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State of New York Public Employment Relations Board Decisions from November 17, 1992

New York State Public Employment Relations Board

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHENECTADY POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-12459

CITY OF SCHENECTADY,

Respondent.

GRASSO & GRASSO, ESQS. (JANE K. FININ and KATHLEEN R. DeCATALDO of counsel), for Charging Party

ROEMER & FEATHERSTONHAUGH, P.C. (JAMES W. ROEMER, JR. and ELAYNE G. GOLD of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Schenectady (City) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). After a hearing, the Assistant Director held that the City had transferred certain traffic and crowd control duties exclusive to the police unit represented by the Schenectady Police Benevolent Association (PBA) to nonunit County Civil Defense Volunteers (auxiliary police) in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act).

The duties in issue involve traffic and crowd control at the City's annual "half-marathon" race. For at least three years

before 1991, on-duty police officers and off-duty officers on overtime assignment covered assigned posts along the 13.1 mile race route to handle traffic and crowd control. Auxiliary police had not previously worked the half-marathon. In 1991, however, the City arranged to have four auxiliary police volunteers stationed at certain of the assigned posts to perform the same functions as had been performed previously by the unit personnel. This enabled the City to avoid calling in any off-duty police officers to cover the race.

The Assistant Director rejected the City's argument that traffic and crowd control at the half-marathon was not exclusive to the unit. In this respect, the Assistant Director found that the auxiliary police's traffic control duties at other special events were dissimilar from the duties undertaken by them during the half-marathon race.

The City in its exceptions renews its argument that the traffic and crowd control duties performed by the auxiliary police at the race were the same as or similar to the duties they had performed at other events in the past. Therefore, the City argues that the PBA has no exclusivity over the work in question and, as such, the unilateral assignment of the auxiliary police to the race was not a transfer of work to which any bargaining duty could attach.

The PBA argues in response that the Assistant Director's findings of fact and conclusions of law are correct in material respect and that his decision should be affirmed.[1/]

Having reviewed the record, we affirm the Assistant Director's decision. Although the auxiliary police have performed traffic and crowd control duties at other times on a regular basis, the duties were not reasonably comparable to those required of them for the half-marathon. As the Assistant Director properly found, the duties of auxiliary police at parades, the only comparable special event at which their duties are known in any detail, were incidental to the police officers' duties. The auxiliary police at these events were assigned to peripheral areas, off route, or with a police officer if on route. During the half-marathon, the auxiliary police were stationed directly along the race route, thereby replacing police officers without immediate police supervision at their assigned posts. We find no record evidence that auxiliary police were used in the past as a substitute for sworn police officers, only as closely supervised adjuncts.

[1/]The PBA in a cross-exception argues that the Assistant Director's finding that the auxiliary police covered posts previously covered by four on-duty police officers is incorrect. The PBA submits that the four auxiliary police replaced one on-duty officer and three off-duty officers on overtime. In view of our disposition of the charge, we do not reach the PBA's cross-exception.

As did the Assistant Director, we find that City of Rochester[2/] is dispositive of this issue. Just as in that case, it is inappropriate to characterize the unit work, to which the exclusivity analysis applies, as traffic and crowd control in general. Rather, it is traffic and crowd control of a certain type as performed by police officers at a particular event or location. The PBA has not lost exclusivity over traffic and crowd control of the type performed by the auxiliary police at the half-marathon by virtue of the services rendered by the auxiliary police at other events or at other times. Therefore, the unilateral reassignment of that work for performance by the nonunit auxiliary police violated the City's duty to negotiate.

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

IT IS, THEREFORE, ORDERED that the City:

1. Restore to the PBA unit the duties at the assigned posts at the half-marathon which were transferred to the auxiliary police on April 7, 1991.
2. Pay PBA unit employees any lost wages or benefits suffered as a result of the loss of unit work on April 7, 1991, with interest at the maximum legal rate.

[2/]21 PERB ¶3040 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

3. Sign and post a notice in the form attached at all locations ordinarily used to post informational notices to unit employees.

DATED: November 17, 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 in the unit represented by the Schenectady Police Benevolent Association (PBA) that the City of Schenectady will:

1. Restore to the PBA unit the duties at the assigned posts at the half-marathon which were transferred to the auxiliary police on April 7, 1991;

2. Pay PBA unit employees any lost wages or benefits suffered as a result of the loss of unit work on April 7, 1991, with interest at the maximum legal rate.

.....City of Schenectady.....

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

MONROE-WOODBURY TEACHERS ASSOCIATION, NYSUT,

Charging Party,

-and-

CASE NO. U-12931

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Respondent.

JEFFREY R. CASSIDY, for Charging Party

RAINS & POGREBIN, P.C. (ERNEST R. STOLZER and RICHARD G. KASS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Monroe-Woodbury Central School District (District) to a decision by an Administrative Law Judge (ALJ). The ALJ held on a stipulated record that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act), as alleged by the Monroe-Woodbury Teachers Association, NYSUT (Association), when it insisted at fact-finding upon a demand which would distribute a percentage of Excellence-In-Teaching (EIT) funds according to an Attendance Incentive Plan (AIP). Under the District's AIP proposal, twenty-five percent of the EIT monies would be distributed to unit employees who used three or fewer of their

contractual leave days between certain dates.[1] The remaining seventy-five percent of the EIT allocation has been distributed to unit employees regardless of their attendance record.

EIT is a state-wide program created in 1986 as part of that year's aid-to-localities state budget. Monies were appropriated to supplement the salaries of teachers throughout the State. As stated by the Court of Appeals in Schneider v. Sobol,[2] the goal of the EIT legislation is "to promote the recruitment and retention of quality teachers by providing supplementary compensation to offset budget shortfalls experienced by local school districts and BOCES."[3]

The EIT legislation requires certain funds to be set aside to increase the salaries of first-, second-, and third-year teachers whose salaries fall below specified medians. The remaining funds are used to "improve salaries for teachers . . . in general" under a distribution plan negotiated in separate collective bargaining between the union and the school district.

The ALJ held the AIP proposal to be a prohibited subject of negotiation because it conflicted with the intent of the EIT legislation[4] and §175.35(e)(6) of the Commissioner of

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[1]The proposal, however, excepted absences caused by an extended illness under certain conditions.

[2]76 N.Y.2d 309 (1990).

[3]Id. at 313.

[4]N.Y. Educ. Law §3602(27) (McKinney Supp. 1992).

Education's (Commissioner) implementing regulations.[5/] In reaching this conclusion, the ALJ adopted an earlier ALJ decision in Ithaca City School District,[6/] which was not appealed to us.

The District argues that the ALJ's decision must be reversed because bargaining regarding the payment of EIT monies has not been plainly and clearly prohibited by law or regulation. According to the District, the ALJ's decision to the contrary is premised upon an incorrect construction of the Commissioner's regulation and an erroneous interpretation of legislative intent.

The Association argues in response that the ALJ's decision is correct because the District's AIP proposal violates both the Commissioner's regulations and the EIT legislation.

For the following reasons, we reverse the ALJ's decision.

The distribution of EIT monies involves salary payments, a mandatorily negotiable subject matter. As such, the District violates the Act only if negotiations regarding the distribution of those monies according to its AIP proposal are preempted. In addressing that basic question, we start from the well-established proposition that collective bargaining is the strong

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[5/]That section of the Commissioner's regulations provides as follows:

> Eligible teachers shall not be required to perform additional services as a condition of their receipt of a distribution of funds pursuant to this subdivision.

[6/]22 PERB ¶4588 (1989).

policy of the State[7], which is preempted only when a contrary legislative intent is plainly and clearly evidenced.[8]

We turn first to a consideration of §175.35(e)(6) of the Commissioner's regulations. The parties have not cited us to any decision interpreting that section of the regulations and we are unaware of any. We do not find it to be applicable in this case.[9] A demand which would distribute a portion of EIT monies according to a teacher's attendance is not one in our view requiring the performance of "additional services" within the meaning of the regulation.

The District's AIP proposal can be considered to require additional services of EIT distributees only in the sense that they may work more days than those teachers who are more frequently absent from work and who would thus be made ineligible under the AIP proposal. We believe, however, that to find the regulation applicable on this basis would give it a strained interpretation which would largely ignore its "services"

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[7]See, e.g., Levitt v. Bd. of Collective Bargaining, 79 N.Y.2d 120, 25 PERB ¶7514 (1992); Bd. of Educ. of the City School Dist. of the City of New York v. PERB, 75 N.Y.2d 660, 23 PERB ¶7012 (1990).

[8]See, e.g., Webster Cent. School Dist. v. PERB, 75 N.Y.2d 619, 23 PERB ¶7013 (1990).

[9]We need not decide, therefore, whether a Commissioner's regulation can preempt negotiations otherwise required by the Act. Compare Newburgh Enlarged City School Dist. v. PERB, 22 PERB ¶7009 (Sup. Ct. Alb. Co. 1989), with Rush-Henrietta Cent. School Dist. v. PERB, 151 A.D.2d 1001, 22 PERB ¶7016 (4th Dep't 1989), leave to appeal denied, 75 N.Y.2d 704, 23 PERB ¶7006 (1990).

component. The quoted portion of the Commissioner's regulation is most reasonably interpreted to apply to duties over and above those which are regularly required of a teacher. The District's demand does not enlarge the teachers' work year or workday or require the performance of any duties other than those already required of unit employees.

This leaves for consideration the question whether the District's demand is prohibited by the EIT legislation itself. We begin our analysis of that question by recognizing that the EIT legislation does not define or restrict the bargaining process except to require that the negotiations be separate from any negotiations for a collective bargaining agreement. Except as the Commissioner's regulations prohibit a requirement of "additional services" in exchange for an EIT distribution, the regulations similarly do not define or restrict the bargaining process. To the contrary, the Commissioner's regulations[10/] provide that the "actual allocation of funds to eligible teachers . . . shall be made in accordance with the agreement separately negotiated between the collective bargaining agent and the school district or board of cooperative educational services."[11/]

Despite the absence of any specific statutory or regulatory restriction on bargaining about the distribution, the Association

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[10/]The Commissioner's regulations can be considered in assessing legislative intent. City School Dist. of the City of Elmira v. PERB, 74 N.Y.2d 395, 22 PERB ¶7032 (1989).

[11/]N.Y. Comp. Codes R. & Regs. tit. 8, §175.35(e)(2)(i) (1988).

argues that the District's demand is implicitly prohibited by the EIT legislation. The Association argues, and the ALJ held, that the language, purpose, and history of the EIT program establish that the distribution of EIT monies can only be made to improve the salaries of all teachers in general in an "ongoing career way".

The District's demand does nothing more than to restrict the eligible class of distributees through the imposition of an attendance level condition. The EIT legislation, however, does not require a distribution to all arguably eligible persons.[12/] Therefore, that all teachers might not receive an EIT distribution is not fatal to the mandatory negotiability of the AIP proposal. Second, we are unable to say with the certainty we must that a distribution to eligible employees based upon their presence in school to teach necessarily fails to improve teachers' salaries, fails to promote the hiring or retention of qualified teachers or fails to recognize and reward excellence-in-teaching in general.

Nor is the District's demand inconsistent with the Education Law's requirement of separate negotiations. The Association contends that the Legislature required the EIT distribution to be made through separate negotiations to prevent the settled terms of the parties' collective bargaining agreement from being reopened. Even were we to accept the Association's

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[12/]Schneider v. Sobol, supra note 10; Appeal of Keesler, 29 Ed. Dep't Rep. 235 (1990).

view of legislative intent in this regard, it would not avail the Association here. The District's demand simply does not seek to reopen the leave provisions of the parties' collective bargaining agreement. The District's proposal merely conditions the payment of certain monies, which are not included in or covered by the parties' contract, on a leave utilization rate. The AIP proposal by its terms, however, does not change any term of the agreement or require any employee to forego any contractual benefit. The type and number of contractual leave days would be unchanged by the District's AIP proposal, as would the employees' entitlements under the contract.

In summary, we do not find the necessary plain and clear legislative intent to restrict the scope of mandatory bargaining regarding the distribution of EIT monies. In that circumstance, we must find the District's proposal to be mandatorily bargainable. The District's exceptions are, accordingly, granted and the ALJ's decision is reversed.

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

DATED: November 17, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3A-11/17/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHOOL ALLIANCE OF SUBSTITUTES IN EDUCATION, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3930

SOUTH COLONIE 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 School Alliance of Substitutes in Education, AFT, 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: All per diem substitute teachers who were employed during the 1991-1992 school year and who received a notice of reasonable assurance of employment for the 1992-1993 school year and who confirmed their availability to the District by August 30, 1992.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the School Alliance of Substitutes in Education, AFT, 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: November 17, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3R-11/17/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BALLSTON SPA POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3972

VILLAGE OF BALLSTON SPA,

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 Ballston Spa Police Benevolent Association 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 1: Included: All permanent full time and regular part time police officers, including Acting Sergeant.

Excluded: All other employees.

Unit 2: Included: All permanent full time and regular part time call center operators (dispatchers) and parking attendants.

Exluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Ballston Spa Police Benevolent Association. 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: November 17, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member