6-2-1992

State of New York Public Employment Relations Board Decisions from June 2, 1992

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from June 2, 1992

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

CLAUDIA S. COCKERILL,

Charging Party,

-and-

CASE NOS. U-9708 & U-10539

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Respondent.

CLAUDIA S. COCKERILL, pro se

BERNARD T. CALLAN, ESQ., for Respondent

BOARD DECISION AND ORDER

By decision dated August 14, 1991,[1/] we affirmed the Administrative Law Judge's (ALJ) dismissal[2/] of these charges that Claudia S. Cockerill had filed against the Brentwood Union Free School District (District).

Cockerill has filed papers with us purporting to be exceptions to that decision. Our Rules of Procedure, however, do not permit exceptions to decisions of the Board. Rather, parties may appeal our final orders to the courts, as Cockerill has done.[3/] Moreover, we cannot consider Cockerill's exceptions even if we were to treat her papers as a motion to reopen or

---

[1/]24 PERB ¶3021 (1991).

[2/]24 PERB ¶4510 (1991).

[3/]Cockerill's judicial appeal was dismissed by decision of the Supreme Court, Albany County, dated April 6, 1992.

reconsider our August 14 decision. Cockerill's exceptions are not based upon newly discovered evidence such as might warrant consideration of a motion to reopen or reconsider.[4/] Her papers merely allege that certain factual and other errors were made in the decision to dismiss her charges. Her allegations in this respect do not support a motion to reopen or reconsider.

For the reasons set forth above, we deny the exceptions to our August 14, 1991 decision in these matters and, alternatively, decline to reopen the record or reconsider that decision. SO ORDERED.

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[4/] See County of Nassau, 18 PERB ¶3076 (1985) (motion to reopen) and Town of Brookhaven, 19 PERB ¶3010 (1986) (motion to reconsider).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUNKIRK PROFESSIONAL FIREFIGHTERS' ASSOCIATION, INC., LOCAL 616,

Charging Party,

-and-

CASE NO. U-11442

CITY OF DUNKIRK,

Respondent.

TOWNE, RUBENSTEIN, SNYDER & POLOWY (Daniel R. Polowy of counsel), for Charging Party

MICHAEL B. BLUTH, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Dunkirk (City) to a decision by an Administrative Law Judge (ALJ). The ALJ held after a hearing that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when its Common Council unreasonably delayed a vote on ratification of a tentative contract negotiated with the Dunkirk Professional Firefighters' Association, Inc., Local 616 (Association). As a remedy for this violation, the ALJ ordered the City to implement the tentative agreement.

The City argues that the ALJ's finding of violation is not supported by the record and that the remedy is contrary to the Act and public policy. The Association argues that the City's exceptions are void because it did not have the Common Council's

authorization to file them. The Association, however, otherwise supports the ALJ's decision and order.

We consider first the Association's argument that we may not entertain the City's exceptions. Having been filed in accordance with our Rules of Procedure (Rules), the City's exceptions are properly before us. Whether the exceptions were filed with the appropriate authorizations is an issue affecting only the various branches and representatives of City government. Such internal disputes do not affect either our powers or our obligations under the Act and our Rules.

The violation found by the ALJ is premised upon the conduct of the Common Council, the City's legislative body. As the legislative body of a government cannot commit a refusal to bargain because it has no statutory right or duty to bargain,[1/] we are faced immediately with an issue as to whether the charge even states a cause of action under §209-a.1(d) of the Act. We hold that it does state a cognizable violation of the City's duty to bargain. Our reasons for that holding warrant explication because they place our disposition on the merits in proper context.

The ALJ found, and the parties agree, that the Common Council was deliberating ratification of the tentative agreement, not legislative approval, as the latter is required by §201.12 of

---

[1/]See, e.g., Niagara County Legislature and County of Niagara, 16 PERB ¶3071 (1983) (history on appeal omitted).

the Act and as it is further referenced in §204-a.1 of the Act. The significance of the differences between ratification and legislative approval,[2/] for purposes of holding that this charge sets forth an improper refusal to bargain, lies in the recognition that a ratification right belongs to the chief executive, not to the government's legislative body, and that ratification is a condition to a duty to execute, on demand, a contract which incorporates the agreements reached during negotiations. If the legislative body is chosen as the employer's ratifying entity, as is the case here, it serves merely as the chief executive officer's agent for purposes of meeting that condition. Therefore, the chief executive officer, who holds the right and duty to bargain under the Act, is responsible statutorily for the ratification process. We, accordingly, reach consideration of the ALJ's holding that the ratification was unreasonably delayed.

We agree with the ALJ's statement that ratification, being part of the bargaining process, is subject to the same standards of good faith as govern the bargaining itself. Reasonable expedition is no less expected in ratification than in bargaining, and that reasonableness is similarly judged by the totality of circumstances under the facts of each case. Here, the contract was concluded on November 16, 1989, ratified by the

---

[2/]See our recent decision in Board of Educ. of the City School Dist. of the City of Buffalo, 24 PERB ¶3033 (1991) in this respect.

Association on November 27, and rejected by the Common Council on February 20, 1990. The Common Council held a number of meetings during this period in which it had the opportunity to, and did, discuss the contract.[3/] Although the Common Council was entitled to a reasonable period for debate on ratification of the contract, after a careful review of the record, we find that the ALJ correctly found that the Common Council unreasonably delayed its vote. In reaching this conclusion, we are aware that the Common Council had questions about certain of the contract terms, that the respective parties' leadership was changing during this time, that the Common Council necessarily had other business to conduct, and that there was no specific timetable for ratification of the contract. Notwithstanding these considerations, we believe that the Common Council was in a position to take an informed vote on the contract sooner than it did. Although the Common Council did not simply ignore the Association's contract, it persisted needlessly in reviewing issues to which it either had an answer already or could have readily obtained an answer from the City's negotiators. Under such circumstances, the time taken to vote on this particular contract was excessive.

Having affirmed the ALJ's finding of violation, we turn to the ALJ's order to implement the agreement, and in that respect,

---

[3/]The ALJ found that the Common Council met twelve times during this period and considered the contract at five meetings.

find that the order must be reversed. We considered the appropriate remedy in circumstances in which a reserved right of ratification has been waived in Board of Education of the City School District of the City of Buffalo[4/] (hereafter Buffalo.) In that case, we refused to issue the very order issued by the ALJ in this case as being in excess of the Act's substantive law and our remedial powers under §205.5(d). The ALJ distinguished Buffalo on the basis of the City's misconduct in this case. Our remedial powers, however, are fixed by the Legislature. Those statutory powers cannot be expanded by the actions or inactions of any party. Consistent with the remedy we issued in Buffalo, the City can only be ordered to execute a document on demand incorporating the agreements reached between the parties on November 16, 1989. Whether any of the agreements set forth therein are subject to legislative approval and whether they are binding in whole or in part are not issues for our determination in the context of this improper practice charge because they concern only the enforceability of the document.

For the reasons and to the extent set forth above, we affirm the ALJ's finding that the City violated §209-a.1(d) of the Act by unreasonably delaying a ratification vote, and deny the City's exceptions to that extent. We grant, however, such of the City's exceptions as are directed to the ALJ's remedial order. The Association's cross-exception is denied.

[4/]Supra note 2.

IT IS, THEREFORE, ORDERED that the City execute, upon the Association's demand, a document embodying the agreements reached by the parties on November 16, 1989, and that it sign and post the attached notice at all locations ordinarily used to post notices of information to employees in the Association's unit.

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, 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 employees of the City of Dunkirk (City) in the unit represented by the Dunkirk Professional Firefighters' Association, Inc., Local 616 (Association) that the City will execute, upon the Association's demand, a document embodying the agreements reached by the City and the Association on November 16, 1989.

CITY OF DUNKIRK

.....

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

AFSCME NEW YORK COUNCIL 66, AFSCME LOCAL 930 (ERIE COUNTY WATER AUTHORITY BLUE COLLAR EMPLOYEES),

Charging Party,

-and-

CASE NO. U-11624

ERIE COUNTY WATER AUTHORITY,

Respondent.

JOEL POCH, ESQ., for Charging Party

ROBERT LANE, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Erie County Water Authority (Authority) to a decision by an Administrative Law Judge (ALJ). After a four-day hearing, the ALJ held that the Authority had refused to bargain with AFSCME New York Council 66, AFSCME Local 930 (Erie County Water Authority Blue Collar Employees) (AFSCME) in violation of §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act).[1/] Specifically, the ALJ held that there were no exceptional circumstances which warranted the Authority's refusal to negotiate with AFSCME unless

---

[1/]The ALJ dismissed allegations that the Authority's refusal to negotiate violated §209-a.1(b) and (c) of the Act and no exceptions have been filed to those parts of the ALJ's decision.

Frank Max, an AFSCME representative, and a former employee of the Authority,[2/] was removed from AFSCME's negotiating team.

The Authority argues in its exceptions that the ALJ misinterpreted the controlling law, failed to consider certain of its points, and incorrectly limited the hearing and its proof. AFSCME supports the ALJ's finding of a violation, but it argues in cross-exceptions that the remedy should include a guaranteed retroactivity for any negotiated pay increase.

The basic legal principles relevant to the disposition of this charge are well defined. In general, either party to a bargaining relationship may choose its own representatives and neither may attempt to control the other's selection. There is a recognized exception to this general rule, however, for those unusual circumstances in which a party's chosen representative poses a clear danger to the collective bargaining process.[3/] The exceptional circumstances test has otherwise been framed to require persuasive evidence that the presence of a particular individual would make good faith bargaining impossible.[4/]

This case is the first in which we have been asked to apply these principles to an employer's refusal to bargain with a union

---

[2/]We recently affirmed another ALJ's dismissal of a charge alleging that Max had been discharged in violation of the Act. Erie County Water Auth., 25 PERB ¶3017 (1992).

[3/]See City of Newburgh, 16 PERB ¶3081 (1986), and County of Nassau, 12 PERB ¶3090 (1979), citing with approval General Electric Co. v. NLRB, 417 F.2d 512, 71 LRRM 2418 (2d Cir. 1969).

[4/]KDEN Broadcasting Co., 93 LRRM 1022 (1976).

because it has appointed a bargaining representative whom the employer considers to be objectionable. The Authority would have us determine whether Max posed a danger to negotiations from the totality of his conduct within and without the work place under all circumstances.[5/] The Authority submits that Max has a history of personal animosity toward the Authority and its managers and has exhibited a tendency to engage in physical assaults sufficient to permit the Authority to refuse to bargain with AFSCME so long as he remains a member of its negotiating team. AFSCME supports the ALJ's decision under which only Max's behavior as a labor representative or his conduct involving the Authority's negotiators is considered.

The Authority's exceptions do not require us to define the outer limits of the evidence which might be admissible in defense of refusal to bargain allegations of this type. It is enough to hold that the approach adopted by the ALJ is too restrictive.

In assessing the danger a given individual poses to the statutory bargaining process, something more than bargaining table misconduct or the individual's interaction with the other side's representatives may be relevant. In this case, for example, the ALJ rejected the Authority's proof of a workplace incident involving Max in which he allegedly threatened coworkers

---

[5/]The Authority submits that this is the approach taken under the National Labor Relations Act. In support of this contention, the Authority relies primarily on NLRB v. Kentucky Utilities Co., 182 F.2d 810, 26 LRRM 2287 (6th Cir. 1950).

with physical harm if they were to bid on a job with the Authority. We cannot say that a demonstrated propensity for violence at the workplace or for the threat of such violence is necessarily immaterial to the Authority's refusal to bargain with Max. Moreover, the ALJ's rulings and statements during the hearing reasonably may have dissuaded the Authority from seeking to introduce anything other than Max's conduct as a labor representative or the threats he allegedly made to the Authority's negotiators. Therefore, we grant such of the Authority's exceptions as allege that the ALJ incorrectly limited the hearing and excluded so much of the Authority's proof as would establish a propensity for violence and/or threats of violence in the workplace. As we cannot fairly assess the propriety of the Authority's refusal to bargain without such proof, it is necessary to reverse the ALJ's decision and to remand the case to the ALJ. On remand, the ALJ is to receive only evidence of Max's workplace misconduct to the date the Authority decided not to bargain with AFSCME and then only to the extent that Max's misconduct was known to the Authority's agents who decided not to bargain with AFSCME and was relied upon by them as a basis for their decision.[6/] Max's conduct after the date of the Authority's decision or which was unknown to its decision-makers could not have influenced the Authority's

---

[6/]The evidence must be reasonably relevant to a claim of an arguable danger to the bargaining process.

decision not to bargain with Max and it is, therefore, immaterial.

For the reasons and to the extent set forth above, IT IS, THEREFORE, ORDERED that the ALJ's decision and order is reversed and the case is remanded for further proceedings and decision as necessary.[7/]

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[7/]We take notice from the contracts on file with us pursuant to §214.1 of our Rules of Procedure that the parties have negotiated a contract covering April 1, 1990 through March 31, 1992. Whether this intervening development renders the issues raised by the charge moot as between the parties is a matter which they should consider.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CARL E. CARTER,

Charging Party,

-and-

CASE NO. U-12001

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 650,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

CARL E. CARTER, pro se

SARGENT, REPKA & PINO (ROBERT HEFTKA and KEVIN STOCKER of counsel), for Respondent

SAMUEL F. HOUSTON, CORPORATION COUNSEL (David F. Mix of counsel), for Employer

BOARD DECISION AND ORDER

By decision dated October 8, 1991,[1/] we affirmed an Administrative Law Judge's (ALJ) decision dismissing Carl E. Carter's charge against the American Federation of State, County and Municipal Employees, AFL-CIO, Local 650 (AFSCME) which

---

[1/] 24 PERB ¶3040 (1991).

alleges that AFSCME breached its duty of fair representation in violation of §209-a.2(c)[2/] of the Public Employees' Fair Employment Act (Act) when it refused to process a grievance on his behalf.

Carter has filed an objection to our 1991 decision. Neither the Act nor our Rules of Procedure, however, permit objections to our decisions. Rather, appeals from our final orders may be filed with the courts pursuant to §213 of the Act. We have, however, under extraordinary circumstances, considered a party's request for reconsideration of a decision. In his objection, Carter merely alleges that certain of our findings are not supported by the record and that certain others are unclear. Such allegations do not support a motion for reconsideration. Having reviewed the record in this case, we are not persuaded that we have overlooked or misapprehended any material fact or misapplied any controlling principle of law in our original decision.[3/]

[2/]Section 209-a.2(c) of the Act, added in 1990, codifies the union's duty of fair representation as developed through case law.

[3/]Town of Brookhaven, 19 PERB ¶3010 (1986).

For these reasons, we deny the objection to our October 8, 1991 decision in this matter and, alternatively, decline to reconsider that decision. SO ORDERED.

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12089

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

In the Matter of

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK,

Charging Party,

-and-

CASE NO. U-12215

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

KAUFF, McCLAIN & McGUIRE (BETH FALK of counsel), for New York State Supreme Court Officers Association, ILA, AFL-CIO

FULBRIGHT & JAWORSKI (K. JANE FANKHANEL of counsel), for Association of Surrogates and Supreme Court Reporters Within the City of New York

HOWARD A. RUBENSTEIN, ESQ. (LEONARD R. KERSHAW of counsel), for State of New York - Unified Court System

BOARD DECISION AND ORDER

By decision dated September 6, 1991, the Assistant Director of Public Employment Practices and Representation (Assistant

Director) held that the State of New York - Unified Court System (System) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused demands by the New York State Supreme Court Officers Association, ILA, AFL-CIO (Officers) and the Association of Surrogates and Supreme Court Reporters Within the City of New York (Reporters) to negotiate the implementation of a lag payroll as required by §375 of Chapter 190 of the Laws of 1990 (Section 375).[1/] The System argues in its exceptions that the Assistant Director's decision must be reversed because §375 has been held by the United States Court of Appeals for the Second Circuit to be unconstitutional as

---

[1/]Section 375 provides, in relevant part, as follows:

> Notwithstanding the provisions of subdivision a of this section or of section 200 of the state finance law, commencing with the last bi-weekly payroll period ending at least fourteen days before March 31, 1991 for each nonjudicial officer or employee, the salary or wages of such officer or employee shall be payable by the state two weeks after they shall have become due. Until such time, an alternative procedure for the payment of salary and wages, to be determined by the comptroller, may be implemented in lieu of the procedure specified in subdivision 1 of such section 200 or in other provisions of law. The procedures set forth in this paragraph (including any alternative procedure determined by the comptroller) shall remain in effect until the state and an employee organization representing nonjudicial officers and employees who are in positions which are in collective negotiating units established pursuant to article 14 of the civil service law enter into an agreement providing otherwise for the payment of salaries and wages to such officers and employees.

violative of the contract clause of the United States Constitution, Article 1, Section 10.[2/] We agree.

The Court's holding renders §375 void.[3/] Therefore, that statute neither conferred a bargaining right upon the Officers and Reporters nor imposed a bargaining obligation upon the System at any time. The Court's finding of unconstitutionality precludes us from determining whether §375 required bargaining about the implementation of a lag payroll and from ordering any remedial relief.

Based upon the finding of unconstitutionality of §375, IT IS ORDERED that the charge must be, and it hereby is, dismissed in its entirety.

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[2/] Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 940 F.2d 766, 24 PERB ¶7535 (2d Cir. 1991), cert. denied, ___ U.S ___, (1991).

[3/] Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, ___ N.Y.2d ___, 25 PERB ¶7502 (January 16, 1992); 20 N.Y. Jur. 2d, Constitutional Law §83.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JO-ANN COSTABILE,

Charging Party,

-and-

CASE NO. U-12619

UNITED FEDERATION OF TEACHERS,

Respondent.

JO-ANN COSTABILE, pro se

JAMES R. SANDNER, ESQ. (JOHN H. JURGENS of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Jo-Ann Costabile to the dismissal of her charge against the United Federation of Teachers (UFT) which alleges a violation of §209-a.2(a) of the Public Employees' Fair Employment Act (Act). The Director of Public Employment Practices and Representation (Director) dismissed the charge as untimely filed.

Costabile's charge, filed on June 28, 1991, alleges that on September 19, 1990, the UFT represented Gloria Sonnenblum, another UFT bargaining unit employee, on a grievance which resulted in Sonnenblum's appointment to the position which Costabile was then holding. Costabile asserts that UFT represented Sonnenblum, to Costabile's ultimate detriment, without first having made an evaluation of the grievance as allegedly required by UFT's internal procedures.

After she was removed from her position, Costabile filed a grievance herself, which was dismissed by an arbitrator's decision dated May 24, 1991. The arbitrator affirmed a lower step determination that the UFT was barred from pursuing Costabile's grievance by its earlier successful pursuit of Sonnenblum's grievance.

The Director held that the four-month limitations period fixed by §204.1(a)(1) of our Rules of Procedure (Rules) ran from September 19, 1990, because Costabile was harmed then by UFT's representation of Sonnenblum. The Director concluded, in essence, that the arbitration award on Costabile's grievance merely failed to reverse the harm, if any, done to her in September 1990, and that the award on her grievance did not provide a third point from which the four-month limitations period could begin. In dismissing the charge, the Director relied upon this Board's decisions in City of Oswego,[1/] and Middle Country Teachers Association (Werner).[2/]

In her exceptions, Costabile contends that her charge is timely because the four-month limitations period should properly run from the date she received the arbitration award denying her grievance. She again argues that the consequences of the UFT's alleged failure to follow its own procedures in evaluating Sonnenblum's grievance were not known until the arbitrator ruled

---

[1/]23 PERB ¶3007 (1990).

[2/]21 PERB ¶3012 (1988).

in May 1991 that her grievance was barred because Sonnenblum's grievance had been granted.

UFT raises certain procedural objections to Costabile's exceptions. It first argues that the exceptions are untimely because they were not filed within fifteen working days after Costabile's receipt of the Director's decision. Although the Director's decision is dated September 6, 1991, it was not mailed until September 9, 1991, and not received by Costabile until September 11, 1991. Her exceptions are postmarked October 1, 1991, and, as such, they were filed within fifteen working days following receipt of the Director's decision, as required by our Rules.

The UFT also contends that Costabile's exceptions should be dismissed because she failed to file the required number of copies of her exceptions. Costabile's failure to file the requisite number of copies of her exceptions, although not in compliance with §204.10(c) of our Rules, does not require dismissal of her exceptions, if otherwise timely and properly filed. The requirement of an original and four copies of exceptions is for the convenience of the Board and it does not implicate any party's substantive or procedural rights.[3/] Therefore, the exceptions may not be dismissed upon this ground.

[3/]Compare City of Albany, 23 PERB ¶3027 (1990), conf'd, City of Albany v. Newman, 24 PERB ¶7004 (Sup. Ct. Alb. Co. 1991), aff'd, ___ A.D.2d ___, 25 PERB ¶7002 (3d Dep't 1992).

The UFT last alleges that Costabile failed to serve it with a copy of her exceptions and failed to submit proof of service of such copy to the Board as required by §204.10(c) of our Rules. In United Federation of Teachers (Thomas),[4/] we held that a party's failure to timely serve a copy of exceptions upon all parties and to file with us proof of service of such copies requires dismissal of the exceptions upon motion of an affected party.[5/]

Based upon the unrefuted assertion of the UFT that it was not served with a copy of Costabile's exceptions, Costabile's failure to file proof of service, and the UFT's motion to dismiss the exceptions, the exceptions must be, and they hereby are, dismissed for failure to comply with the service and filing requirements of §204.10(c) of the Board's Rules.

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[4/]15 PERB ¶3030 (1982).

[5/]See also Catskill Regional Off-Track Betting Corp., 14 PERB ¶3075 (1981), and City of Albany, supra note 3.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DEPEW POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-11098

VILLAGE OF DEPEW,

Respondent.

WYSSLING, SCHWAN & MONTGOMERY (W. JAMES SCHWAN of counsel), for Charging Party

MAHONEY, BERG & SARGENT (NICHOLAS J. SARGENT of counsel), for Respondent

BOARD DECISION ON MOTION

By decision dated February 25, 1992,[1/] this Board held that the Village of Depew (Village) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it prohibited officers and members of the Depew Police Benevolent Association, Inc. (PBA) from conducting a particular fund raiser and threatened them with suspension from their jobs if the fund raiser were held.

[1/] Village of Depew, 25 PERB ¶3009 (1992).

The Village has filed a motion to have us reconsider the decision on the ground that we misapprehended a material fact and misapplied the controlling law.[2/] The motion must be denied.

The material fact which the Village argues was misapprehended in the Board's earlier decision is that the purpose of the PBA's fund raiser was to raise money to assist a unit employee with the expenses he had incurred in the defense of disciplinary charges brought under Civil Service Law §75. However, our decision refers to those charges and the facts pertaining to the purpose of the fund raiser were clearly part of the record reviewed and considered by us. Our subsequent reference to a "grievance" was intended only to reflect that the PBA was assisting the unit employee with a job-related complaint.

The Village's second argument in support of reconsideration is that the PBA was not required to hold a fund raiser for the unit employee and that its decision to do so is not protected. The issue in this case is not the PBA's duties, but its rights and the rights of the employees it represents. The PBA and the unit employees had a right protected by the Act to hold the fund raiser and the Village interfered with the exercise of that right.

[2/]We have entertained motions for reconsideration on these grounds. See Town of Brookhaven, 19 PERB ¶3010 (1986).

For the reasons set forth above, the Village's motion is denied.

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Sommertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. LOCAL 1000, AFSCME, AFL-CIO, VILLAGE OF NEW PALTZ UNIT, LOCAL 856,

Charging Party,

-and-

CASE NO. U-12082

VILLAGE OF NEW PALTZ,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of counsel), for Charging Party

J. PHILIP ZAND, ESQ., for Respondent

BOARD DECISION AND ORDER

The Village of New Paltz (Village) has filed exceptions to an Administrative Law Judge's (ALJ) determination that the Village violated §209-a.1(c) of the Public Employees' Fair Employment Act (Act) by discharging James Noon, a unit employee, in retaliation for his statutorily protected activities on behalf of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Village of New Paltz Unit, Local 856 (CSEA). CSEA has filed cross-exceptions to the remedy ordered by the ALJ.

The Village asserts that the ALJ's findings are not supported by a balanced reading of the record, that he relied incorrectly on hearsay testimony, and that he drew an

inappropriate negative inference from the Village's failure to call Noon's former supervisor, Vincent Palermo, to testify.

Having reviewed the record and considered the Village's exceptions, we find that the record fully supports the ALJ's findings in material respect and we affirm his decision.

Noon's expressed interest in running for unit president, his communications to unit employees of CSEA meetings and his attendance at such meetings are undisputedly[1/] protected activities. Palermo's awareness of these activities and his unhappiness with them is similarly uncontrovertible. Palermo, for example, threatened to see to it that Noon was terminated from his job within six or seven months should he run for union office. Although Noon thereafter decided not to run for unit president, he proceeded, within the time frame set forth in Palermo's threat, to lodge health and safety complaints with Palermo on behalf of CSEA. On the morning of July 24, 1990, he publicized the second CSEA meeting and had his second confrontation with Palermo regarding that communication. In the afternoon of July 24, two members of the Village Personnel Committee - Carole Smith and Thomas Nyquist, the Village's mayor - met and approved Palermo's request for Noon's termination. On July 25, the Village Board passed a resolution terminating Noon, with Palermo present and providing input. Midday on July 27,

---

[1/] See infra.

Noon was summarily notified of his discharge. It is undisputed that Noon's discharge was pursuant to Palermo's instigation and based upon his recommendation. There is no evidence that Noon was otherwise being considered for termination or any other disciplinary action by the Village, no evidence that the Village Board, which voted on Noon's termination, had reviewed his work record, and no evidence that any member of the Village Personnel Committee, which approved Palermo's recommendation for termination and forwarded it to the Village Board, did more than a cursory review of Noon's personnel file. Moreover, after Noon was discharged, Palermo admitted to Jean Shannon, a Village employee, that Noon had been terminated for his union activity.[2/] This evidence alone would be sufficient to establish Noon's protected activity, Palermo's animus, and the causation necessary for the finding of a violation of the Act. The rest of the record only strengthens this determination. As explained hereafter, the Village's attempts in its exceptions and supporting brief to discredit or weaken various portions of the record and the ALJ's interpretation of it are not persuasive.

The Village's reliance on Noon's allegedly mediocre job performance and spotty attendance, particularly regarding overtime assignments, is without merit. According to the

---

[2/]After Shannon told Palermo that a discharge for such a reason was illegal, Palermo immediately changed the subject and did not refer to it again.

testimony of the Village's own witness, Garry Thomsen, who was one of Noon's supervisors, Noon's job performance was on a par with that of the other unit employees. Noon's attendance was of such minor concern to the Village that it prompted only one counselling session over a year prior to Noon's termination. Noon's requests for leave, sometimes submitted after the fact, were routinely approved, pursuant to Palermo's practice in the department. It strains credulity to conclude, as the Village would have us do, that it was suddenly overcome by Noon's work history to the point of having to summarily terminate his employment following one minor disciplinary action over a year before. The predominant activity described on this record in the months preceding Noon's termination was his union activity and his confrontations with Palermo regarding it. Noon's termination occurred within the time period stated in the threat Palermo made when Noon initiated his union activity and was considered within hours of, and occurred within a day of, a confrontation between Noon and Palermo regarding Noon's posting of a second CSEA meeting notice.

The Village's argument that Palermo's actions and motive cannot redound to the Village's detriment is meritless. Palermo, as Noon's supervisor, acted as an agent of the Village. Because the Village terminated Noon at Palermo's instigation and on his

recommendation,[3] its termination proceeding and order were the direct result of Palermo's improper motive and were tainted as a result.[4]

The Village argues that Noon was never designated a CSEA shop steward and was not authorized to lodge health and safety complaints on CSEA's behalf. Although no formal CSEA vote was taken, and Noon was not formally designated a shop steward by CSEA, we find that Noon was acting as a shop steward, with the knowledge and consent of the majority of the unit employees, and that he proceeded to make health and safety complaints in the name of CSEA. Further, regardless of Noon's official status, there is no evidence that Palermo rejected Noon's representation that he was acting on CSEA's behalf. Under these circumstances, any action taken against him based on these complaints was unlawful under the Act.[5]

---

[3]Smith testified on behalf of the Village regarding the process by which Noon was terminated. As found by the ALJ, and contrary to the assertion of the Village in its brief, Smith's testimony is properly characterized as vague except in her description of Palermo as responsible for Noon's termination.

[4]See, e.g., County of Suffolk, 20 PERB ¶3009, at 3018 (1987); Town of Gates, 15 PERB ¶3079 (1982); Elmira City School Dist., 14 PERB ¶3015 (1981).

[5]Based on the above, we need not consider whether Noon's safety complaints would be otherwise protected. In that regard, see Metropolitan Suburban Bus Auth., 23 PERB ¶3006 (1990). Even if not protected, the rest of Noon's union related activities are sufficient to support our determination.

The Village's reliance on the relatively few incidents of alleged interference with Noon's statutory rights and on record evidence of goodwill within the department during Noon's employ is misplaced. Contrary to the Village's apparent belief, statutory liability is not necessarily defined by balancing union animus and improper motives against other circumstances in which the employer may have acted properly. An employer may have done nothing unlawful under the Act for the majority of an employee's employment, but that fact, even with some general evidence of departmental goodwill,[6/] does not negate direct evidence, as we have here, of union animus and improper motive. This same analysis requires the rejection of the Village's reliance on its lack of interference with the first CSEA meeting,[7/] with Noon's attendance at the two CSEA meetings or with Noon's presenting health and safety complaints.

[6/]In noting the Village's contention in this respect, we do not suggest that there was overall goodwill in the department. The record references to goodwill are few and brief while Palermo's temper and oft-expressed displeasure at the mention of unions are well documented. That Palermo may have had a tendency to become angry with employees for reasons unrelated to union activities, as the Village suggests, merely demonstrates that other things angered him; it does not weaken the evidence of animus proven on this record.

[7/]In its brief, the Village notes that Thomsen, then a unit employee who was instrumental in scheduling the first CSEA meeting in April 1990 and who had earlier tried to have the unit offices filled, was not discriminated against. While covered by the above analysis, we note also that the record does not indicate whether the Village had knowledge of these activities.

The Village also objects to the ALJ's reliance on Shannon's alleged conjectural, hearsay testimony regarding Palermo's stated motive for Noon's discharge. Contrary to the Village's claim, Shannon's testimony was not conjecture, and, even if it qualifies as a hearsay statement, it is an exception to the hearsay rule as an admission against interest. Hearsay evidence, in any event, may be admitted in an administrative proceeding. It can be used to support a finding of violation otherwise premised, as here, on evidence acceptable in a court of law and it can even be the sole basis for an administrative determination.[8/]

The Village objects to the ALJ's reference to prior retaliation by Palermo in response to a unit employee's safety complaint to his union representative, claiming that it is an "improper" example. To the contrary, Palermo's actions in considering an employee "guilty" who had complained to his bargaining agent about the safety of a truck in the department, in informing unit employees that they "would all suffer the consequences" if he did not learn the identity of the complainant, in seeking to learn the identity of the so-called guilty party, and in withdrawing the use of a microwave oven from unit employees until the guilty employee came forward are clear and uncontested, and demonstrate retaliation for the exercise of a statutorily protected right. Whether the guilty employee's

---

[8/]Gray v. Adduci, 73 N.Y.2d 741 (1988), and the cases cited therein.

subsequent job assignment was undesirable or punishment is immaterial given the evidence of Palermo's retaliatory conduct in handling the matter up to that point.[9/]

Although the Village also complains about the ALJ's drawing of a negative inference from the failure to call Palermo as a witness,[10/] the record evidence, without any negative inference, is conclusive in support of the ALJ's findings.

Based on the above, the ALJ's decision is affirmed.

CSEA's cross-exception to the remedial order[11/] is denied for the reasons set forth in our recent decision in County of Orleans.[12/]

[9/]Noon testified on direct examination that it was an undesirable assignment, but opined on cross-examination that it was not a punishment.

The Village argues merely that the record lacks evidence that the employee considered the assignment to be punishment. The employee's subjective belief, however, is not dispositive.

[10/]The Village asserts in its brief that there is no record evidence to support the ALJ's statement that Palermo still resided, at the time of the hearing, near the Village. However, Thomsen testified without contradiction that Palermo lives in a nearby town and travels through the Village regularly.

It also argues that the ALJ should have concluded that Palermo would have been a hostile witness to the Village based on Palermo's resignation from the Village's employ since the at-issue incidents. The mere fact that Palermo resigned his employment is no basis upon which to presume hostility.

[11/]CSEA seeks an order requiring the Village to give personal notice of the violation to each unit employee and to notify its supervisors of the unit employees' rights under the Act and to train them in that respect.

[12/]25 PERB ¶3010 (1992).

IT IS, THEREFORE, ORDERED that the Village:

1. Immediately offer James Noon reinstatement to his prior position with the Village;
2. Make James Noon whole for any loss of pay or benefits suffered by reason of his discharge from the date thereof to the date of the unconditional offer of reinstatement, less any earnings derived from other employment obtained as the result of the discharge, with interest at the current maximum legal rate;
3. Cease and desist from discriminating against James Noon for seeking union office, publicizing or attending union meetings or serving as a union representative;
4. Sign and conspicuously post notice in the form attached at all locations ordinarily used by the Village to communicate information to Village employees in CSEA's unit.

DATED: June 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, 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 the employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Village of New Paltz Unit, Local 856, that the Village of New Paltz (Village) will:

1. Immediately offer James Noon reinstatement to his prior position with the Village;

2. Make James Noon whole for any loss of pay or benefits suffered by reason of his discharge from the date thereof to the date of the unconditional offer of reinstatement, less any earnings derived from other employment obtained as the result of the discharge, with interest at the current maximum legal rate;

3. Not discriminate against James Noon for seeking union office, publicizing or attending union meetings or serving as a union representative.

VILLAGE OF NEW PALTZ

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

BERNE-KNOX-WESTERLO TEACHERS SUPPORT STAFF, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3837

BERNE-KNOX-WESTERLO 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 Berne-Knox Westerlo Teachers Support Staff, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Teacher Aides

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Berne-Knox-Westerlo Teachers Support Staff, NYSUT. 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 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED INDUSTRY WORKERS, LOCAL 424,

Petitioner,

- and -

CASE NO. C-3884

WEST ISLIP UNION FREE SCHOOL DISTRICT,

Employer,

- and -

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

Intervenor.

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,[1/]

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

---

1/ A secret mail ballot election was held on February 27, 1992. Of the 121 eligible voters, 31 votes were cast for Civil Service Employees Association, Inc., 1000, AFL-CIO (CSEA) and 76 votes were cast for United Industry Workers, Local 424. In addition, one vote was cast against both participating employee organizations and three ballots were challenged, bringing the total of votes cast to 111.

On March 4, 1992, the CSEA filed objections to conduct allegedly affecting the outcome of the election; however, on April 30, 1992, the objections were withdrawn.

IT IS HEREBY CERTIFIED, that United Industry Workers, Local 424, 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 cooks, assistant cooks, food service custodians, maintenance personnel, head and special custodians, driver messengers, bus dispatchers, and bus drivers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with United Industry Workers, Local 424. 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 other 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 , 1992
Albany, New York

Pauline Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MIDDLETOWN ENLARGED CITY SCHOOL DISTRICT,

Employer-Petitioner,

CASE NO. C-3901

-and-

MIDDLETOWN PART-TIME FOOD SERVICE HELPERS AND LEAD PERSONS ASSOCIATION, MIDDLETOWN COOK AND COOK MANAGERS UNIT, MIDDLETOWN HOME SCHOOL LIAISON UNIT, MIDDLETOWN FULL-TIME MONITORS UNIT,[1] UNION OF MIDDLETOWN SCHOOL EMPLOYEES, NYSUT,

Intervenors.

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 Union of Middletown School Employees, NYSUT has been designated and selected by a majority of the employees of the above-named public employer, in the units agreed upon by the parties and described below, as their exclusive representative for the purpose of collective

---

[1] All of the foregoing, the representatives of the units which are here consolidated, have disclaimed any further representation interest among the public employees in their respective units.

negotiations and the settlement of grievances.

Unit I:
Included: Liaison, Aides and Monitors Unit consisting of regular part-time teacher aides working not more than 19 3/4 hours per week, regular monitors and regular full-time Home School Liaison;

Excluded: All other employees.

Unit II:
Included: Food Service Workers Unit consisting of regular full-time Cooks, regular full-time Cook Managers, regular part-time Food Service Helpers working not more than 19 3/4 hours per week and regular part-time lead persons working not more than 19 3/4 hours per week;

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Union of Middletown School Employees, NYSUT. 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 2, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member