10-21-1992

State of New York Public Employment Relations Board Decisions from October 21, 1992

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from October 21, 1992

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

2A-10/21/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED INDUSTRY WORKERS, LOCAL 424,

Petitioner,

-and-

CASE NO. C-3885

SOUTH HUNTINGTON UNION FREE SCHOOL DISTRICT,

Employer,

-and-

LOCAL 144, DIVISION 100, SEIU, AFL-CIO,

Intervenor.

RICHARD M. GREENSPAN, ESQ., for Petitioner

GEORGE JACKSON, for Employer

VLADECK, WALDMAN, ELIAS & ENGLEHARD, P.C. (LARRY CARY of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Local 144, Division 100, SEIU, AFL-CIO (SEIU) to a decision by the Director of Public Employment Practices and Representation (Director). The Director dismissed SEIU's objections to an election involving certain employees of the South Huntington Union Free School District (District). United Industry Workers, Local 424 (UIW) received a majority of the valid votes cast in an election

conducted by mail ballot during February 1992.[1/] The notice of election was not posted by the District until February 7, 1992, the day the ballots were mailed to eligible voters, because the District was not provided with copies of the notice until the late afternoon on February 6. Although the election consent agreement executed by the parties and approved by the Director states that the notices of election are to be posted "at least five (5) days before the election"[2/], the Director declined to set aside the election. He concluded that the vote was representative and that the delayed posting did not affect the outcome of the election.

SEIU urges us to set aside an election pursuant to timely election objections anytime there has been a failure to post election notices within a specified time frame if the objecting party is not responsible for the nonposting.[3/]

Apart from its election objection, SEIU requests that we consider certain information which assertedly bears upon UIW's eligibility for certification. SEIU alleges that there is evidence that UIW has undergone certain changes since the date of

---

[1/]From 137 eligible voters, UIW received 67 votes, SEIU received 37 votes and 3 employees voted against representation by either union. There were also 8 void ballots and 5 challenged ballots. Seventeen eligible employees did not vote.

[2/]The date the ballots are mailed is used for calculating the start of the posting period.

[3/]The National Labor Relations Board has such a policy. See, e.g., Smith's Management Corp., 295 NLRB No. 105, 131 LRRM 1731 (1989).

its petition which suggest that UIW no longer exists in a form which is the same or substantially similar to its organizational form at the date of its petition.

UIW argues that we should affirm the Director's decision on the election objection and certify it as the bargaining agent for the unit of District employees.

The District takes no position on the merits of the parties' positions, urging only an expeditious resolution of the representation questions.

Having considered the parties' arguments, including those at oral argument, we reverse the Director's decision, set aside the election and remand the case to the Director for further investigation and decision.

We do not have any need in this case to articulate an election posting policy applicable in all circumstances to all representation cases. In this case, the notices of election were not posted by the District within the time frame set forth in the consent agreement because Board employees failed to promptly transmit the notices to the District. Having reviewed the record, we cannot conclude to a legal or factual certainty that the delayed posting had no effect on the results of this election.[4/] In these circumstances, we do not consider reliance on an estimate of the representative character of the vote to

---

[4/]The total of the void and challenged ballots and those which could have been cast by the employees who did not vote is 30. If SEIU had received all of these 30 votes, the election would have tied between SEIU and UIW at 67 votes each.

best serve the policies of the Act, the interests of the parties or the employees.

Having determined to set aside the election, we would ordinarily order that another election be conducted forthwith. We do not do so in this case, however, because substantial questions have been raised regarding the current status, identity or structure of UIW. UIW concedes that it has undergone some changes since it filed its petition. It maintains, however, that the changes are insignificant, relate only to its internal affairs and amount to a name change only. SEIU alleges, with some supporting information, that the changes are of a different type, arguably significant enough to affect the continuing processing of this petition and UIW's eligibility for certification.[5/] These are issues which are properly before us because they relate directly to the possible certification of an employee organization as the exclusive representative for a unit of employees, which is inherently within our power to grant, withhold, rescind or review.[6/] We do not now have all of the information which may be relevant to an inquiry in these respects and certain of the information which is currently in our possession is disputed. We, therefore, cannot now determine whether UIW in its present form is the same as or substantially

---

[5/]State of New York, Unified Court System, 12 PERB ¶3019 (1979).

[6/]County of Orange and Sheriff of Orange County, 25 PERB ¶3004 (1992); City School Dist. of the City of Schenectady, 23 PERB ¶3028 (1990).

similar to the organization which filed the petition. Without making that decision, it cannot be determined whether the petition should be processed further and, if so, under what conditions.

For the reasons set forth above, the Director's decision is reversed and the election is set aside. The case is remanded to the Director for forthwith investigation and hearing, as necessary, regarding changes in UIW's identity, organization or structure since the date the petition was filed and for a decision by the Director regarding a new election as may then be appropriate.

DATED: October 21, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2B-10/21/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NASSAU CHAPTER CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, NASSAU LOCAL 830,

Charging Party,

-and-

CASE NO. U-12702

COUNTY OF NASSAU,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (ROBERT T. DeCATALDO of counsel), for Charging Party

BEE & EISMAN (PETER A. BEE and DANIEL E. WALL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Nassau Chapter Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Nassau Local 830 (CSEA) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed CSEA's charge against the County of Nassau (County) which alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it changed the content of the meal plan available to certain unit employees under the parties' current collective bargaining agreement.

The ALJ dismissed the charge for lack of jurisdiction, finding that the parties' contract covered the subject which is the basis of the improper practice charge.[1/]

In relevant respect, CSEA argues that the contract does not give it any rights regarding the content of the meal plan and, therefore, that the ALJ erred by dismissing the charge for lack of jurisdiction. CSEA also argues that the jurisdictional question should have been deferred to a pending grievance and the charge only conditionally dismissed. The County argues in its response that the ALJ's decision to dismiss the charge for lack of jurisdiction is correct and should be affirmed.

Having reviewed the record and the parties' arguments, we affirm the ALJ's decision.

Turning first to CSEA's contention that the jurisdictional issue should have been deferred, the record contains no evidence that a grievance related to the subject of the improper practice charge was pending. The first reference to that grievance is in CSEA's brief to us on appeal. There being no evidence before the ALJ of any pending grievance, he properly addressed the jurisdictional issue.[2/]

Regarding the jurisdictional question, the parties' contract provides that "all employees utilizing the meal deduction plan

---

[1/]As an alternative disposition, the ALJ found there was no cognizable change in the meal plan. In view of our disposition of the charge, we do not reach this aspect of the ALJ's decision or the exceptions which are taken to it.

[2/]Erie County Water Auth., 25 PERB ¶3017 (1992).

shall pay four hundred and fifty two dollars ($452) per year per meal." CSEA's charge centers on an allegation that the County decreased the number of complete meals available to employees under the meal plan. Although the number of meals is itself not specifically addressed by the contract, that is not dispositive of the jurisdictional question.[3/] As we have previously stated, we are without jurisdiction under §205.5(d) of the Act when the parties' collective bargaining agreement provides the charging party with a reasonably arguable source of right with respect to the subject matter of the charge.[4/]

The contract is the source of the employees' entitlement to participate in the meal plan. Despite CSEA's argument to the contrary, there is nothing to evidence the existence of some other noncontractual meal plan. As we view the agreement, a specific benefit was obtained for a specific price. It may be necessary to resort to extrinsic evidence, including the parties' practice regarding the provision of meals, to define precisely what the meal plan must provide in return for its price. That, however, does not convert the benefit from one which is contractually based to one which is extra-contractual and subject to definition and regulation through the improper practice provisions of the Act.

[3/]See, e.g., City of Albany, 25 PERB ¶3006 (1992).

[4/]County of Nassau, 23 PERB ¶3051 (1990).

For the reasons set forth above, CSEA's exceptions are denied and the ALJ's decision dismissing the charge for lack of jurisdiction, is affirmed.

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

DATED: October 21, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2C-10/21/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF ELMIRA,

Charging Party,

-and-

CASE NO. U-13352

ELMIRA POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

JOHN J. RYAN, JR., ESQ., for Charging Party

JOHN B. SCHAMEL, JR., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Elmira (City) to a decision by the Director of Public Employment Practices and Representation (Director). The Director dismissed the City's charge against the Elmira Police Benevolent Association, Inc. (PBA) which alleges that the PBA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by including a nonmandatory residency demand in its petition for compulsory interest arbitration. The Director dismissed the City's charge as untimely because it was not filed within the time allowed under our Rules of Procedure (Rules).

In relevant respect, §§205.5(a) and 205.6(b) of our Rules together require an improper practice charge raising an objection to the arbitrability of a demand to be filed at or before the time the response to the petition for interest arbitration is

filed. Such a response is due within ten working days after receipt of the demand for arbitration. Even assuming the City's response to the petition for arbitration was timely filed, there is no dispute that the charge was not filed until several days thereafter.

In its exceptions, the City argues that its late filing of the charge should be excused because it was not "unduly" delayed and the PBA had prior notice from the response to the petition that the City objected to the negotiability of the residency demand.

The PBA argues in its response that the City's late filing of the charge should not be excused and that the Director's decision must be affirmed.

Having reviewed the parties' arguments, we affirm the Director's decision.

We have construed strictly our Rules regarding the time periods for improper practice filings.[1/] In this case, the failure of timeliness was apparent from the charge as filed and the PBA objects to the processing of it. Because the objection to arbitrability could not be raised in the response to the interest arbitration petition, notice of the City's objection to the negotiability of the residency demand in that response did not commence the improper practice proceeding nor extend the time

---

[1/]See, e.g., City of Albany v. PERB, ___ A.D.2d ___, 25 PERB ¶7002 (3d Dep't 1992), conf'g 23 PERB ¶3027 (1990); United Fed'n of Teachers, 25 PERB ¶3034 (1992); Catskill Regional Off-Track Betting Corp., 14 PERB ¶3075 (1981).

within which a charge could be filed. Notwithstanding the alleged lack of prejudice to the PBA, our Rules as written and applied require that the charge be dismissed as untimely filed.

For the reasons set forth above, the City's exceptions are denied and the Director's decision is affirmed.

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

DATED: October 21, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2D-10/21/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN LaBARBARA,

Charging Party,

-and-

CASE NO. U-12167

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 66, LOCAL 930,

Respondent,

-and-

ERIE COUNTY WATER AUTHORITY,

Employer.

HENRY E. WYMAN, ESQ. (SUSAN I. PLESKOW of counsel), for Charging Party

JOEL M. POCH, ESQ., for Respondent

ROBERT J. LANE, ESQ., for Employer

BOARD DECISION AND ORDER

John LaBarbara has filed exceptions to a decision by an Administrative Law Judge (ALJ) dismissing his charge against the American Federation of State, County and Municipal Employees, Council 66, Local 930 (AFSCME). The charge alleges that AFSCME violated §209-a.2(c)[1/] of the Public Employees' Fair Employment Act (Act) by refusing to grieve a September 2, 1990 overtime "call-out" on his crew and the regular assignment of another unit employee, Richard Scoma, to that crew. LaBarbara alleges that Scoma is unqualified for his assignment and that his assignment

---

[1/]This section of the Act codifies a union's duty of fair representation.

has caused LaBarbara to lose overtime in violation of AFSCME's contract with the Erie County Water Authority (Authority) which requires the Authority to endeavor to distribute overtime equitably.[2/]

LaBarbara was afforded repeated opportunities by the Assistant Director of Public Employment Practices and Representation (Assistant Director) and the ALJ to cure noted deficiencies in his charge. The ALJ dismissed the charge after a conference, however, finding that there were not sufficient facts set forth in his several pleadings[3/] to establish a prima facie breach of AFSCME's duty of fair representation.

LaBarbara argues generally in his exceptions that the ALJ's decision is not supported by the record. More specifically, he alleges that AFSCME's refusal to process a grievance on his behalf as requested was discriminatory and improperly motivated.[4/]

[2/]The Authority is a party to this charge pursuant to §209.3 of the Act. That section requires that a public employer be made a party to a charge against a union which alleges a breach of that union's duty of fair representation arising from a refusal to process a claim that the public employer breached its contract with the union.

[3/]LaBarbara filed two amendments to his charge and a post-conference offer of proof.

[4/]We have held that a union violates its statutory duty of fair representation only if its actions are arbitrary, discriminatory or in bad faith. New York State Public Employees Fed'n, 22 PERB ¶3049 (1989). The standard clearly encompasses actions which are improperly motivated. Professional Staff Congress, 23 PERB ¶3030 (1990).

The Authority and AFSCME in their responses argue that the ALJ's decision accurately summarizes the record and correctly applies the law such that her decision must be affirmed.

Having reviewed the record and the parties' arguments, we affirm the ALJ's decision.

AFSCME's local President, Chris Mulhern, responded to LaBarbara with a two-page letter soon after he made the grievance request. The letter shows that Mulhern was aware of the circumstances involving the September 2 callout and Scoma's job assignment. In that letter, Mulhern explains why, in his opinion, LaBarbara did not have a meritorious grievance.

By responding promptly to LaBarbara's complaint and explaining its position regarding his grievance request, AFSCME satisfied one aspect of its duty of fair representation.[5/] AFSCME's response, however, would not insulate it from liability on a duty of fair representation theory if its decision not to grieve were improperly motivated or discriminatory as LaBarbara alleges. AFSCME's decision was allegedly improperly motivated because the call-out on September 2 was done by a dispatcher in AFSCME's unit and AFSCME will not grieve the actions of a unit employee. AFSCME's decision was allegedly discriminatory because AFSCME has otherwise represented Scoma's interests to LaBarbara's detriment.

[5/]Nassau Educ. Chapter of the Syosset Cent. School Dist. Unit, CSEA, Inc., 11 PERB ¶3010 (1978); Social Service Employees' Union, Local 371, 11 PERB ¶3004 (1978).

The ALJ considered in detail both LaBarbara's discrimination and improper motivation allegations. The ALJ concluded that they were conclusory allegations made without any supporting facts. Having reviewed LaBarbara's several pleadings, we agree with the ALJ's assessment of them. There are no facts pleaded which would evidence that AFSCME has a policy of never grieving actions taken on behalf of the Authority by a unit employee in the course of his employment.

As to LaBarbara's discrimination theory, there is no unlawful discrimination per se in a union assisting one unit employee and denying assistance to another.[6/] Although LaBarbara plainly considers himself aggrieved by Scoma's job assignment, that does not mean that Scoma is not entitled to have and hold that assignment, even if he were given it for the reason LaBarbara alleges[7/] or even if the assignment impacted LaBarbara's overtime earnings. Giving LaBarbara's pleadings every reasonable inference, we cannot conclude that Scoma's assignment to LaBarbara's crew on or after September 2, 1990 violated the parties' contract or controlling practice.

For the reasons set forth above, the ALJ's decision is affirmed and the exceptions are denied.

[6/]United Fed'n of Teachers, Local 2, 18 PERB ¶3048 (1985); South Huntington United Aides, 17 PERB ¶3012 (1984); State of New York, 14 PERB ¶3043 (1981).

[7/]LaBarbara alleges that Scoma was given the assignment to boost his final average salary prior to retirement.

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

DATED: October 21, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3A-10/21/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL BROTHERHOOD OF CORRECTIONAL OFFICERS, A DIVISION OF THE NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3953

COUNTY OF ROCKLAND and SHERIFF OF ROCKLAND COUNTY,

Employer,

-and-

SHERIFF'S CORRECTION OFFICERS ASSOCIATION OF ROCKLAND COUNTY,

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,

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

IT IS HEREBY CERTIFIED that the International Brotherhood of Correctional Officers, a Division of the National Association of Government Employees, SEIU, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described

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

Unit: Included: Correction Officers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Correctional Officers, a Division of the National Association of Government Employees, SEIU, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 21, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3B-10/21/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

IBT, TEAMSTERS LOCAL 693,

Petitioner,

-and-

CASE NO. C-3959

TOWN OF SANFORD,

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 IBT, Teamsters Local 693 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: Motor Equipment Operator, Light Equipment Operator, Laborer, Automotive Mechanic, Truck Driver, Motor Grader Operator, Deputy Highway Superintendent.

Excluded: Supervisory employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the IBT, Teamsters Local 693. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 21, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

30-10/21/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-3979

TOWN OF WALLKILL,

Employer,

-and-

NEW YORK STATE FEDERATION OF POLICE, INC.,

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,

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties[1/] and described below, as their exclusive representative

---

1/ The intervenor, which was the unit's bargaining agent, did not participate in this proceeding.

for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All police officers and sergeants.

Excluded: All other employees of the employer.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 21, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

MEMORANDUM

September 18, 1992

TO: All Professional Staff

FROM: John Crotty

RE: Rule Changes

Attached are proposed rule changes regarding the appeal of representation and improper practice cases. I would appreciate any comments you may have. The changes are designed to control the filing of papers with the Board. New material is underlined. Deletions are in brackets.

Amend §201.12(c) as follows:

(c) Within seven working days after receipt of exceptions, any party may file with the board an original and four copies of a response thereto, or cross-exceptions and a brief in support thereof, together with proof of service of a copy thereof upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and four copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding. No pleading other than exceptions, cross-exceptions or a response thereto will be accepted or considered by the board unless it is requested by the board or filed with the board's authorization. If any additional pleading is requested or authorized by the board, the board shall notify the parties regarding the conditions under which that pleading will be permitted.

Amend caption and text of §204.11 as follows:

§204.11 Cross exceptions [.]; responses; replies. Within seven working days after receipt of exceptions, any party may file an original and four copies of a response thereto, or cross-exceptions and a brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and four copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding. No pleading other than exceptions, cross-exceptions or a response thereto will be accepted or considered by the board unless it is requested by the board or filed with the board's authorization. If any additional pleading is requested or authorized by the board, the board shall notify the parties regarding the conditions under which that pleading will be permitted.