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State of New York Public Employment Relations Board Decisions from December 22, 1994

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 22, 1994

Keywords

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

Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-14816

COUNTY OF YATES,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Charging Party

DAVID LEE FOSTER, COUNTY ATTORNEY, for Respondent

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA (NEIL M. BLOCK of counsel), AMICUS CURIAE
for Board of Cooperative Educational Services of Nassau
County

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ). CSEA's charge against the County of Yates (County) alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused CSEA's demand for the social security numbers of those County employees in CSEA's unit who are required to pay an agency shop fee pursuant to §208.3(b) of the

Act.^{1/} The ALJ held that the County had not violated the Act by refusing CSEA the nonmembers' social security numbers because CSEA had not established a need for that information.^{2/}

CSEA argues in its exceptions that its need was reasonably established. The County has not responded to the exceptions.

The Board of Cooperative Educational Services of Nassau County (Nassau BOCES), which has a similar charge (U-14546) filed against it by CSEA pending before another ALJ, was granted amicus status. With the consent of the parties, the Nassau BOCES was also permitted to participate at oral argument because the County elected not to attend and we considered that our analysis would benefit by advocacy on both sides of the issues presented. Having reviewed the record and considered the issues as argued, we reverse the ALJ's decision.

The ALJ's dismissal of the charge was premised only upon her determination that CSEA had not shown it had a need for the nonmembers' social security numbers. We find there to be a reasonable need for the information, however, based upon the County's admission in that respect. CSEA detailed its need for the nonmembers' social security numbers in a letter to the County

^{1/}The agency shop fee provisions of the Act require the nonmembers of a certified or recognized exclusive bargaining agent to pay a dues equivalent fee to the union subject to a pro rata return upon the nonmember's objection to the union's expenditures for political or ideological purposes.

^{2/}See, e.g., City Sch. Dist. of the City of Albany, 6 PERB ¶3012 (1973), for the factors considered in assessing whether there is a duty to provide information to a bargaining agent on demand.

Attorney. After a review of those reasons and an internal discussion, the County Attorney informed CSEA that the County would provide CSEA with the social security numbers of the nonmembers on condition that the numbers not be disclosed to anyone "outside of the Collective Bargaining Group". This letter clearly represents the County's acknowledgement that CSEA had reasonably established a sufficient need for the information, and the County has never alleged or argued to the contrary. It was only the County's concern for the nonmembers' privacy which ultimately prompted the County to withhold the information it had earlier promised to release. We turn, therefore, to a consideration of those privacy arguments.

From our review of federal and state law, we conclude, as have the parties, that the County is not prohibited from releasing to CSEA the information it requested. Federal^{3/} and New York State^{4/} personal privacy protection statutes are inapplicable in relevant part to local governments.

It has been held, however, that a government is not required to release the social security numbers of its employees under

^{3/}Compare the Privacy Act of 1974, 5 U.S.C. §552(a) (1988 ed. and Supp. IV) as construed in United States Dep't of Defense v. FLRA, 114 S. Ct. 1006 (1994). In that case, the Supreme Court held that the home addresses of bargaining unit employees could not be disclosed to the union representative of those employees because the Privacy Act, applicable to federal agencies, prohibited the disclosure of any records unless the disclosure was required under the Federal Freedom of Information Act (FOIA). The Court concluded that disclosure was not required under the FOIA and was, therefore, prohibited by the Privacy Act.

^{4/}Public Officers Law §92(1).

New York's Freedom of Information Law^{5/} (FOIL) because the release constitutes an unwarranted invasion of privacy within the meaning of an exemption in Public Officers Law §87(2)(b) to the general disclosure requirement.^{6/} The FOIL decisions are not dispositive of the issue in this case, however, because the County, although not required to disclose the social security numbers of its employees under FOIL, retains the discretion to do so. As the Court of Appeals stated in Capital Newspapers v. Burns:^{7/}

[w]hile an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records^{8/}

It is, of course, the very fact that a public employer has discretion to act in one way or another which subjects it to a bargaining obligation. The exercise of that power and privilege to release, which is afforded the County under FOIL, is subject to controlling provisions of other State law, including the Act. Ultimately, therefore, the question becomes whether the policies of the Act are advanced by requiring an employer to disclose to a bargaining agent the social security numbers of the nonmembers in

^{5/}Public Officers Law Art. 6, §§84-90.

^{6/}Sellig v. Sielaff, 201 A.D.2d 298 (1st Dep't 1994).

^{7/}67 N.Y.2d 562 (1986).

^{8/}Id. at 567.

its unit despite the well recognized and significant privacy interests individuals have in their social security numbers.

Having considered these several policy issues, we conclude that the County's conditional release to CSEA of the nonmembers' social security numbers is required under §209-a.1(d) of the Act.

The information CSEA requested is reasonably relevant and concededly necessary to its fulfillment of the obligations imposed upon it by the agency shop fee provisions of the Act as interpreted.^{2/} That information is also not reasonably available to CSEA except through the County and the County does not argue that the production of that information is burdensome. Were it not for the privacy interests of the individuals there would be no question of CSEA's entitlement to that information on the facts of this case, nor would the County otherwise question that entitlement. Those privacy interests, however significant, do not prohibit disclosure in relevant context. The public may not be entitled to access the employees' social security numbers under FOIL, but that does not mean that a union certified or recognized as the exclusive bargaining agent of the employees of a public employer may be denied that same information on a demand made pursuant to the Act. A bargaining agent is simply not similarly situated to the general public when it demands

^{2/}These allegations include a duty to provide information to nonmembers regarding the agency shop fee refund procedures, to account to them regarding expenditures and to return on demand the nonmembers' pro rata share of expenditures for political or ideological purposes.

employment information from an employer about employees it is obligated to represent. New York's FOIL is concerned basically with the public's right to know about the operations of government as government. A public employee's social security number is largely irrelevant to the performance of the employee's duties. It is for that reason that disclosure of such information is deemed an unwarranted invasion of privacy and exempt as such from compulsory disclosure under FOIL. A bargaining agent demanding employment information of a government, however, is not seeking information about government as government, but government as employer. It is entitled to demand and receive relevant information from an employer under the Act because the information is needed to enable it to exercise its rights and carry out the responsibilities imposed upon it under the Act.

We are, however, sensitive to the harm which can be caused to individuals by the unscrupulous use of their social security numbers. By shaping the conditions for the release and the use of the nonmembers' social security numbers, however, we can protect individual privacy interests without sacrificing CSEA's right to information under the Act. Our decision, therefore, recognizes the legitimate interests on both sides and strikes what we believe is an appropriate balance between them. CSEA's articulated need for the social security numbers simultaneously limits the permissible uses of those numbers. The nonmembers' social security numbers are made available for CSEA's

confidential, exclusive use in conjunction with its rights and duties under the Act vis-a-vis the unit of County employees it represents. The nonconsensual use of those numbers by other than agents of CSEA or the use or release of any such number by any means under any condition for other than statutory purposes is not authorized by our decision. It is clear from the record that CSEA understands the need to maintain the strict confidentiality of all social security numbers delivered to it and is amenable to conditions intended to effect that result. Should there be proof of noncompliance with these conditions for release, we will entertain a motion to reopen and modify our decision and order herein as may be appropriate.

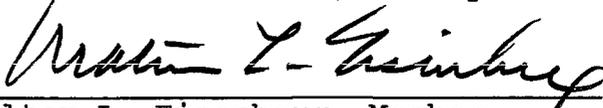
For the reasons set forth above, CSEA's exceptions are granted and the ALJ's decision is reversed.

IT IS, THEREFORE, ORDERED that the County forthwith provide CSEA with the social security numbers of unit employees who pay an agency shop fee pursuant to §208.3(b) of the Act and to sign and post notice in the form attached at all locations ordinarily used to post notices of information to unit employees.

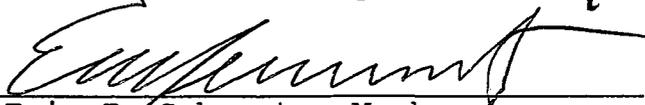
DATED: December 22, 1994
Albany, New York



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 (CSEA) that the County of Yates will forthwith provide CSEA with the social security numbers of unit employees who pay an agency shop fee pursuant to §208.3(b) of the Act.

Dated

By
(Representative) (Title)

COUNTY OF YATES
.....

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

UNIONDALE TEACHERS ASSOCIATION, NYSUT,
AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-14559

UNIONDALE UNION FREE SCHOOL DISTRICT,

Respondent.

JOSEPH P. McPARTLIN, for Charging Party

RAINS & POGREBIN, P.C. (JOHN T. BAUER of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions to an Administrative Law Judge's (ALJ) decision filed, respectively, by the Uniondale Teachers Association, NYSUT, AFT, AFL-CIO (Association) and the Uniondale Union Free School District (District). The Association charged the District with a violation of §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) when it refused to deduct an agency shop fee from one athletic coach, Philip Corbo, and refused to process a union membership dues deduction authorization from two other athletic coaches, Leigh Pollet and Annette Barnes. On a stipulated record, the ALJ dismissed the charge on a finding that these three coaches are not in the Association's unit and,

therefore, the District had no statutory duty to deduct either agency shop fees or membership dues.

The parties' exceptions are directed only to the ALJ's conclusion regarding the coaches' inclusion in the Association's unit. The Association argues that the evidence establishes that all persons who coach athletics are in its unit. The District argues that the evidence establishes that the Association represents only those coaches who are otherwise in its unit by virtue of their employment with the District. Specifically, the District argues that the Association does not represent Corbo as coach because he is a department chairman who is in a unit represented by the Uniondale Supervisors Association (USA), which bargains for department chairs' extracurricular activities, including coaching. Pollet and Barnes are not represented by the Association according to the District because they are "outside" personnel who hold no other employment with the District.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's dismissal of the charge on the finding that the three coaches are not in the Association's unit.

Preliminarily, we consider an argument by the District that the Association's exceptions and supporting brief were not filed as separate documents as required by §204.10(a) of our Rules of Procedure (Rules). The Association claims in its response to the District's cross-exceptions that it filed its exceptions as a separate document under a letter dated July 15, 1994. Our files, however, do not contain such a letter, but we conclude that the

Association's exceptions and brief were filed in substantial compliance with §204.10(a) of the Rules. The Association's exceptions are separated from the arguments supporting them. Therefore, we and the District are reasonably able to distinguish between those exceptions and the argument, thereby materially achieving the result §204.10(a) of the Rules is intended to effect.

On the merits, the Association represents, through its contractual recognition clause, "all certified teachers", excluding department chairpersons, administrators and persons in the supervisory negotiating unit. Corbo, as previously stated, is a department chairman, who is included in USA's unit and excluded from the Association's unit. Article IX of USA's contract with the District permits unit employees to engage in extracurricular activities, such as coaching, and to receive additional compensation for such services. The extracurricular activities of personnel in USA's unit are authorized and paid pursuant to USA's contract. That the USA's contract has not fixed a specific rate of compensation for the extracurricular activities pursued by its unit members is immaterial. That contract, at the very least, currently permits the payment of compensation to them at a rate determined by the District. In any event, USA and the District at any time could make specific and fixed that which is currently open-ended. As such, the extracurricular activities of the department chairpersons have been and can be the subject of negotiations between the District

and the USA and the most reasonable conclusion is that Corbo, a department chairman, is in USA's unit for all relevant purposes.

Pollet and Barnes have no relevant relationship to the District except as coaches. It does not appear to us that any of the District's unions represent the position of coach. Quite the contrary, coaching appears to be merely a voluntary assignment, which the District offers to its unit personnel and to "outsiders" when there are not enough volunteers from among the District's employees. The Association, of course, does not represent assignments, but positions and their incumbents. Therefore, although the Association has negotiated coaching rates, those negotiations are merely an incident of its representation of teachers and the others in its recognized unit who might elect to coach or accept some other extracurricular assignment.

Our conclusion is supported, as the ALJ observed, by the fact that the Association did not claim representation over outside coaches hired regularly by the District prior to the 1992-93 school year, nor did the Association ever solicit these individuals for membership in the Association. We are, therefore, persuaded that the Association itself did not consider coaches drawn from outside the teaching staff to be included in its unit.

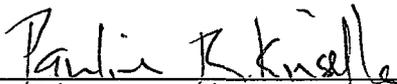
Our decision recognizes that Pollet and Barnes are without current representation under the Act. However, many persons eligible for representation under the Act have not exercised that

right. Without deciding whether Pollett or Barnes is eligible for representation, the Association, or another union, is free to seek their representation in the appropriate unit either by agreement with the District or pursuant to the appropriate representation petition filed under the Act and our Rules.

For the reasons set forth above, the ALJ's decision is affirmed and the Association's exceptions are dismissed. Having affirmed the ALJ's decision, we need not and do not reach any of the District's other cross-exceptions.

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

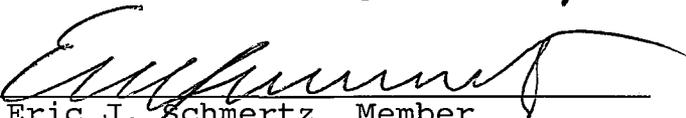
DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

20-12/22/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,
LOCAL 424, A DIVISION OF UNITED INDUSTRY
WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4235

COUNTY OF ALBANY,

Employer.

RICHARD M. GREENSPAN, P.C., for Petitioner

ROEMER & FEATHERSTONHAUGH, P.C., for Employer

BOARD DECISION AND ORDER

By decision dated April 11, 1994, the Director of Public Employment Practices and Representation (Director) found that United Public Services Employees Union, Local 424 (Local 424), A Division of United Industry Workers District Council 424, was eligible for certification without an election in a unit of employees of the County of Albany (County). We first considered Local 424's eligibility for certification in this case at our May 31, 1994 meeting. At that meeting, we determined not to issue a certification pursuant to the Director's recommendation because issues had been raised in other pending cases involving

Local 424 regarding its status as an employee organization under §201.5 of the Public Employees' Fair Employment Act (Act).^{1/} The parties in this case were informed of our determination not to issue a certification to Local 424 at that time by letter dated June 7, 1994. By decision dated September 30, 1994,^{2/} we held that Local 424 as then constituted was not an employee organization within the meaning of the Act. Local 424's appeal of our determination in that respect is now pending in Supreme Court, Kings County.

By letter dated December 9, 1994, Local 424 demands, alternatively, that we certify it as the bargaining agent in this case or that all members of the Board recuse themselves such that the decision of the Director "stands". Local 424 argues lastly that any questions concerning its status as an employee organization have been "mooted" by changes in its structure, which were made after, and in response to, our September 30, 1994 decision.

For the reasons set forth below, we do not issue a certification to Local 424 in this case but remand it to the Director for such investigation and processing as may be appropriate.

^{1/}Northport/East Northport Union Free Sch. Dist., 27 PERB ¶3025 (1994).

^{2/}27 PERB ¶3053 (1994).

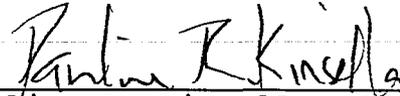
Local 424's request to have the participating members of this Board recuse themselves is denied as the asserted grounds for the recusal are either without factual basis or otherwise without merit or frivolous. Member Schmertz, however, has voluntarily elected not to participate in the discussion or decision of any of the cases involving Local 424's status as an employee organization and he has again not participated and has absented himself from the discussion and decision of the instant case. We would note, moreover, that our recusal would not effect Local 424's certification. The Director's decision was a recommendation only. Only the Board may certify an employee organization as a bargaining agent for purposes of the Act. Therefore, even were the Director's decision to "stand" by reason of any recusal, it would not afford Local 424 any statutory bargaining rights and would not impose upon the County any statutory bargaining obligations.

The effect of Local 424's alleged changes in its structure on its status as an employee organization has not been previously evaluated. That same issue is now pending before the Director, either directly or indirectly, in other cases. In keeping with our established policy and procedures, changes in Local 424's structure are not properly considered by us without prior investigation and determination by the Director.

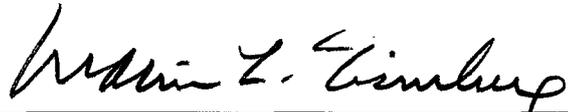
The case is, accordingly, remanded to the Director for investigation and determination in accordance with this decision.

SO ORDERED.

DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member

2D-12/22/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCKY POINT SCHOOL RELATED PERSONNEL
ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-14747

ROCKY POINT UNION FREE SCHOOL DISTRICT,

Respondent.

MARTIN FEINBERG, for Charging Party

INGERMAN, SMITH, GREENBURG, GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA (JOHN H. GROSS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Rocky Point School Related Personnel Association, NYSUT, AFT, AFL-CIO (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Rocky Point Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally increasing to twelve months the workyear of three, ten-month clerk typists represented by the Association. The ALJ determined that, pursuant to language in the parties' current collective bargaining agreement, PERB lacked subject-matter jurisdiction over the charge and, alternatively, that the Association had waived its right to negotiate the change.

The Association excepts to the ALJ's decision, arguing that the collective bargaining agreement does not divest PERB of

jurisdiction and that the language relied on by the ALJ does not constitute a clear, explicit and knowing waiver of its right to negotiate. The District supports the ALJ's decision.

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

The parties stipulated to the following facts. Prior to July 1, 1993, three clerk typists - Loretta Reiter, Patricia O'Neill and Ann Reynen - were employed by the District as ten-month employees, working from September 1 to June 30 each year, as provided in Article VIII(A) of the contract.^{1/} Effective July 1, 1993, the District unilaterally changed their workyear to twelve months. The employees' salaries and fringe benefits were increased on a pro-rata basis to reflect their increased workyear.

The contract defines the length of the workyear for ten-month employees, setting forth the starting month and the ending month. The Association's charge alleges a unilateral change in the workyear of the ten-month employees. As we have previously held, "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."^{2/} Article VIII(A) of the

^{1/}The Article, entitled "workyear", provides that "10 month employees(sic) work year shall begin on September 1 and end on June 30th."

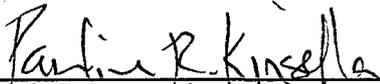
^{2/}County of Nassau, 25 PERB ¶3071, at 3147 (1992).

parties' contract is an arguable source of right to the Association with respect to the length of the unit employees' workyear and the specific months to be worked.

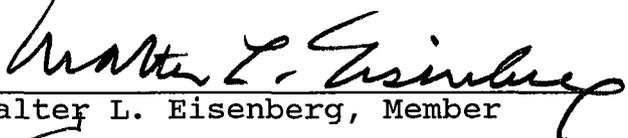
For the reasons set forth above, the Association's exceptions are denied and the ALJ's decision dismissing the charge for lack of jurisdiction is affirmed.^{3/}

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

DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{3/}As an alternative disposition, the ALJ found that the Association had waived its right to negotiate the at-issue change in workyear because of Article XVII in the parties' current contract, which provides that:

All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control and shall not be the subject of negotiations until the commencement of the negotiations for a successor to this agreement.

In view of our disposition of the charge, we do not reach this aspect of the ALJ's decision or the exceptions which were filed with respect to it.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

POUGHKEEPSIE CITY SCHOOL DISTRICT,

Charging Party,

-and-

CASE NO. U-14797

POUGHKEEPSIE PUBLIC SCHOOL TEACHERS
ASSOCIATION,

Respondent.

SHAW AND SILVEIRA (JAY M. SIEGEL of counsel), for Charging
Party

C. FREDERICK OTT, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Poughkeepsie City School District (District) to a decision of an Administrative Law Judge (ALJ) dismissing its charge alleging that the Poughkeepsie Public School Teachers Association (Association) had violated its duty to negotiate under §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by failing to submit its brief^{1/} to the fact finder until four months after the original date set by the fact finder for the filing of briefs.

^{1/}No hearing was held before the fact finder and the parties' entire fact-finding presentation consisted of the submission of briefs pursuant to stipulation.

The parties submitted the case to the ALJ on a stipulated record. The ALJ found that there was no violation because the Association's action did not have the effect of frustrating the negotiating process. The District argues in its exceptions that the ALJ erred in failing to find the Association responsible for a delay in negotiations, in failing to find that no legitimate reason was given for the delay in filing the brief with the fact finder, and in finding that the Association had not refused any District demand to return to the bargaining table^{2/}.

For the reasons set forth below, we reverse the ALJ's decision.

In August 1992, the District and the Association commenced negotiations for a successor to their collective bargaining agreement, which had expired on June 30, 1992. In September 1992, the parties declared impasse. In October 1992, PERB appointed a mediator, who was thereafter appointed as fact finder in January 1993. On February 10, 1993, the parties met with the fact finder and agreed to submit their respective cases to the fact finder by filing fact-finding briefs by March 12, 1993. David Shaw, the District's negotiator, contacted C. Frederick Ott, the Association's representative, on March 12 and was advised that Ott was not yet prepared to submit his brief. Shaw

^{2/}The ALJ made note that there was no separate allegation that the Association had refused any District demands to return to the bargaining table during the fact-finding process in his determination that the only Association conduct complained of was the failure to timely submit a fact-finding brief. Based upon our ultimate conclusion, we need not address this exception.

contacted Ott again on March 17 and March 24, 1993, to inquire about the status of the brief. On March 29, 1993, Shaw sent a letter to the fact finder, outlining what had happened and requesting that the fact finder set a new date for briefs. He also enclosed the District's brief, with a copy that he requested the fact finder forward to Ott when he had received the Association's brief. Shaw again wrote to the fact finder on April 15, 1993, complaining about the absence of a brief from the Association and including additional information on the District's financial situation. On April 20, 1993, Shaw, in another letter to Ott, articulated the District's concerns about the health insurance situation for its employees. Again on May 10, 1993, Shaw wrote to the fact finder, since the Association had not yet filed its brief or indicated when it would be filing, requesting the establishment of a deadline for the submission of fact-finding briefs. Finally, on May 20, 1993, during a conference call with Shaw and Ott, the fact finder set June 18, 1993 as the due date for the Association's brief. Ott did not file the Association's brief by the second deadline and he was out of his office due to illness from June 18 to July 7, 1993. Without having requested or received an extension of time to file from either Shaw or the fact finder, Ott submitted the Association's fact-finding brief on July 23, 1993. The parties received the fact finder's report and recommendations on August 28, 1993.

We have frequently held that a party's action or inaction which causes an unreasonable delay in the negotiations process is a violation of the duty to negotiate in good faith.^{3/} The obligation to negotiate in good faith extends to the mediation and fact-finding processes.^{4/} A party may not refuse to participate in either of the processes. Here, the Association's representative failed to submit its fact-finding brief either on the initial date set by the fact finder for submission or on the subsequent date set, without the consent of the fact finder or the District. The submission of the brief was essential to the fact-finding process and, indeed, constituted the Association's entire participation in the fact-finding proceedings. This substantial and unexcused detainment unreasonably delayed the issuance of the fact finder's report and completion of the fact-finding process. Such conduct violates the Association's duty to negotiate in good faith just as any other unreasonable delay in the initiation or completion of the other aspects of negotiations would.

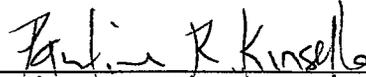
For the reasons set forth above, the ALJ's decision is reversed and IT IS, THEREFORE, ORDERED that the Association negotiate in good faith and post the attached notice in all

^{3/}CSEA, Inc. Town of Riverhead Unit of Local 852, 25 PERB ¶3057 (1992); City of Dunkirk, 25 PERB ¶3029 (1992).

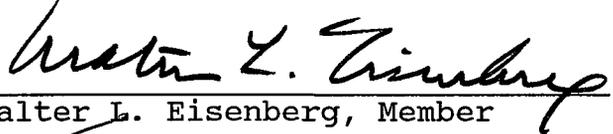
^{4/}City of Mount Vernon, 11 PERB ¶3095 (1978).

locations normally used by the Association to communicate with unit employees.

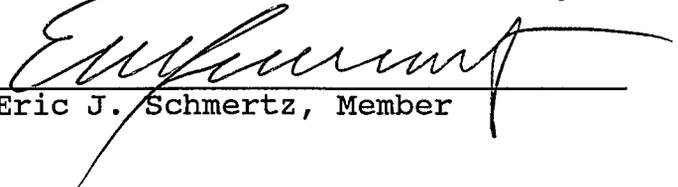
DATED: December 22, 1994
Albany, New York



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 all employees represented by the Poughkeepsie Public School Teachers Association (Association) that the Association will negotiate in good faith with the Poughkeepsie City School District.

Dated

By
(Representative) (Title)

POUGHKEEPSIE PUBLIC SCHOOL TEACHERS ASSOCIATION
.....

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

STEPHEN A. PENNA, et al.,

Charging Parties,

-and-

CASE NO. U-15729

COUNTY OF ERIE AND ERIE COUNTY SHERIFF
and TEAMSTERS LOCAL 264,

Respondents.

E. CAREY CANTWELL, ESQ., for Charging Parties

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Stephen E. Penna and twenty-six other individuals (charging parties) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing their charge that the County of Erie and Erie County Sheriff (together, employer) violated §209-a.1(e) of the Public Employees' Fair Employment Act (Act) and that the Teamsters Local 264 (union) breached its duty of fair representation in violation of §209-a.2(c) of the Act. The charging parties, all former deputy sheriffs, allege in their charge that the employer and the union improperly entered into a collective bargaining agreement which provided for retroactive pay increases for 1992 and 1993 "but only to [employees] currently on the [employer's] payroll."

The Assistant Director of Public Employment Practices and Representation (Assistant Director) thereafter informed the charging parties that their charge was deficient. The Assistant Director informed the charging parties that as against the employer, they, as individuals, have no standing to allege a violation of §209-a.1(e) of the Act and that as to the union, no facts were alleged which would establish that the union's conduct was arbitrary, discriminatory or in bad faith. He further informed them that a contract which was made applicable only to current employees does not, absent the aforementioned conduct, violate the Act. The charging parties declined to withdraw the charge, instead filing an amendment claiming that their right to a salary increase was a vested right based upon an opinion by the New York State Comptroller. The Director thereafter dismissed the charge. The charging parties except to the Director's decision on the ground that he did not decide that their right to the retroactive pay increase was a vested right.

For the reasons set forth below, we affirm the decision of the Director.

The charging parties allege that the union and the employer finalized a collective bargaining agreement for the term 1992-95 on February 17, 1994. That agreement provides for retroactive salary increases for 1992 and 1993, but only for employees who were employed by the employer at the time the collective bargaining agreement was finalized. The charging parties all

left the employer's employ before the union and the employer entered into the contract.

As against the employer, the Director dismissed the charge because individual employees have no standing to allege a violation of §209-a.1(e) of the Act. We affirm this determination.^{1/}

As against the union, the Director noted that this Board and the courts have long held that, absent improper intent, a union does not breach the duty of fair representation by entering into an agreement which favors some employees over others.^{2/} The charging parties argue, however, that their right to a salary increase was a vested right and that the union breached its duty of fair representation when it acted to deprive them of this vested interest. They rely on an opinion of the State Comptroller which states that

where an individual leaves municipal service after the announcement of a salary increase but before the actual determination of the amount of such increase, he has a right to any retroactive increase established after his separation from service, but payable for work performed in any period covered by the increase, during which he was in municipal service.^{3/}

^{1/}Ballston Spa Educ. Ass'n and Ballston Spa Cent. Sch. Dist., 25 PERB ¶3084 (1992); City Sch. Dist of the City of New York, 22 PERB ¶3012 (1989).

^{2/}See Plainview-Old Bethpage Cent. Sch. Dist., 7 PERB ¶3058 (1974); Litman v. Bd. of Educ. of the City of New York, 170 A.D.2d 194, 25 PERB ¶7504 (2d Dep't 1991); Gambardella v. County of Nassau, 168 A.D.2d 421, 24 PERB ¶7553 (2d Dep't 1991).

^{3/}Opinion 68-898, January 3, 1969.

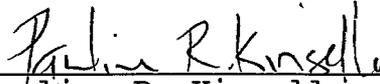
That opinion appears to involve an announced wage increase unilaterally adopted by the employer for unrepresented employees, not a negotiated collective bargaining agreement. It is, therefore, inapplicable to the case before us. Furthermore, here there was no announcement of salary increase to be effective at a specific time. The union and the employer negotiated through 1992 and 1993. While the charging parties allege that "all parties to the bargaining acknowledged that there would be a pay increase", there was no announcement of a salary increase until the contract had been finalized. When it was finalized, the charging parties had already left the employer's service. Therefore, even if we were to give weight to the Comptroller's opinion, which is not binding on us, it is inapplicable to the facts in this case.

A union's compromise of employees' potential contractual benefits does not violate its duty of fair representation.^{4/} While the charging parties were excluded from the 1992 and 1993 salary increases because they left the employer's employ before the announcement and implementation of the increases, the union's agreement to the exclusion does not violate the Act. The Director's decision is, therefore, affirmed and the charging parties' exceptions are dismissed.

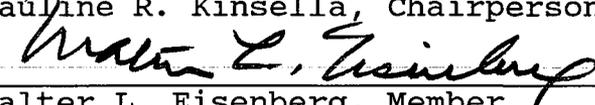
^{4/}See Airline Pilots Ass'n., Int'l v. O'Neill, 499 U.S. 65, 24 PERB ¶ 7512 (1991); Jackson v. Transworld Airlines, 457 F. 2d 802, 80 LRRM 2362 (2d Cir. 1972); Ekas v. Carling Nat'l Breweries, Inc., 101 LRRM 3101 (4th Cir. 1979).

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

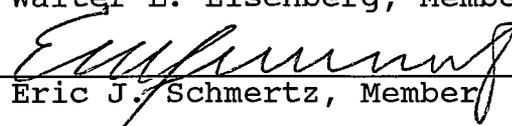
DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2G-12/22/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BRIDGE AND TUNNEL OFFICERS
BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NOS. U-14220
& U-14781

TRIBOROUGH BRIDGE AND TUNNEL
AUTHORITY,

Respondent.

In the Matter of

TRIBOROUGH BRIDGE AND TUNNEL
AUTHORITY,

Charging Party,

-and-

CASE NO. U-14324

BRIDGE AND TUNNEL OFFICERS
BENEVOLENT ASSOCIATION,

Respondent.

HAYT, HAYT & LANDAU (LAWRENCE J. WEINGARD of counsel), for
Charging Party in Case Nos. U-14220 & U-14781 and Respondent
in Case No. U-14324

PROSKAUER, ROSE, GOETZ & MENDELSON (NEIL H. ABRAMSON of
counsel), for Respondent in Case Nos. U-14220 & U-14781 and
Charging Party in Case No. U-14324

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Bridge and
Tunnel Officers Benevolent Association (Association) to an

Administrative Law Judge's (ALJ) decision^{1/}. The Triborough Bridge and Tunnel Authority (Authority) has filed a response to the exceptions.

The Association filed its first charge (U-14220) alleging that the Authority had violated of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by submitting either nonmandatory subjects of negotiations, new or previously settled demands to compulsory interest arbitration. The Authority thereafter filed a charge (U-14324) alleging that the Association had violated §209-a.2(b) of the Act by submitting nonmandatory subjects of negotiation to arbitration. The parties then engaged in discussions which resulted in the withdrawal or modification of several proposals. The Association filed its second charge (U-14781) in response to the July 1, 1993 final modification of proposals submitted by the Authority, alleging that the modifications were untimely and had changed or escalated the Authority's proposals originally submitted to arbitration to such a degree as to make them new demands. The ALJ consolidated the three charges for hearing and decision.

The ALJ dismissed the Association's charge in U-14781, finding that the substance of each of the demands contained in the Authority's July 1 proposal was contained in its original submission and that the modifications were no more than amendments meant to clarify the original proposals. He then

^{1/}27 PERB ¶4595 (1994).

determined the negotiability of the Authority's demands (as challenged in U-14220) in light of the July 1, 1993 clarifications. Finding each of the proposals to be mandatory, the ALJ dismissed the charge in U-14220 in its entirety. In his decision in U-14324, he found six of the eight demands submitted by the Association to arbitration to be nonmandatory and ordered the Association to withdraw them from arbitration. He dismissed the Authority's charge as to the remaining two demands.

The Association excepts to the ALJ's decision on numerous grounds, which may be categorized as alleged errors by the ALJ in finding that the Authority's July 1 proposals were not new demands but clarifications of original proposals, in the ALJ's determining that those proposals were mandatory, and in his finding that six of the demands that it had submitted to arbitration were nonmandatory. The Authority supports the ALJ's decision.

For the reasons set forth below, we affirm the decision of the ALJ in part and reverse in part.

U-14781

The ALJ decided the allegations in U-14781 first to enable him to determine whether the Authority's proposals as originally submitted, or as modified by its July 1 amendment, should be reviewed to ascertain their negotiability.

The Association alleges in U-14781 that the following demands, as set forth in the July 1 amendment, were either new demands or were such an escalation as to be rendered new demands.

The July 1 demands in issue are as follows:

OVERTIME

- 4) Amend Article VIII, Sections 5 and 7 to provide for overtime to be distributed equally among BTOs.

This demand is contained in the original petition for interest arbitration and is challenged in U-14220, discussed infra.^{2/}

HEALTH BENEFITS (ARTICLE XVII)

The demands below are limited to current employees (i.e., single and family coverage).

- 6) Institute the following employee contributions through bi-weekly payroll deductions:

Single	\$5.56
Family	16.82

- 7) Hospitalization

Institute deductible of \$300 (IP/OP - calendar year)
Institute pre-admission and concurrent hospital review program

- 8) Major Medical

Increase deductible to \$100 per person, \$200 family
Change benefit level to 75% of reasonable and customary
No major medical coverage for HIP participants

^{2/}The Association argues that overtime equalization was never negotiated by the parties and is therefore improperly included in both the petition for interest arbitration and, as modified, in the July 1 amendment to the petition. The ALJ correctly found, however, based upon the testimony at the hearing and a stipulation entered into by the parties, that equalization of overtime, though not specifically outlined in this demand, was in fact negotiated by the parties and, accordingly, that neither the demand in the original petition nor the demand in the July 1 amendment was a new demand.

9) GHI

Terminate

These health benefit demands are set forth in the appendix to the petition for interest arbitration, with the exception of the removal of the reference to coverage of persons already retired from the unit.

VACATIONS, HOLIDAYS, LEAVES

- 10) Amend Article XIII, Section 1.B to reduce vacation for new hires by eight days at each level of the vacation entitlement.

In the original petition, the demand read as follows:

Reduction of vacation and sick leave entitlements for new hires-reduce vacation by 8 days, reduce sick leave by 6 days.

The amended demand is a lesser demand than the original to the extent that it eliminates the demand for reduction of sick days. The additional language concerning reduction in vacation entitlements has not been established by the Association to be a new or escalated demand. The original demand is susceptible to the interpretation that persons hired after a certain date will receive less vacation days for the entire term of their employment and the amended demand is accordingly construed only as a clarification of the original demand.

- 11) Replace Article XIII, Section 2.A with the following:

There shall be 12 paid holidays annually which shall be paid in cash in December of each year. The paid holidays shall accrue at the rate of one per month provided that the employee is in a pay status a minimum of 15 days during the month the holiday is earned. Absences due to illness or injury-on-duty shall not count toward the 15 day minimum.

The original demand was as follows:

There shall be 12 paid holidays annually which shall be paid in cash in June of each year, prorated for employees who are on active payroll on the respective holidays.

Contrary to the ALJ, we hold that the modified demand sets additional conditions for payment of holiday pay and is, therefore, an improper escalation of the original demand.

14) Replace Article XIII, Section 5.D with the following:

Personal business days will be granted only when an extra man is available in the schedule or a nonpermanent employee can be obtained to cover the tour. The total number of personal business days, including EPB, shall remain limited to seven (7) per employee per year.

This amended demand adds the word "only" but does not change the meaning of the demand in context. It is, therefore, substantially the same demand as the one contained in the original petition for arbitration.

The amended demand seeking to replace Article XIII, Section 3.B of the contract (which relates to sick leave verification) with new language is identical to the original demand, with the exception of one sentence: "There will be no limitation on the Authority's right to make phone calls to the absent employee." That sentence was also included in the original petition, although under the heading "Sick Leave Proposals". The movement of the sentence to the amended demand does not substantially change the nature of the original demand.

The ALJ determined that the demands set forth in the July 1 proposal were permissible clarifications or modifications of the demands set forth in the Authority's petition for interest arbitration. With the exception of the holiday demand, as to which we reverse, we agree with the ALJ's holdings. While the Association argues that the demands dealing with overtime, health benefits, vacations, and sick leave are new proposals, the substance of each of these demands is set forth in the Authority's petition for interest arbitration. Neither can they be characterized, as the Association argues, as an improper escalation of demands. We have previously held that a party may amend a demand, where the substance of the demand remains unchanged, even after an improper practice charge has been filed.^{3/} The Authority's July 1 demands, except as noted above, are either the same as or minor modifications of the demands set forth in its petition for interest arbitration. We, therefore, modify the ALJ's decision in U-14781 with respect to the holiday demand, and otherwise affirm the ALJ's dismissal of that charge. As to the holiday demand, the Authority is directed to withdraw the July 1 amended demand from arbitration.^{4/}

^{3/}Amherst Police Club, Inc., 12 PERB ¶13071 (1979).

^{4/}The original demand was not challenged by the Association and accordingly remains properly part of the original petition for arbitration.

U-14220

As the Association's challenge in U-14781 to the Authority's July 1 proposals was dismissed by the ALJ, the Authority's demands, as set forth in its original petition and as amended by its July 1 modifications, were addressed by the ALJ in Case No. U-14220.^{5/}

The Authority proposals, as modified, follow.

1. Replace Article XIV, Section 1A with the following:

The Authority will provide each BTO with 104 RDO's per year.^{6/}

2. Eliminate Article XIV, Section 2.^{7/}

^{5/}The Association did not challenge Authority demands Nos. 4, 10, 14, 19 and 20 as being nonmandatory or impermissibly vague in its charge in U-14220. The ALJ, therefore, correctly did not allow the challenge to those demands as set forth in U-14781, finding that the demands were not new demands, that they had been included in the Authority's original petition for interest arbitration, and the Association, having failed to raise the negotiability of those demands in U-14220, was now time-barred from raising the issue in U-14781. See Elmira Police Benevolent Ass'n, Inc., 25 PERB ¶3072 (1992).

^{6/}The present contract clause states:

A) The [Authority] will provide each BTO with 109 RDOs [rotating day off] per year, pursuant to the schedule annexed to this Agreement as Exhibit A and agreed upon by the parties. New schedules were implemented as of December 21, 1981. The parties improved the schedules such as Exhibit A by replacing odd tours such as 6 p.m. - 2 a.m. and 10 a.m. - 6 p.m. with basic tours such as 5 p.m. - 1 a.m. and 9 a.m. - 5 p.m. where possible, subject to traffic requirements.

^{7/}This clause states:

Starting times shall be in accordance with Exhibit A when that schedule is implemented except as otherwise agreed upon by the parties.

3. The Authority proposes to eliminate Article XIII, Section 3(D)(1), amend 3(D), and eliminate Article XVII, and Section 10(C), by substituting a proposal entitled Injury On Duty for BTOBAs for the present existing contractual clauses.^{8/}

INJURY ON DUTY PROPOSAL TO BTO'S

The TBTA hereby submits to the BTOBA a formal written IOD policy. It is intended to spell out the managerial oversight that will be pursued on IOD claims, incorporate the proposals made in collective bargaining and amend the differential entitlement which the parties have discussed at previous sessions. In terms of the oversight provisions, they reflect rights which the Authority currently has, for the most part but which have not been incorporated into the collective bargaining agreement.

Replace Article XIII, Section 3(D)(1) with the following language:

- a. An employee incapacitated from performing his/her job duties as a result of an accidental injury sustained in the course of his/her employment will be allowed, for such period or periods during such incapacity as the Authority may determine in accordance with Section 3(D)(2), a differential payment, not to exceed 150 days, which shall be

^{8/}The present language is as follows:

Article XIII, Section 3(D)(1), states:

D) 1. "Injuries on duty" shall mean all accidents or injuries sustained on the job under all circumstances. The first year to be at full pay with no charge to sick leave. The employee must notify his supervisor of the injury immediately. Such notification shall be made at the time the injury occurs or, if there is no immediate effects of the injury, no later than the commencement of the next tour of duty.

sufficient to comprise, together with any Workers' Compensation payable to him/her under the provisions of the Workers' Compensation law an amount after taxes equal to his/her after tax wages for a forty (40) hour work week.

b. If the absence for which he/she is to be allowed pay as herein provided occurs 150 days or more after the date of the original accident, the allowance shall be based upon an amount equal to seventy (70) percent of the his/her after tax wages for a forty (40) hour work week calculated on the date of the original accident minus any Workers' Compensation payable to him/her under the provisions of the Workers' Compensation Law.

c. If the Workers' Compensation payment granted pursuant to law is equal to or greater than the amount the employee was receiving prior to the period of incapacity, after taxes, for a forty (40) hour work week, or is equal to or greater than the payment provided for absences of 150 days or more, the employee shall not receive any differential payments or other payments provided for herein.

d. In order to qualify for the differential payment described in a and b, the employee must be absent from employment because of such accidental injuries sustained in the course of employment seven consecutive days and the payment provided for herein will commence after the seventh day of such absence.

4. No differential pursuant to Sections (D)(1)(a) shall be granted;

a. Unless the employee sustained an accidental injury, as defined by the New York State Workers' Compensation Law, while engaged in the performance of his/her assigned duty for the Authority and such accidental injury was the direct cause of the employee's incapacity for work.

b. Unless the employee notifies his supervisor of the injury immediately.

c. If the accident was due to violation by the employee of any rule, procedure or policy of the Authority.

d. If the employee was engaged in horse play when the accident occurred.

e. If the employee was under the influence of alcohol, drugs or controlled substances at the time of the accident.

f. If the employee failed to report for examination or re-examination by a physician selected by the Authority when instructed to do so under Sections (D)(2) and (3) above.

g. If the employee failed to report for the performance of his/her regular work when directed to do so.

h. If the period for which the differential is requested was a period during which the employee, in the opinion of a physician selected by the Authority, would not have been incapacitated for work had it not been for some physical or mental condition existing prior to the accident.

i. If the employee failed to comply with appropriate medical advice.

5. The parties' contract, Article XVII, Section 10(C) presently states:

Total disability to be redefined to provide that after 24 months of the period of disability the employee may engage in other employment and continue to receive long term disability benefits less earnings from such other employment, providing he remains disabled from employment as a Bridge and Tunnel Officer.

The Authority seeks to amend Article XVII, Section 10(c) as follows:

- C. After 24 months, a physician selected by the Authority will re-examine the employee. If the physician finds that the employee is capable of gainful employment, the employee will be terminated and all benefits under this Section will cease.

6. The Authority's Health Cost Containment Proposals state:

Hospitalization

1. \$200 Deductible
2. \$300 Deductible
3. 20% of the first \$1,000 for O/P expenses (Calendar Year)
4. 20% of 1st \$2,500 of hospital charges (IP/OP-Calendar Year)
5. 20% of 1st \$5,000 of hospital charges (IP/OP-Calendar Year)
6. 20% of 1st \$2,500 with \$200 deductible (IP/OP-Calendar Year)
7. 20% of 1st \$5,000 with \$200 deductible (IP/OP-Calendar Year)
8. 20% of 1st \$2,500 with \$300 deductible (IP/OP-Calendar Year)
9. 20% of 1st \$5,000 with \$300 deductible (IP/OP-Calendar Year)
10. Preadmission and Concurrent Hospital Review Program HIP
\$10 Copayment

Major Medical

1. Deductible increase to \$100 GHI/\$500 HIP
2. Deductible increase to \$150 GHI/\$750 HIP
3. Deductible increase to \$200 GHI/\$1,000 HIP
4. Change Benefit Level from 80% to 75%

Other Plan Provision

1. Bi-Weekly Payroll Deductions

Single \$5.56
Family \$16.82

2. Terminate GHI and Pay Medical/Surgical Expenses as Major Medical with:

- (a) \$50 GHI/\$250 HIP Deductibles
- (b) \$100 GHI/\$500 HIP Deductibles
- (c) \$150 GHI/\$750 HIP Deductibles
- (d) \$200 GHI/\$1,000 HIP Deductibles

3. Have Travelers pay GHI Benefits.

The Authority modified this demand in its July 1 proposal to clarify that it was only applicable to current employees. The demand, as modified, states:

Health Benefits (Article XVII)

The Demands below are limited to current employees (i.e. single and family coverage). Institute the following employee contributions through bi-weekly payroll deductions:

Single \$5.56
Family \$16.82

Hospitalization

Institute deductible of \$300 (IP/OP-calendar year)
Institute pre-admission and concurrent hospital review program.

Major Medical

Increase deductibles to \$100 per person, \$200 family
Change benefit level to 75% of reasonable and customary
No major medical coverage for HIP participants

GHI

Terminate

6. Amend Article VIII, Sections 5 and 7 to provide for overtime equalization to be distributed equally.

The ALJ found each of the Authority's proposals challenged in U-14220 to be a mandatory subject of negotiation. After a careful review of the record, we affirm and adopt the ALJ's conclusions of fact and law, for the reasons stated by him, which address all of the parties' claims and arguments.

The Association also objected to the "arbitrability of any matter set forth in the petition which the Authority claims it will not make retroactive on the grounds that the matter proposed (i.e. retroactivity) has been resolved by agreement during the course of negotiations." The Association argues that retroactivity has been resolved and, therefore, it was improper for the Authority to indicate that there had been no agreement on this issue. In support of this argument, it refers to a letter from the Authority to the Association, which states in pertinent part:

In light of the fact that the collective bargaining agreement between the [Association] and the Authority has expired and the current negotiations for a successor agreement have not yet been concluded, this letter is intended to clarify the parties' current positions regarding retroactivity.

Those terms of a successor agreement, when negotiated, which may be made retroactive shall be made effective on the first day of the new contract (March 19, 1991) unless the parties agree otherwise. It is understood that this interim understanding pertains to the current negotiations and, in the event such negotiations do not result in agreement, shall be of no force or effect.

The ALJ, finding the language of this letter to be clear and unambiguous and finding no testimony or evidence to the contrary, held that the issue of retroactivity had not been resolved by the parties prior to arbitration and that it was properly presented to arbitration by the Authority as an open issue between the parties. We affirm his holding in this regard also.

U-14324

In this charge, the Authority alleges that certain demands of the Association contained in its response to the petition for arbitration are nonmandatory.^{2/}

The Association's demands follow.

Demand No. 6.

Article V, Section 5A, shall be modified to read as follows:

<u>YEARS OF SERVICE</u>	<u>ANNUAL RATE OF ALLOWANCE</u>
From the first day of such service in the sixth year to the last day of service in the tenth year	\$1,000 Per Year
From the first day of such service in the eleventh year to the last day of service in the fifteenth year	\$2,000 Per Year
From the first day of such service in the sixteenth year to the last day of service in the twentieth year	\$3,000 Per Year
From the first day of such service in the twenty-first year to the last day of service	\$4,000 Per Year

Article V, Section 5C, shall be modified to read as follows:

C. Beginning with calendar year 1991, an annual lump sum longevity allowance will be paid to those members of the bargaining unit who became members of a public employee pension system of the State or City of New York prior to July 1, 1973 and who have continuous years of service in the employ of the Authority as permanent Bridge and Tunnel Officers in accordance with the following schedule:

^{2/}No exceptions were filed by the Authority to the ALJ's decision that the Association's Demands Nos. 10 and 22 are mandatory and properly included in its response to the Authority's petition for interest arbitration.

<u>YEAR OF SERVICE</u>	<u>LUMP SUM ANNUAL LONGEVITY ALLOWANCE</u>
16th through 20th	\$3,000
21st through last day of service	\$4,000

The longevity allowance shall be paid on or about December 31, 1991 and on each succeeding year prorated for those members who first become eligible for an increase in the longevity allowance during such year or who separate from service prior to December 31 or any such year, except that no allowance shall be paid to former members of the unit who separate from service prior to December 31, 1991. The longevity allowance shall be considered as part of the member's regular rate of compensation for pension purposes and not for overtime pay, shift differential or check-in check-out payment.

Article V, Section 5D shall be deleted.

We reverse the ALJ's determination that the longevity demand is nonmandatory and find it to be a mandatory subject of negotiation. The ALJ held the demand to be nonmandatory because the longevity payments are made pensionable. Those monies, however, may or may not be properly included in an employee's compensation for purposes of calculating pension entitlements under current law. That is a decision to be made by the appropriate retirement system officials which will bind these parties, subject to judicial appeal. If the Association's demand had stated that the payments are pensionable in accordance with law, it clearly would have been a mandatory subject of negotiation. That same qualification is necessarily implicit in all bargaining demands. We read bargaining demands as having been proposed to the extent consistent with law, except in those circumstances in which the demand as written is patently unlawful. This demand is not clearly unlawful as written and, as implicitly qualified, it is mandatorily negotiable.

Demand No. 24

All Bridge and Tunnel Officers shall have all funds collected by them fully accounted for at the end of each tour.

The ALJ found this demand to be nonmandatory because he considered the accounting for funds collected to be an inherent part of the officers' job duties. We find, however, that this demand is mandatorily negotiable. The demand seeks a timely accounting of funds collected, utilizing either the officers themselves or any other means chosen by the Authority. As the accounting has implications for employee discipline, a demand for timely notification of a discrepancy in those funds, which may be used as a basis to discipline an employee, and which does not, on balance, unreasonably interfere with any managerial prerogatives associated with an accounting of funds, is mandatorily negotiable.

Demand No. 35

Patron complaints shall not be accepted or put into a Bridge and Tunnel Officer's file unless made in person within 24 hours. If unfounded, it shall be removed permanently from the Bridge and Tunnel Officer's file.

Demand No. 62A

The [Authority] shall increase the present major medical coverage to \$1,000,000 per person per illness, per year.

Demand No. 64

Article VII, Section 1 shall be modified to read: The Authority will contribute to the Bridge and Tunnel Officers Family Protection Plan a sum annually for each employee as follows:

January 1, 1991 - \$1,500.00
January 1, 1992 - \$2,000.00

Demand No. 65

The Authority shall continue to provide coverage for both medical and welfare benefits for all widows, widowers and children, after a Bridge and Tunnel Officer presently covered is deceased.

The ALJ found all of the Association's demands to be nonmandatory subjects of negotiation and ordered the Association to withdraw them from arbitration. After a careful review of the record, we affirm the ALJ's conclusions of fact and law, except those concerning longevity and accounting of funds. It should be noted that the ALJ found Demands Nos. 62A, 64 and 65 to be nonmandatory because they applied to retirees as well as current employees.^{10/} After the ALJ issued his decision, we decided City of Cohoes,^{11/} which provides further support for his findings.

The ALJ also rejected the Association's waiver argument, finding that the fact that the Authority had negotiated with the Association about the demands above found to be nonmandatory before the petition for interest arbitration was filed did not waive its right to file a scope of negotiation charge once the petition for arbitration had been filed and the Association included those nonmandatory proposals in its response.^{12/} The ALJ also rejected an estoppel theory argued by the Association.

^{10/}The Association acknowledged to the ALJ that these demands were intended to include retirees. On that basis, the ALJ correctly found the demands to be nonmandatory, rejecting as well, the waiver and estoppel arguments raised by the Association and treated with infra.

^{11/}27 PERB ¶3058 (September 30, 1994)

^{12/}Johnstown Police Benevolent Ass'n, 25 PERB ¶3085 (1992); Fairview Professional Fire Fighters Ass'n, Inc., 13 PERB ¶3102 (1980).

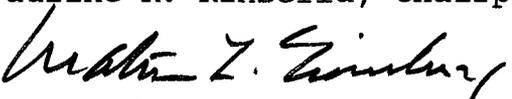
The ALJ found nothing in the record to support a finding that the Association concluded to its detriment from the words or actions of the Authority that nonmandatory demands would be negotiated, without objection, beyond impasse. We also affirm the ALJ's findings in this regard.^{13/}

We, therefore, dismiss the Association's exceptions and affirm the ALJ's decisions in Case Nos. U-14220, U-14324 and U-14781, except as to the Authority's holiday demand dealt with in U-14781 and the longevity and accounting for funds demands in U-14324. The charges in Case Nos. U-14220 and U-14781 are dismissed, except as noted. With regard to Case No. U-14324, the Association is directed to withdraw from arbitration its demands numbered 35, 62A, 64 and 65; the remainder of that charge is dismissed. SO ORDERED.

DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{13/}The ALJ also reviewed the correspondence between the parties and the record testimony and concluded correctly that the Authority's willingness to negotiate benefits for retirees was limited to negotiations between the parties prior to a declaration of impasse and the filing of the petition for arbitration. See Local 650, AFSCME, 18 PERB ¶3015 (1985).

2H-12/22/94

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-4149

TOWN OF EAST FISHKILL,

Employer.

NANCY E. HOFFMAN, GENERAL COUNSEL (ROBERT REILLY of
counsel), for Petitioner

ANDERSON, BANKS, CURRAN & DONOGHUE (JOHN M. DONOGHUE of
counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of East Fishkill (Town) to a decision by the Director of Public Employment Practices and Representation (Director). The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) filed a petition seeking to represent the following seven currently unrepresented Town employees: comptroller, account clerk, secretary to planning and zoning boards, assessor, clerk to the highway superintendent, recreation director, and building inspector II. The Town argued to the Director that these employees are either managerial or confidential within the meaning of §201.7(a) of the Public Employees' Fair Employment Act

(Act) and, therefore, ineligible for representation. After a hearing, the Director determined that all of the employees are eligible for representation. Pursuant to the parties' agreement, the Director then added the seven employees to an existing unit of Town employees which CSEA currently represents.

The Town appeals from the Director's decision as to all positions except the account clerk and the secretary to planning and zoning boards. As to the other five positions, the Town argues that the Director misapplied the law and failed to consider evidence in the record in finding the incumbents eligible for representation. CSEA argues in response that the Director's decision is correct on the law and the facts in all material respects.

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

Managerial and confidential employees are ineligible for representation under §201.7(a) of the Act. Managerial employees are only those who formulate policy or who assist or can reasonably be required to assist directly in collective negotiations, contract administration or personnel functions on behalf of their employer. Confidential employees are only those who act in a confidential capacity to the second category of managerial employee. Unless shown to be excluded from the Act as managerial or confidential, public employees, including supervisors, are eligible for representation.

The Director concluded that the testimony of the several employee witnesses and Sam Patton, the Town's supervisor, did not establish that any of the employees seeking representation are managerial or confidential as defined in the Act. The Director concluded that Patton's testimony was largely nonspecific and conclusory. Where Patton's testimony varied from the employees' description of their duties, the Director gave greater weight to the employees' testimony. Having reviewed the record, we concur with the Director's assessment regarding Patton's testimony and his evaluation of the record evidence. Where the duties as rendered by the incumbents of the positions in issue are to any degree detailed in the record, they are representative of supervisory status. Supervisors at whatever level, however, are eligible for representation under current law. Whatever operational difficulties this circumstance may present the Town can only be addressed by the Legislature.

Some additional discussion is warranted with respect to Robert Mayen, the Town's comptroller. Although we have designated other comptrollers as managerial or confidential,^{1/} our designations were based upon the duties of those positions as shown on the record in those cases. Our designations are not based merely on job titles. The record in this case does not support Mayen's designation as either managerial or confidential. His role in the budget process is largely undefined and it

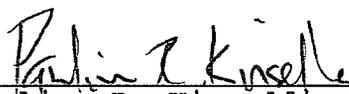
^{1/}County of Rensselaer (Hudson Valley Community College), 18 PERB ¶3001 (1985), aff'g 17 PERB ¶4060 (1984).

appears to be, to the extent discretionary, recommendatory in nature. There is no showing that in that role Mayen is exposed to any confidential labor relations information. Similarly, his financial analysis during negotiations or contract administration has been restricted thus far to proposals which at the time had been made or accepted.

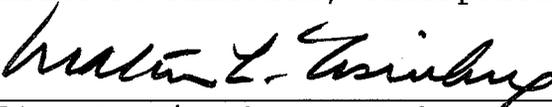
The Director accurately described the record in all material respects and his decision is consistent with §201.7(a) as written and applied.^{2/} Therefore, we affirm the Director's decision for the reasons stated herein and in his decision.

Accordingly, the Town's exceptions are dismissed. SO ORDERED.

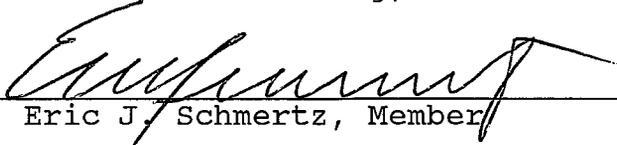
DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{2/}See, e.g., Town of Greece, 27 PERB ¶3024 (1994); Chautauqua County and Chautauqua County Sheriff, 26 PERB ¶3070 (1993).

21-12/22/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4214

YONKERS CITY SCHOOL DISTRICT,

Employer.

BRIAN M. LUCYK, for Petitioner

ANDERSON, BANKS, CURRAN & DONOGHUE (JOHN M. DONOGHUE of
counsel), for Employer

BOARD DECISION AND ORDER

On December 18, 1993, Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (petitioner) filed a petition seeking to represent a unit of certain employees of the Yonkers City School District (employer). Thereafter, the parties executed a consent agreement in which they stipulated that the following two negotiating units were appropriate:

UNIT A

Included: The following titles: Accountant, Assistant Supervisor of School Lunch, P.C. Specialist, Planner-School Facilities, Programmer, Project Coordinator-Construction, Purchasing Agent, Supervisor of Accounts Payable, Technical Support Manager.

Excluded: The following titles: Director, Executive Director, Program Supervisor, Accounting Analyst,

Assistant Director of Personnel, Assistant Supervisor of Buildings and Grounds, Assistant Supervisor of Maintenance, Assistant Supervisor of Custodians, Employee Benefits Manager, Senior Budget Analyst, Supervisor of School Facilities, Supervisor of School Lunch Programs, Transportation Supervisor, Chief Account Auditor, Assistant Superintendent of School Administration, Assistant Superintendent for Operations, Assistant Superintendent Pupil/Assessment, Assistant Superintendent Management Services, Assistant Superintendent Supervision/Curriculum, Assistant Superintendent Restructuring Pre-K to 12, Assistant Superintendent of Registration/Compliance, Deputy Superintendent of Schools, Executive Assistant, Exempt Secretary to Superintendent, Superintendent of Schools, and all other titles.

UNIT B

Included: The following titles: Medical Inspector, Physician, Coordinator.

Excluded: Coordinator assigned to negotiations and all other titles.

Pursuant to that agreement, a secret-ballot election was held in each unit on November 30, 1994.

In the election among the 17 employees in Unit A, 6 ballots were cast in favor of representation by the petitioner, 10 ballots were cast against representation by the petitioner, and there were no challenged ballots. Inasmuch as the results of the election in Unit A indicate that a majority of the employees in that unit who cast ballots do not desire to be represented by the petitioner

IT IS ORDERED that the petition should be, and it hereby is, dismissed insofar as it seeks representation in Unit A.

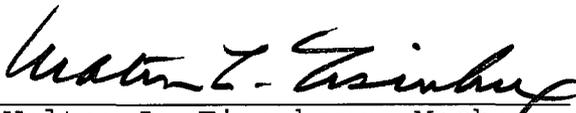
In the election among the 22 employees in Unit B, 12 ballots

were cast in favor of representation by the petitioner, 9 ballots were cast against representation by the petitioner, and there were no challenged ballots. Inasmuch as the results of the election in Unit B indicate that a majority of the employees in that unit who cast ballots do desire to be represented by the petitioner, we have this date certified the petitioner as the exclusive bargaining agent for that unit.

DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3A-12/22/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4214

YONKERS CITY SCHOOL DISTRICT,

Employer.

BRIAN M. LUCYK, for Petitioner

ANDERSON, BANKS, CURRAN & DONOGHUE (JOHN M. DONOGHUE of
counsel), for 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 Local 456, International
Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of
America, 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: The following titles: Medical Inspector, Physician, Coordinator.

Excluded: Coordinator assigned to negotiations and all other titles.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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: December 22, 1994
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

SARATOGA COUNTY DEPUTY SHERIFF'S PBA,

Petitioner,

-and-

CASE NO. C-4366

COUNTY OF SARATOGA,

Employer,

-and-

SARATOGA COUNTY DEPUTY SHERIFF'S
BENEVOLENT ASSOCIATION,

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 Saratoga County Deputy Sheriff's PBA 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.

30-12/22/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 200B, SERVICE EMPLOYEES
INTERNATIONAL UNION,

Petitioner,

-and-

CASE NO. C-4318

ALEXANDRIA 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,

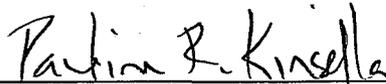
IT IS HEREBY CERTIFIED that the Local 200B, Service Employees International Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All regularly scheduled employees in the following civil service titles: Account Clerk, Bus Driver, Auto Serviceman, Cleaner, Cook, Custodian, Food Service Helper, Part-Time Teacher Aide, Teacher Aide, School Monitor, School Nurse, Typist.

Excluded: Cook Manager, Head Auto Mechanic, Head Custodian, Board of Education Clerk/Superintendent Secretary and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 200B, Service Employees International Union. 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.

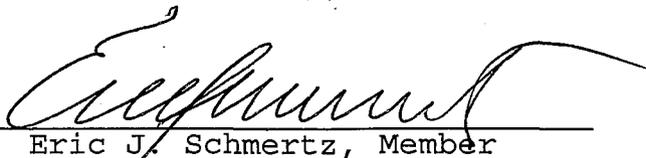
DATED: December 22, 1994
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member