5-14-1990

State of New York Public Employment Relations Board Decisions from May 14, 1990

New York State Public Employment Relations Board

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-9810

TOWN OF INDEPENDENCE,

Respondent.

BAPTISTE & WILDER, P.C. (PATRICK J. SZYMANSKI, ESQ., and GEORGE WISZYNSKI, ESQ., of Counsel), for Charging Party

BOND, SCHOENECK & KING (STEPHEN J. VOLLMER, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

In an improper practice charge filed on November 17, 1987, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local Union 65 (Teamsters) alleged that the Town of Independence (Town) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it laid off James Pensyl on October 28, 1987, because of his union activity. Following three days of hearing, the assigned Administrative Law Judge (ALJ) found that a violation of the Act had occurred, and ordered, among other things, Pensyl's reinstatement with back pay.[1/]

[1/] 22 PERB ¶4599 (1989).

In its exceptions to the ALJ decision, the Town generally excepts to the weight accorded to some facts, but not others, which appear in the record, and to the credibility determinations made by the ALJ in evaluating the testimony of certain witnesses.

FACTS

The facts of this case may be briefly summarized as follows. In early 1985, Albert Nye, then a member of the Town's Highway Department four-member work crew, was promoted to the position of Highway Superintendent. On a number of occasions during 1985, Nye approached James Pensyl, then self-employed as a dairy farmer, concerning the possibility of his being appointed to the crew position vacated by Nye upon his promotion. In August, 1985, Pensyl was appointed by Nye to the Town Highway Department crew, returning the crew to the same staffing level which it had prior to Nye's promotion. Pensyl discussed with Nye, in late 1985 and early 1986, whether he should sell his dairy cows, which required his care during the early morning and evening hours, when Pensyl's services might be needed by the Town on an overtime basis. Nye encouraged Pensyl to sell off his cows, and Pensyl did so in early 1986. At no time during these discussions did Nye ever indicate to Pensyl that he was considering reducing the size of the Highway Department work crew from four to three persons, or that he was going to

study the need for the fourth member of the crew for all four seasons before making a decision whether to reduce the size of the crew. Indeed, Nye emphasized the security of the position to Pensyl as an incentive to attain his acceptance of the appointment.

In 1986, Pensyl and the other members of the crew made an application to the Town Board for a pay raise and certain fringe benefits. Following a rejection of most of the request, Pensyl contacted a business agent of the Teamsters for the purpose of seeking representation of the Highway Department crew by that organization.

Before the Teamsters filed a petition seeking recognition as the bargaining agent for the Highway Department crew in May, 1987, Pensyl and two of the other crew members discussed their organizing efforts in Nye's presence. During the summer of 1987, at least two incidents occurred in which, according to the crew members, Nye expressed some hostile references to "the union". Nye denied making such references. In approximately June, 1987, the Teamsters was recognized as the bargaining agent for all the employees of the Highway Department, except Nye, and negotiations for a collective bargaining agreement commenced on or about September 9, 1987. For a three-week period during October, 1987, Nye loaned Pensyl to a neighboring town, in accordance with custom in the area, to assist with a

project. The remaining crew members were engaged at that time in ditch digging, brush clearing, equipment maintenance and repair, and hauling of sand and salt for the upcoming winter season. On October 28, 1987, a payday, Pensyl reported to work as usual, completed his normal workday, and, at the end of the workday, was handed two paychecks. When he asked why he was getting two checks, Pensyl was informed by Nye that he was laid off from his position, effective immediately. The following day, the Town contracted out the work of hauling sand to Dean Contractors, Inc.

DISCUSSION

It is well settled that the elements necessary to prove a case of discrimination for union activity under the Act are that the affected individual was engaged in protected activity, that such activity was known to the person(s) making the adverse employment decision, and that the action would not have been taken but for the protected activity. The existence of anti-union animus may be established by statements or by circumstantial evidence, which may be rebutted by presentation of legitimate business reasons for the action taken, unless found to be pretextual.[2/] The ALJ rejected Nye's denials of knowledge of Pensyl's union activity, including the fact that Pensyl was the one who

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[2/] See State of New York (Division of Human Rights) (PEF), 22 PERB ¶3036 (1989).

initially contacted the Teamsters and had been selected by the Teamsters as its shop steward at the work site. Nye's denials of any threats or comments about the Teamsters were also rejected by the ALJ, who credited the testimony of Pensyl and two other crew members who testified.

The ALJ further found the Town's explanation for the layoff of Pensyl to have been pretextual. Two Town Council members testified that, at least beginning in 1985, they had recommended to Nye that the Town reduce its crew to three persons, rather than four, but that Nye had declined to do so in 1985, stating instead that he wanted to study the need for a four-member crew through all four seasons. This testimony was not controverted and was accepted by the ALJ. Nye testified that in mid-October, 1987, he concluded that a three-member crew was sufficient to meet the Town's needs and two weeks later terminated Pensyl, the least senior employee, for that reason. However, he had been Superintendent with a four-person crew for more than two full years before he made the decision to eliminate a crew member, Pensyl. The ALJ determined that the timing of Nye's decision to reduce the crew by one person, approximately one month after the commencement of contract negotiations with the Teamsters, together with the anti-union statements found by the ALJ to have been made, and knowledge of Pensyl's role in union

activity supported the conclusion that Pensyl would not have been laid off when he was but for his protected activity.

It is our finding that notwithstanding the Town's many factual exceptions, the record supports the credibility and factual determinations made by the ALJ, and that the ALJ decision should be affirmed in all respects.

IT IS, THEREFORE, ORDERED that the Town:

1. Forthwith offer James Pensyl reinstatement to his former position;
2. Make Pensyl whole for any loss of pay and benefits suffered by reason of his layoff from the date thereof to the effective date of the offer of reinstatement, whether or not accepted, less any earnings derived from other employment obtained as a result of the layoff, with interest at the maximum current legal rate;
3. Cease and desist from interfering with, restraining, coercing, or discriminating against employees for the exercise of rights protected under the Act;

4. Sign and conspicuously post a notice in the form attached at all locations throughout the Town ordinarily used to communicate information to unit employees.

DATED: May 14, 1990
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 Highway Department of the Town of Independence represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union 65 that the Town:

1. Shall forthwith offer James Pensyl reinstatement to his former position;

2. Shall make Pensyl whole for any loss of pay and benefits suffered by reason of his layoff from the date thereof to the effective date of the offer of reinstatement, whether or not accepted, less any earnings derived from other employment obtained as a result of the layoff, with interest at the maximum current legal rate; and

3. Shall not interfere with, restrain, coerce, or discriminate against employees for the exercise of rights protected under the Act.

...Town of Independence.....

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

RICHARD L. BRIDGHAM,

Charging Party,

-and-

CASE NO. U-10857

PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 274, IAFF, AFL-CIO,

Respondent.

RICHARD L. BRIDGHAM, pro se

DE SOYE AND REICH, ESQS. (FREDERICK K. REICH, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Richard L. Bridgham to the dismissal, without hearing, of his improper practice charge against the Professional Firefighters Association, Local 274, IAFF, AFL-CIO (Association), which alleges that the Association violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) by refusing to represent him at arbitration concerning a grievance filed by him against his employer, the City of White Plains (Employer).

Following receipt of the charge and the Association's answer, the assigned Administrative Law Judge (ALJ) requested that Bridgham file an offer of proof to clarify and support his charge. Based upon the charge, answer, and offer of

proof filed by Bridgham, the ALJ dismissed the charge upon the ground that the facts offered by Bridgham, if proven, would not establish a breach of the duty of fair representation and a violation of §209-a.2(a) of the Act.[1/] The ALJ concluded that there was no showing that the Association's refusal to further process Bridgham's grievance at arbitration was arbitrary, discriminatory, or made in bad faith.

The facts of this case[2/] may be briefly summarized as follows. Bridgham suffered an on-the-job injury on November 4, 1987, resulting in lacerations to his arm and injury to his back. Thereafter, he did not return to work. In December 1987, Bridgham was directed by the Chief of the Employer's Fire Department to confine himself to his home, except upon permission granted. Bridgham thereupon filed a contract grievance alleging that the confinement order was improper, assertedly because confinement is only appropriately ordered when an employee is absent for ordinary disability, and does not apply when the employee is absent for on-the-job disability.

[1/] 23 PERB ¶4511 (1990).

[2/] The allegations set forth herein are derived from Bridgham's charge and offer of proof only. The allegations are deemed to be true for the purpose of determining the appropriateness of the ALJ's dismissal of the charge on the pleadings. See County of Nassau (Police Department) (Unterweiser), 17 PERB ¶3013 (1984).

Bridgham's grievance was processed through the steps of the contractual grievance procedure, and ultimately proceeded to arbitration on October 14, 1988. It appears that during the entire period following his injury until approximately September 16, 1988, when Bridgham's application for accidental disability retirement pursuant to the Retirement and Social Security Law was approved, he continued to receive full salary and benefits pursuant to §207-a of the General Municipal Law (GML).[3/]

On the date of the arbitration hearing, the Association apparently learned, for the first time, that Bridgham was at that time engaged in outside employment as a limousine driver. In any event, discussions took place on that date between the Employer and the Association concerning possible settlement of the grievance, which the Employer appears to have resisted upon the ground that Bridgham's back condition (herniated discs) was not the result of his November 4, 1987

[3/]GML §207-a(6) provides as follows:

> Any fireman receiving payments or benefits pursuant to this section, who engages in any employment other than as provided in subdivision 3 or 5 of this section shall on the commencement of such employment, forfeit his entitlement to any payments and benefits hereunder, and any such payment or benefit unlawfully received by such fireman shall be refunded to and may be recovered by the municipal corporation or fire district employing such fireman in a civil action.

on-the-job injury, but was the result of ordinary disability. The arbitration hearing was at that time adjourned.

On or about January 24, 1989, Bridgham was informed by Association representatives that the Association had made a determination not to proceed further with his grievance at arbitration, because, by taking outside employment, Bridgham had placed in jeopardy his eligibility for salary and benefits pursuant to GML §207-a.

Following this notification, Bridgham pursued his grievance at the arbitration step without Association assistance and representation.

Bridgham presents no evidence that the Association's refusal to proceed further with his arbitration was either discriminatory or improperly motivated. He asserts, instead, that the refusal to proceed was arbitrary and therefore violative of §209-a.2(a) of the Act as a breach of the duty of fair representation.

Notwithstanding the ALJ's conclusion that the Association "reassessed the merits of the claim and determined that they were not sufficient to warrant the Association's further involvement" (23 PERB ¶4511, at 4525-26), it is our determination that the record as it presently exists does not adequately support this conclusion. We so find because the explanation which Bridgham asserts was given to him by the Association representatives in January

1989, that his outside employment in October 1988 might disqualify him from GML §207-a benefits and therefore adversely affected his claim that an improper confinement order issued in December 1987, is confusing at best and not rationally based at least. There is, for example, no information concerning when Bridgham engaged in outside employment. Indeed, if the outside employment occurred following approval of his application for accidental disability retirement in September 1988, he may well have been entitled to §207-a GML benefits continuously from his accident until his retirement. Additionally, even if Bridgham became ineligible for §207-a benefits by virtue of his acceptance of outside employment at some time between November 1987 and October 1988, there is no information in the record before us which would establish or even indicate that his absence in December 1987 was not occasioned by on-the-job injury and disability, for which no confinement order is assertedly appropriate. While the Association may well have a rational and reasonable explanation for its determination to withdraw from further processing of Bridgham's grievance at the arbitration step, we cannot now say that its determination was not arbitrary without further information about its reasons for that determination.[4/] This

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[4/] County of Nassau (Police Department) (Unterweiser), supra.

is particularly so on the facts of the case, which include the fact that the Association had already determined to proceed to arbitration.

IT IS ACCORDINGLY ORDERED that the dismissal of this charge is reversed and the matter is remanded to the assigned Administrative Law Judge for further proceedings not inconsistent with this Decision and Order.

DATED: May 14, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WARSAW EDUCATORS ASSOCIATION, NEA/NY,

Charging Party,

-and-

CASE NO. U-11259

WARSAW CENTRAL SCHOOL DISTRICT,

Respondent.

CHRISTOPHER J. KELLY, for Charging Party

BOARD DECISION AND ORDER

By decision dated January 12, 1990, the Director of Public Employment Practices and Representation (Director) dismissed a charge filed by the Warsaw Educators Association, NEA/NY (Association) which alleges that the Warsaw Central School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it implemented a teacher work schedule which "did not reflect the agreement and understanding of the memorandum of understanding" executed by the parties on July 20, 1989.

The Director dismissed the charge for lack of jurisdiction based upon §205.5(d) of the Act, and cases

decided thereunder, which establish that PERB is without jurisdiction to enforce collective bargaining agreements.[1/]

In its exceptions, the Association argues that pursuant to our decision in Herkimer County BOCES, 20 PERB ¶3050 (1987), deferral is appropriate of PERB's jurisdictional determination whether the parties' agreement covers the matter raised by the instant charge pending the outcome of grievance procedures in progress. It further argues that conditional dismissal of the charge should have been ordered by the Director, rather than unconditional dismissal. We disagree.

In Herkimer County BOCES, supra, we held that the mere act of filing a contract grievance does not automatically divest PERB of jurisdiction over an improper practice charge. We there determined that where a question exists concerning whether the parties' agreement in fact covers the issue raised by the charge, deferral of PERB's jurisdictional finding until after exhaustion of the grievance procedures is appropriate. This is so because arbitration will in most cases resolve the issue of whether the parties' agreement covers the issue and, if so, whether the agreement was

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[1/]Section 205.5(d) of the Act provides that PERB "shall not exercise jurisdiction over an alleged violation of such an agreement [between an employer and an employee organization] that would not otherwise constitute an improper employer or employee organization practice." See also County of St. Lawrence, 10 PERB ¶3058 (1977); Erie County Water Authority, 22 PERB ¶3006 (1989).

violated. In this fashion, the inequitable result of dismissal by PERB for lack of jurisdiction based upon contract coverage and subsequent dismissal of the grievance for lack of contract coverage is avoided. However, as we held in County of Suffolk, 22 PERB ¶3033, at 3078 (1989), a "charge must set forth at least a colorable claim of violation of the Act separate and apart from any possible contract violation" if the limitation on our jurisdiction contained in §205.5(d) of the Act is not to apply. Here, as in County of Suffolk, supra, at 3078, "[b]ecause no basis is set forth by the charging party to establish the existence of an issue concerning our jurisdiction, unconditional dismissal of the charge is required."

The instant charge alleges nothing more than a question whether a memorandum of agreement executed by the parties which changes the workday of Association unit members from 8:10 a.m. to 3:10 p.m. to 8:00 a.m. to 3:00 p.m. will continue to afford unit members 30 minutes of professional responsibility time at the end of the workday (as had been the case under the prior work day) by incorporating a similar 10-minute change in the students' school day. This issue is exclusively a matter of interpretation of the terms of the memorandum of understanding executed by the parties. The charge makes no allegation that the District willfully or intentionally misled or otherwise acted in bad faith in its

negotiation of the memorandum of understanding, but simply asserts that the District failed to adhere to its terms.

Based upon the foregoing, and in keeping with our decision in County of Suffolk, supra, the Director's dismissal of the charge is affirmed, and IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: May 14, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member