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State of New York Public Employment Relations Board Decisions from November 21, 1989

New York State Public Employment Relations Board

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Keywords

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHAUTAUQUA COUNTY SHERIFF'S EMPLOYEES' ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-10715

COUNTY OF CHAUTAUQUA,

Respondent.

SOTIR & GOLDMAN, ESQS. (RICHARD L. SOTIR, JR. ESQ., of Counsel), for Charging Party

CHAUTAUQUA COUNTY DEPARTMENT OF LAW (MICHAEL J. SULLIVAN, ESQ., DEPUTY COUNTY ATTORNEY, of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the County of Chautauqua (County) to an Administrative Law Judge (ALJ) decision which held that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented a directive that a contractually authorized meal allowance would not be reimbursed without the submission of a receipt by employees represented by the Chautauqua County Sheriff's Employees' Association, Inc. (Association).

In its answer to the charge, and in its exceptions before us, the County asserts that the requirement of a receipt is authorized by its collective bargaining agreement with the Association or, alternatively, that the receipt requirement is

simply a substitution of one manner of employee participation for another, and that, accordingly, no change in terms and conditions of employment took place upon implementation of the receipt requirement.

The County cites §§7.02(a) and (b) and 7.05 of the parties' collective bargaining agreement in support of its claim that requirement of a receipt is contractually authorized.[1/] Taking

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[1/] These sections provide as follows:

Section 7.02 Meals

(a) Field employees, subject to other provisions herein, shall be reimbursed up to a maximum of three dollars and fifty cents ($3.50) for meal expense.

(b) The reimbursement allowance for any conference or committee meeting held within the county shall be up to a maximum of three dollars and fifty cents ($3.50), except that this may be exceeded only if a receipt is provided.

Section 7.05 Forms of Claims

All claims for personal expense shall regularly be on forms furnished by the Finance Department. A department head may require the use of a special form when approved by the Director of Finance. All such claims shall contain as a minimum the following information:

(a) Specific nature of county business when expense is incurred.
(b) Date, time and place where expense is incurred.
(c) Point of departure and destination.
(d) Travel authorization certificates shall be attached.
(e) Registration fee of one hundred dollars ($100.00) is allowed pursuant to Section 77-b of the General Municipal Law for the attendance at a convention or school conducted for the betterment of county government. A receipt for this expense when presented to the Finance Department should indicate if it covers anything more than actual registration fee or tuition.

these provisions together, we concur with the ALJ's finding that a receipt for reimbursement of up to $3.50 for meal expense is not required by the parties' agreement. Indeed, the agreement makes specific reference to receipts in only two instances, when the meal allowance is exceeded (§7.02(b)), or when a registration fee of $100.00 is paid (§7.05(e)). The extent of the employees' contractual obligation with respect to payment for meal expenses is that a claim form be submitted identifying, among other things, the expense incurred. The parties' agreement does not require or authorize the submission of a receipt in addition to a claim form. The ALJ's finding that the collective bargaining agreement does not require receipts for all meals is accordingly affirmed.

The County's next argument, that the extent of employee participation in the County's record-keeping is unchanged by the submission of a receipt and accordingly does not constitute a change in terms and conditions of employment, is also rejected. As we have previously held, a material change in the degree of employee participation in record-keeping may give rise to a finding of unilateral change in terms and conditions of employment (see, e.g., Newburgh Enlarged CSD, 20 PERB ¶3053 (1987)). In the instant case, the imposition of a receipt requirement as a condition of reimbursement for meals constitutes an additional item of record-keeping which places additional burdens upon unit members, who may receive emergency calls during

meals and who may utilize drive-through meal facilities which do not customarily provide receipts. The ALJ finding that a unilateral change in terms and conditions of employment took place is, accordingly, also affirmed.

Finally, the County asserts that Article VII, Section 8 of the New York State Constitution, which prohibits the use of public funds for the giving of gifts, authorizes the requirement of submission of a receipt for meal reimbursement. While it is indeed true, as the County asserts, that receipts would document that payments were in fact made in the amount of expenditures claimed, there is no evidence that either the New York State Constitution or §203 of the County Law, also cited by the County, necessarily requires submission of receipts, nor is there any evidence contained in the record which would establish that the requirement of receipts was necessitated by evidence that employees were not indeed expending the monies for meals which they recorded on claim forms submitted to the County for reimbursement. The County's argument that receipts for these expenditures are constitutionally mandated and that bargaining is accordingly neither necessary nor appropriate on the subject is therefore rejected.

For the foregoing reasons, we find that the County violated §209-a.1(d) of the Act when it unilaterally implemented its directive of December 19, 1988 requiring submission of receipts as a condition of reimbursement for meals.

IT IS THEREFORE ORDERED that the County:

1. Reinstate the practice of reimbursing meals based upon submission of the travel expense claim, as it existed prior to January 1, 1989;
2. Compensate all unit employees who lost reimbursement because of the receipt requirement, with interest at the maximum legal rate;
3. Negotiate in good faith with the Association with respect to terms and conditions of employment; and
4. Post the attached notice conspicuously at all locations normally used by the County to communicate with unit employees.

DATED: November 21, 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 County of Chautauqua in the unit represented by the Chautauqua County Sheriff's Employees' Association, Inc., that the County of Chautauqua will:

1. Reinstate the practice of reimbursing meals based upon submission of the travel expense claim, as it existed prior to January 1, 1989;

2. Compensate all unit employees who lost reimbursement because of the receipt requirement, with interest at the maximum legal rate; and

3. Negotiate in good faith with the Association with respect to terms and conditions of employment.

COUNTY OF CHAUTAUQUA

.....

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

JOHN F. HERBERGER,

Charging Party,

-and-

CASE NO. U-10113

CITY OF LOCKPORT and AFSCME, COUNCIL 66,

Respondents.

JOHN F. HERBERGER, pro se

A. ANGELO DIMILLO, ESQ., DEPUTY CORPORATION COUNSEL, for Respondent City of Lockport

JOEL M. POCH, ESQ., for Respondent AFSCME, Council 66

BOARD DECISION AND ORDER

John F. Herberger (charging party) excepts to the dismissal on motion of his improper practice charge against the City of Lockport (City) and AFSCME, Council 66 (AFSCME) at the conclusion of charging party's case before the assigned Administrative Law Judge (ALJ). Dismissal of the charge followed two days of hearing at which the charging party testified and called witnesses on his behalf before resting his case.

The charge alleges that the City violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it threatened the charging party on March 21, 1988, and when it terminated him on March 25, 1988, in retaliation for filing an improper practice charge against it. The charge

further alleges that AFSCME violated §209-a.2(a) of the Act by refusing to permit him to join the organization, by refusing to allow him to see its collective bargaining agreement with the City, and by threatening him with arrest if he failed to withdraw an improper practice charge filed by the charging party against it.

The ALJ dismissed all charges against both respondents at the conclusion of the charging party's presentation for failure to present a prima facie case. The charging party excepts to the ALJ decision in a lengthy document, much of which presents information concerning events subsequent to the conclusion of the hearing in this matter, and which recites conversations in support of his charge which were not part of the record before the ALJ. Because we are limited to the evidence before the ALJ, we have not considered this material, and it does not form any part of the basis for our decision and order.

The remainder of the charging party's exceptions relate to his assertion that he has indeed established a prima facie case and has thus shifted the burden of persuasion to the City and AFSCME. Each of the aspects of the charge and the evidence presented in support of a prima facie case will be addressed in turn.

With respect to the allegations made by the charging party against the City, the evidence presented establishes

that the City terminated the charging party on March 25, 1988. However, it fails to establish that the layoff, which, City employees testified (on behalf of the charging party), was occasioned by budgetary constraints and charging party's temporary part-time status, had any relationship to any activity protected under the Act. Furthermore, neither the charging party, nor any other witness called by the charging party, testified to any threats by any City representative of retaliation for filing an improper practice charge against the City on March 18, 1988, or any other date. Indeed, the uncontroverted testimony presented by the charging party establishes that on March 21, 1988, when he alleges threats of retaliation were made, and on March 25, 1988, when charging party's layoff took place, City representatives were unaware that the charging party had filed an improper practice charge against the City.

The charging party's failure to present any supporting evidence whatsoever, and, indeed, the presentation of evidence by him contradicting the allegations of the charge, warranted its dismissal as against the City.[1/]

[1/]Although, as we held in County of Nassau (Police Department), 17 PERB ¶3013 (1984), a charging party will be given the benefit of all reasonable inferences derived from the record in considering a motion to dismiss, where, as here, no evidence whatsoever is presented from which such inferences could be drawn, dismissal at the close of the charging party's case is appropriate.

With respect to the charges against AFSCME, the record clearly and unequivocally discloses that the charging party was not entitled to union membership because he was not a member of the bargaining unit represented by AFSCME due to his temporary, part-time status. Furthermore, the record is devoid of evidence that the charging party requested and was denied membership in AFSCME, even if AFSCME could have accepted him as a member. Nor is there any evidence that the charging party requested and was refused the opportunity to review the collective bargaining agreement between AFSCME and the City, even if he had been entitled to do so. Thus, these aspects of the charge against AFSCME were properly dismissed for failure to present a prima facie case.

The remaining issue to be decided is whether the ALJ properly dismissed the aspect of the charge which alleges that an AFSCME representative threatened the charging party with arrest if he did not withdraw the improper practice charge which he had filed against AFSCME for its failure to admit him to membership. The ALJ dismissed this aspect of the charge upon a credibility determination resolving a conflict in testimony between the charging party and two witnesses called by him, both of whom denied that the threat, allegedly made in their presence, was actually made. Credibility determinations are generally to be reserved until the conclusion of an entire case, and the truth of the

charging party's evidence is generally to be assumed to be true for the purpose of deciding a motion to dismiss at the conclusion of the charging party's case. County of Nassau (Police Department), supra. However, under the highly unusual circumstances presented here, wherein a direct conflict in the charging party's evidence precludes the making of an assumption of the truth of all of the charging party's evidence and requires the making of a credibility determination in order to resolve the conflict in testimony presented by the charging party, the making of a credibility determination necessary to decide the motion at the close of the charging party's case was appropriate.

Having found that a credibility determination at the conclusion of the charging party's case, although unusual, was necessitated by the existence of a direct conflict in the charging party's evidence, we must determine whether the credibility resolution made by the ALJ against the charging party and in favor of the two other witnesses called on his behalf should be affirmed. We find that it should, in keeping with the weight appropriately accorded to such credibility determinations by the trier of fact having the opportunity to observe and evaluate the demeanor of all witnesses.

Based upon the foregoing, we find that dismissal of the charge against AFSCME at the conclusion of the charging

party's case is supported by the record, and IT IS THEREFORE ORDERED that the entire charge be, and it hereby is, dismissed in its entirety.

DATED: November 21, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALLEN WILLIAM LYNCH,

Charging Party,

-and- CASE NO. U-9712

AMALGAMATED TRANSIT UNION, LOCAL 1342,

Respondent.

ALLEN WILLIAM LYNCH, pro se

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

BOARD DECISION AND ORDER

Allen William Lynch (charging party) excepts to the dismissal, after hearing, of his improper practice charge against the Amalgamated Transit Union, Local 1342 (ATU), which alleges that the ATU violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it requested, permitted, and participated in a System Wide Pick (SWP) pursuant to an agreement with the Niagara Frontier Transit Metro System, Inc. (employer), and when it failed to follow a majority opinion (expressed in a vote at a meeting on February 23, 1987) which sought the elimination of the SWP.

The assigned Administrative Law Judge (ALJ) found, after receiving numerous exhibits, stipulations of fact and

testimony, the following essential facts.[1/]

The ATU and employer entered into a collective bargaining agreement covering the period August, 1983 to July, 1986. This agreement included certain seniority definitions applicable to a number of benefits, including vacation selection, assignment selection, and other matters.

On August 1, 1984, the parties entered into a Memorandum of Agreement setting forth provisions for the initial staffing, selection and training of individuals to fill new jobs created in connection with the operation and maintenance of the employer's planned rail operation, established under the Urban Mass Transportation Act, 49 U.S.C. §1600 et seq. The Memorandum of Agreement, which was voted upon and ratified by the membership of the ATU in 1984, included provision for an SWP which, in essence, modified the seniority definitions contained in the parties' collective bargaining agreement. The Agreement further provided that the SWP would be conducted by the employer within 90 days after completion and staffing of the rail system.

Although the SWP agreement was coterminous with the parties' collective bargaining agreement, the ATU membership, at a meeting in May or June 1986, voted to continue in effect

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[1/]The ALJ decision sets forth a detailed statement of facts which will not be repeated here, except as necessary to place our holdings in proper context. See Amalgamated Transit Union, Local 1342, 22 PERB ¶4568 (1989).

the SWP agreement, thereby extending it for an unstated period of time. Thereafter, in February 1987, at a membership meeting, a motion was made to rescind the 1986 vote and eliminate the SWP agreement. That vote was ruled by the ATU Local President presiding to require, pursuant to Robert's Rules of Order, a two-thirds vote which was not achieved.

In the meantime, on December 11, 1986, the employer's rail operation was completed, triggering the 90-day period for establishment of an SWP. During the 90-day period, the ATU's Local President requested that the SWP take place, and it was in fact commenced on April 6, 1987, 26 days after the expiration of the 90-day period during which the parties' SWP agreement contemplated that the SWP would be conducted.

The charging party asserts that he was adversely affected by the modified seniority arrangement created by the SWP, when it was finally put in place on or about September 6, 1987.

At the outset, we note that the charging party makes an allegation both in his charge and exceptions before us, that §13(c) of the Urban Mass Transportation Act (49 U.S.C. §1609(c)) assures both the continuation of collective bargaining rights and the protection of individual employees against a worsening of their positions with respect to their employment as a result of application of the other provisions

of the Urban Mass Transportation Act, and that his employment conditions with respect, in particular, to seniority, have been worsened in violation of that federal statutory protection. This allegation is not properly before us, both because the record establishes that it has previously been a matter of litigation between these same parties in another forum, and because it is not for us to decide whether this section of Federal law has been violated, particularly where, as here, there is no evidence that the alleged violation of §13(c) of the Urban Mass Transportation Act was otherwise violative of the ATU's duty of fair representation under the Act.[2/]

It is well established that a breach of the duty of fair representation is established only by proving that an employee organization's decisions, including those which adversely affect some portion of its membership, were made in an arbitrary manner, for discriminatory reasons, or in bad faith. The long accepted broad latitude given employee organizations in the negotiations process[3/] is particularly understood in the negotiation of seniority provisions in which, by definition, some employees are advantaged and

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[2/]See, e.g., Amalgamated Transit Union v. Louisville and Jefferson County Transit Authority, 659 F.2d 722, at 724 (6th Cir. 1981), wherein the Court held that "federal courts have subject matter jurisdiction to entertain cases arising under §13(c) agreements and the UMTA."

[3/]See, e.g., Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953).

others are not. As we have held: "[T]he duty of fair representation does not preclude an employee organization from reaching agreements in negotiations that are more favorable to some unit employees than to others." UFT Local 2, AFT, AFL-CIO, 18 PERB ¶3048, at 3105 (1985); See also State of New York and PEF, 14 PERB ¶3043 (1981); Plainview-Old Bethpage CSD, 7 PERB ¶3058 (1974).

The evidence before us is limited to the facts that the ATU entered into an agreement which had some adverse impact upon the charging party, waived the time limit within which compliance by the employer was required by the agreement, and declined to void the agreement, notwithstanding an expression of interest by a majority of persons present at a union meeting that it do so. Whether the ATU could have avoided application of the ratified SWP Memorandum of Agreement is not before us. What is before us is whether its election not to seek to do so constitutes a breach of the duty of fair representation. We find that it does not. An employee organization is entitled to latitude and discretion in the negotiation and administration of agreements with employers. The exercise of that discretion in the instant case has not been affirmatively shown by the charging party to have been arbitrary, discriminatory, or bad faith, nor were the actions of the ATU so patently unreasonable or overreaching as to warrant an adverse inference of such. Indeed, as the ALJ

found, the actions of the ATU were taken upon due deliberation and in good faith.

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

DATED: November 21, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member