO argues that because road patrol deputies are police officers, the provisions of §209.4 of the Public Employees' Fair Employment Act (Act), which

^{1/}See, e.g., State of New York (Long Island Park, Recreation and Historical Preservation Commission), 22 PERB ¶3043 (1989); Chautauqua County BOCES, 15 PERB ¶3126 (1982).

entitles police officers who are members of an organized police department or police force to impasse procedures culminating in interest arbitration, should, notwithstanding Board precedent, apply to them and warrant their fragmentation from the overall unit.

As we held in Erie County Sheriff and Erie County, 7 PERB ¶3057 (1974), the fact that certain deputy sheriffs are police officers does not mean that a sheriff's department is a police force or a police department within the meaning of §209.4 of the Act. This finding was supported by interpretations of other statutes which distinguish between police officers employed by a sheriff and police officers employed by organized police forces or departments. (See discussion at 3094-95.) It is now clearly established that deputy sheriffs are not deemed to be covered by the impasse procedures contained in §209.4 of the Act. Whether, based upon the many reasons presented by CAPO, deputy sheriffs who are police officers, or deputy sheriffs in general, should be included in the §209.4 impasse procedures, is a matter for the State Legislature to decide. Certainly, as we found in Village of Skaneateles, 16 PERB ¶3070 (1983), entitlement of police officers to §209.4 impasse procedures is and would be a significant and perhaps compelling basis upon which fragmentation would be warranted. However, such a

set of circumstances is not now before us because of the inapplicability of §209.4 of the Act to deputy sheriffs, whether police officers or not.

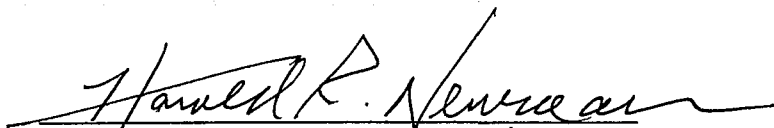
The remaining questions to be decided are whether the fact that road patrol deputies and investigators are police officers so distinguishes and separates them from others in the unit also having law enforcement responsibilities (e.g., court and holding center deputies) as to give rise to an actual conflict of interest warranting fragmentation,^{2/} or whether inadequate representation has been established. We have carefully reviewed the exceptions filed by CAPO with respect to these two issues and are nevertheless persuaded that the Director's factual findings are supported by the record. For the reasons set forth in the Director's decision, we find that the record does not support a finding of the existence of an actual conflict of interest, nor does it establish inadequate representation of these employees by the incumbent employee organization. Fragmentation must, accordingly, be denied.

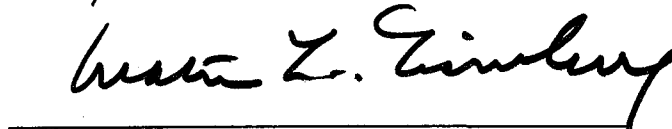
^{2/}In County of Warren, 21 PERB ¶3037, at 3081 (1988), we held:

We have previously considered and rejected the claim that there is an inherent conflict of interest between the responsibilities of road patrol deputies and correction officers in a sheriff's department warranting fragmentation of an overall unit of sheriff's department employees.

IT IS THEREFORE ORDERED that the petition be, and it hereby is, dismissed.

DATED: October 31, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
UNITED FEDERATION OF POLICE OFFICERS, INC.,
Petitioner,

-and-

CASE NO. C-3403

VILLAGE OF NORTH TARRYTOWN,
Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Federation of Police Officers, 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: All full-time and regular part-time employees in the following titles: Intermediate Account Clerk, Intermediate Typist, General Foreman, Superintendent of Recreation and Parks, Sewer Maintenance Foreman and Building Inspector.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Police Officers, 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: October 31, 1989
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PATRICIA SUHR and MARJORIE TAYLOR,

Petitioners,

-and-

CASE NO. C-3557

WAYNE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**WAYNE CENTRAL UNIT, WAYNE COUNTY
LOCAL 859, CSEA, AFSCME, LOCAL 1000,
AFL-CIO,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding^{1/} 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 Wayne Central Unit, Wayne County Local 859, CSEA, AFSCME Local 1000, 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

^{1/} The proceeding was instituted by a petition seeking decertification of the intervenor as negotiating agent.

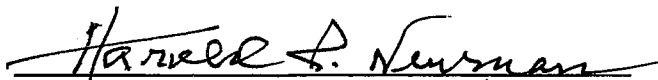
parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

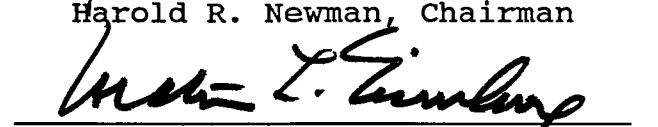
Unit: Included: All regularly scheduled full- and part-time employees in the following titles: Senior Stenographer, Senior Typist, Senior Account Clerk, Account Clerk, Library Clerk, Typist, Switchboard Receptionist, Clerk, Teacher Aide, Senior Custodian, Stores Clerk, Custodian, Cleaner, Courier, Groundskeeper, Head Mechanic, Mechanic, Bus Driver, Transportation Clerk, Food Service Helper, Registered Nurse, Cook Manager, Noon Monitor.

Excluded: All management and confidential employees and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Wayne Central Unit, Wayne County Local 859, CSEA, AFSCME Local 1000, 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: October 31, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member