10-26-2004

State of New York Public Employment Relations Board Decisions from October 26, 2004

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

EAST MEADOW TEACHERS ASSOCIATION SCHOOL RELATED PERSONNEL UNIT, NYSUT, AFT, AFL-CIO,

Charging Party,

- and -

CASE NO. U-23888

EAST MEADOW UNION FREE SCHOOL DISTRICT,

Respondent.

In the Matter of

EAST MEADOW TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

- and -

CASE NO. U-23959

EAST MEADOW UNION FREE SCHOOL DISTRICT,

Respondent.

MARY MEYERS, LABOR RELATIONS SPECIALIST, for Charging Parties

GROTTA, GLASSMAN & HOFFMAN, P.A. (BERTRAND POGREBIN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed jointly by the East Meadow Teachers Association School Related Personnel Unit, NYSUT, AFT, AFL-CIO (SRP), and the

East Meadow Teachers Association, NYSUT, AFT (Association), to a decision of an Administrative Law Judge (ALJ), dismissing their improper practice charges. The SRP's charge (case U-23888), filed on November 25, 2002, alleges that the East Meadow Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it assigned unit members in the title of Intervention Assistant to a newly established program, Literacy through the Arts (LTA), and directed them to perform the nonunit work of instructing kindergarten students in the areas of art, music, physical education and library, which had previously been performed exclusively by certified teachers in the Association's bargaining unit. The Association's charge (case U-23959), filed on December 22, 2002, alleges that the District violated §209-a.1(d) of the Act by unilaterally assigning its exclusive bargaining unit work of instructing students in the areas referred to in the SRP charge to employees in the SRP bargaining unit. The District answered, generally denying the allegations of both improper practice charges. The charges were thereafter consolidated for hearing.

Finding that the duties assigned to Intervention Assistants in the SRP unit are not the same as those that teachers in the Association's unit had performed and are consistent with the Intervention Assistants' job description and with other duties that they perform, the ALJ dismissed both charges.

EXCEPTIONS

The SRP and the Association contend that the ALJ erred by ignoring the duties that Gayle Horowitz performed in the title of Intervention Assistant in the LTA program and by failing to find that the work assigned to Intervention Assistants in the LTA program is the exclusive work of teachers in the Association's unit. The SRP and Association also argue that the ALJ erred when he found that the duties of the

Intervention Assistants in the LTA program are consistent with their job description and with the work they perform in a different, extended-day academic program. Finally, they argue that he misapplied the Board's decision in *Niagara Frontier Transportation Authority* (*Niagara Frontier*).[1]

The District filed a response to the exceptions in support of the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision and adopt his findings of fact.

FACTS

The facts are fully set forth in the ALJ's decision[2] and are repeated here only as necessary to our consideration of the exceptions.

The SRP is the certified bargaining representative for District employees in the title of Intervention Assistants, as well as other non-teacher titles. The job description for Intervention Assistants states that they "assist teachers with the provision of instructional programs in order to improve student performance" and that they also:

1. provide intervention instruction for students either within the class setting or in a separate location;

2. collaborate with classroom/special area teachers relative to the provision of instructional programs;

3. work with students within the class setting or in a separate location to reinforce/enhance classroom instruction;

4. utilize special skills and abilities in such areas as crafts, arts, music, etc., to support and augment instruction; and

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[1] 18 PERB ¶3083 (1985).

[2] 37 PERB ¶4547 (2004).

5. participate in appropriate in-service training.

Prior to 2002, the District assigned Intervention Assistants to assist teachers in their classrooms and to support the kindergarten curriculum taught by classroom teachers by teaching in an extended-day academic program for children identified as needing additional assistance. The focus of the extended-day program was language development, phonemic awareness, and sound symbol recognition.

The Association is the certified bargaining representative for teachers and other professional titles. Before September 2002, art, music, and physical education teachers were scheduled on a rotating basis to teach kindergarten students in order to provide kindergarten teachers with contractually required preparation time. Effective September 2002, the District laid off a number of teachers, the majority of whom were special subject teachers of art, music, physical education, and library in kindergarten through sixth grades.

Also in September 2002, the District instituted a kindergarten curriculum change and established LTA, a program that focuses on the development of early literacy skills and incorporates art, music, and physical activity as a means to achieve the literacy objectives. The District assigned Intervention Assistants to LTA to reinforce the kindergarten students' literacy skills through visual arts, music, movement and interpersonal experiences and scheduled their work to cover the kindergarten teachers' contractual preparation times.

Julie Mulcahy, the District's Early Intervention Consultant for the past eight years, has worked with Intervention Assistants in the extended-day academic program and in the LTA program. Her uncontroverted testimony is that LTA is a new and different curriculum from the former kindergarten curriculum in which children received

instruction in the content areas of art, music and physical education. In contrast, the LTA program concentrates on language development and the reinforcement of literacy skills using the modalities of visual arts, music, movement, and interpersonal experiences. The duties of Intervention Assistants in LTA are not to instruct students about art, music, physical education and library, but to use these as activities to reinforce the classroom teacher's instruction in the core curriculum.

Gayle Horowitz was hired in 2002 as an Intervention Assistant in the LTA program. She holds a teaching certificate for pre-K through sixth grade. Horowitz testified that she meets weekly with kindergarten teachers to discuss the schedule and activities of the kindergarten and, in particular, literature that is introduced to the children in order to avoid duplication when planning her lessons.

Dana Epstein, an art teacher in grades kindergarten through fifth for the past 13.5 years, testified that before 2002, she wrote a curriculum for kindergarten arts which focused on shape, form, color, texture, and spatial relationships, but did not involve the use of art to enhance literacy. With the LTA program, Epstein has used art projects to reinforce stories as one means of using art to further literacy goals.

Dawn Heller has been employed by the District since 1983 as a teacher of general music in first through fifth grades. She taught music in kindergarten prior to 2002 and testified how kindergarten students used rote learning techniques to learn music as an end in itself and not as a way to learn to read words.

Debra Nerko, employed by the District for 11 years as a kindergarten teacher, testified that her interaction with Intervention Assistants assigned to the LTA program includes regular meetings to discuss issues involving individual students, as well as

what is being covered in the classroom. In contrast, she testified that she did not meet with the teachers of art, music, and physical education.

DISCUSSION

The SRP and the Association argue that the Intervention Assistants in the LTA program are instructing kindergarten students in the areas of art, music, physical education, and library; that these are duties that teachers had previously performed exclusively; and that the instructional duties that Intervention Assistants perform in the LTA program are not inherent in the SRP unit employees' job duties.

In *Niagara Frontier,*[3] the Board adopted the following test to determine whether there has been a transfer of unit work:

> With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of § 209-a.1(d), unless the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation. If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other. [Footnote omitted.]

In applying the *Niagara Frontier* test, we ordinarily focus on the specific job functions or duties of the unit position at issue.[4]

It is clear from the record that the LTA program was a new and different curriculum in which the children received supplementary literacy instruction through the use of art, music, physical education, and library. Mulcahy testified to the interaction between the classroom teacher, whose responsibility was to teach the core curriculum,

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[3] 18 PERB ¶3083, at 3182 (1985).

[4] *Hyde Park Cent. Sch. Dist.,* 21 PERB ¶3011 (1988).

and the LTA Intervention Assistants, who concentrated on language development and literacy skills using a variety of modalities. Uncontroverted testimony establishes that the LTA Intervention Assistants were not instructing kindergarten students in the discrete subjects of art, music, physical education and library. Thus, the ALJ was correct when he found that their duties were merely supplemental to the kindergarten curriculum. This finding is supported by Mulcahy's testimony and recognizes that the Intervention Assistants in the LTA program functioned as teaching assistants rather than as teachers. We find that the work of the Intervention Assistants in the LTA program was not exclusive unit work of the Association and, therefore, deny the first and second exceptions.

In support of the claim that the duties that the District assigned to the Intervention Assistants in the LTA program were not inherent in the nature of the SRP unit employees' job duties, SRP argues that the Intervention Assistants' duties in the LTA program were different from their duties in the extended-day program. The record does not support this argument and we disagree. Mulcahy's uncontroverted testimony establishes that "the focus of both programs is all under the literacy umbrella." In both cases, the Intervention Assistants were supporting the curriculum taught by the classroom teacher. Consequently, in both cases, the roles of the Intervention Assistant were consistent with their job description. The differences in their respective duties arose from programmatic differences in the curriculum, not from differences in the nature or scope of their roles as Intervention Assistants. The third exception is denied.

In their fourth exception, SRP and the Association argue that the ALJ made an error of law when he applied the *Niagara Frontier* test. They argue that the essence of both charges is that the Intervention Assistants were assigned teaching duties, which is

the work of the Association's unit. As we previously found, the record does not support this exception.

In support of the fourth exception, the SRP and the Association argue that while employed as an Intervention Assistant in the LTA program, Horowitz performed the same duties that teachers Nerko, Epstein, and Heller performed, such as preparing lesson plans and disciplining students and, like them, was subject to observation.

Under the regulations of the Commissioner of Education, a teaching assistant is appointed by a board of education to provide, under the general supervision of a licensed or certified teacher, direct instructional service to students.[5] It appears from this record that the duties Horowitz performed were not inconsistent with the regulations of the Commissioner of Education for teaching assistants nor the cases interpreting §80-5.6(b)(1) of the Education Department's regulations. Horowitz testified that, in addition to preparing lesson plans, as an Intervention Assistant in the LTA program, she met weekly with kindergarten teachers to discuss the schedule and activities taking place at the kindergarten level. Epstein, Heller and Nerko testified how they have integrated the new LTA curriculum into their respective subject areas. We find that the SRP and the Association have failed to prove that the Intervention Assistants were assigned to teach kindergarten students art, music, physical education and library.

Based upon our decision, we deny the exceptions and affirm the decision of the ALJ.

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[5] 8 NYCRR §80-5.6(b)(1); *see also Appeal of Rees and Chachakis*, 34 Ed. Dep't Rep 616 (1995) [It does not mandate a teacher's presence at the time such instruction is provided]; *Appeal of Banschback and Dowler*, 38 Ed. Dep't Rep 493 (1999) [in addition to teaching students, such instruction would include preparation of lesson plans, progress reports, . . . supervising and directing teacher aides assigned to the classes, provided that such activities are under the certified teacher's general supervision].

IT IS, THEREFORE, ORDERED that improper practice charges U-23888 and U-23959 be, and hereby are, dismissed.

DATED: October 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

37-3032
B/R: 37-4554

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CORRECTION OFFICERS BENEVOLENT ASSOCIATION OF ROCKLAND COUNTY,

Charging Party,

- and -

CASE NO. U-23897

COUNTY OF ROCKLAND AND ROCKLAND COUNTY SHERIFF,

Respondent.

KOEHLER & ISAACS, LLP (JOEY L. JACKSON of counsel), for Charging Party

PATRICIA ZUGIBE, COUNTY ATTORNEY (KENNETH R. DE STEFANO), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Correction Officers Benevolent Association of Rockland County (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge which alleged, as amended, that the County of Rockland and Rockland County Sheriff (employer) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it transferred to part-time transport officers, who are within another bargaining unit, the duty of locking inmates, who are awaiting legal proceedings, in holding cells within the County Courthouse, adjacent to the several courts or the District Attorney's office. The ALJ found that

locking inmates from the jail in holding cells while they were in the courthouse was a task incidental to the transport officers' other duties in supervising inmates while they were present in the courthouse and that, therefore, the unilateral assignment of locking inmates in holding cells did not violate §209-a.1(d) of the Act.

EXCEPTIONS

The Association excepts to the ALJ's decision, arguing that the ALJ erred in finding that the charge centered on locking of the inmates in the holding cells and not addressing the broader impact that the reassignment had on the care, custody and supervision of inmates, the exclusive job duty of correction officers. The Association also argues that the ALJ erred in finding that locking of the holding cells was a task incidental to those already performed interchangeably by both transport officers and correction officers. The employer supports the ALJ's decision.

Based upon our review of the record and our consideration of the Association's arguments, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision[1] and are repeated here only as necessary to address the exceptions filed by the Association.

Correction officers are in the unit represented by the Association. Their job duties include the responsibility for the custody and general welfare of inmates in the jail, which may involve transporting the inmates to a variety of destinations, including court. Transport officers are part-time employees who are represented by the Rockland County Sheriff's Deputies Association, which did not intervene in this proceeding. Their

[1] 37 PERB ¶4554 (2004).

duties include the transport of prisoners to and from local courts, police departments, and medical and correctional facilities.

In October 2001, the construction of the new County Courthouse was completed. The courthouse has an area described as the "bull pen" which is adjacent to the sally port, where individuals in custody arrive and depart. There are a number of holding cells in the bull pen area on the ground floor of the court house. Correction officers man this area and supervise inmates while they are in those holding cells. The inmates are transported from the County jail to the courthouse by transport officers, where they are turned over to correction officers. From October 2001 to January 2002, nine correction officers were assigned to the courthouse. In January 2002, the number of correction officers was reduced to six, and transport officers began picking up inmates from correction officers at the doors of the courtrooms, escorting the inmates into court and supervising them while they were in court.

In March 2002, the employer reduced the number of correction officers at the courthouse to two.[2] Transport officers delivered inmates to correction officers on the ground floor, the inmates were held in the "bull pen" and, when directed to appear in a certain court, were escorted to the holding cells located near the courtrooms on the upper floors of the courthouse where transport officers supervised them and then brought them into the courtroom. The holding cells near the courtrooms were not locked even though there were inmates held there, under the transport officer' supervision.

Effective September 12, 2002, the employer issued a policy whereby correction officers were directed to give keys to the holding cells to transport officers so that

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[2] The correction officers previously assigned to the courthouse have been reassigned to the jail.

inmates in their custody could be locked in the holding cells while awaiting their appearance in court. It is this action which forms the basis of the instant charge, which was filed on November 26, 2002.

The ALJ determined that the function of the correction officers at the courthouse from the time its construction was complete, has been the custody of inmates from the jail from the time they arrive inside the courthouse to the time they leave. The ALJ also found that, from October 2001 to September 2002, the responsibilities of the transport officers had evolved to include many, if not most, of the duties also performed by the correction officers, including custody of inmates in the courtrooms, escort duties to and from the "bull pen" to the courtrooms, supervision of the inmates while in the holding cells on the upper floors, and finally, the ability to secure those inmates in the holding cells.

DISCUSSION

As we held in *City of Rome*[3]*:*

> The seminal case on transfers of unit work, *Niagara Frontier Transportation Authority*,[4] requires in such cases that the charging party establish that the work in issue was performed exclusively by employees in its bargaining unit and that the transferred work is substantially similar to the unit's work. Over the years, our analysis of exclusivity in cases where the unit work involves multiple tasks, multiple-function jobs, or multiple locations, has come to rely upon the concept of a "discernible boundary."[5] In order to

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[3] 32 PERB ¶3058, at 3140 (1999).

[4] 18 PERB ¶3083 (1985).

[5] *See Town of West Seneca*, 19 PERB ¶3028 (1986). *See also New York City Transit Auth.*, 30 PERB ¶3004 (1997); *Clinton Comm. Coll.*, 29 PERB ¶3066 (1996); *State of New York (DOCS)*, 27 PERB ¶3055 (1994); *Hudson City Sch. Dist.*, 24 PERB ¶3039 (1991); *Indian River Cent. Sch. Dist.*, 20 PERB ¶3047 (1987).

> determine whether a discernible boundary has been established around work, which may then be deemed exclusive to the unit, we assess the nature, location, and frequency of the work unit employees perform, and any tasks incidental to that work.

The record here establishes that since the completion of the new County Courthouse, the duties that had once been exclusively performed by the correction officers represented by the Association have also become the duties of the transport officers. The transport officers perform several of the core duties of the correction officers at the courthouse, including the escort and supervision of jail inmates while they are in the courthouse. The performance of these duties by the transport officers evolved over the time from October 2001 to March 2002, without protest from the Association. The Association improper practice charge, complaining that a component of correction officers' duties, the securing of inmates in the holding cells adjacent to the courtrooms, was assigned to the transport officers in September 2002, does not timely bring the previous transfers of duties to the transport officers before us for consideration.

The giving of keys to the holding cells to transport officers, the single element of inmate supervision at the courthouse that is in-issue in this charge, is duty incidental to the overall responsibility for the care and custody of jail inmates at the courthouse, which is shared by both correction officers and transport officers. As we stated in *County of Westchester*,[6] "[w]here a union has never acquired or has lost exclusivity over the major aspects of the work at issue, exclusivity is not possessed as to tasks incidental to the performance of the core components of that unit work, even if only unit employees have performed those incidental tasks."

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[6] 31 PERB ¶3034, 3076 (1998).

On this record, as found by the ALJ, the Association has failed to establish that the grant of authority to transport officers to lock inmates in the holding cells adjacent to courtrooms is a unilateral reassignment of a core component of exclusive unit work to nonunit employees in violation of §209-a.1(d) of the Act.

Based on the foregoing, we deny the exceptions filed by the Association and affirm the decision of the ALJ.

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

DATED: October 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHENANGO COUNTY LAW ENFORCEMENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5413

COUNTY OF CHENANGO AND CHENANGO COUNTY SHERIFF,

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 Chenango County Law Enforcement 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.

Included: Regular full-time employees in the titles of Deputy Sheriff, Deputy Sheriff/Correction Officer, Lieutenant, Road Patrol Lieutenant, Road Patrol Sergeant, and Sergeant, who are engaged directly in criminal law enforcement activities that aggregate more than 50% of their service as certified by the Chenango County Sheriff, and are police officers pursuant to subdivision 34 of §1.20 of the Criminal Procedure Law as certified by the Municipal Police Training Council.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Chenango County Law Enforcement 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: October 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALBANY POLICE SUPERVISORS ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5400

CITY OF ALBANY,

Employer,

-and-

**ALBANY POLICE OFFICERS UNION LOCAL 2841,
LAW ENFORCEMENT OFFICERS UNION COUNCIL 82,
AFSCME, AFL-CIO,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that the Albany Police Supervisors 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.

Included: All Sergeants and Lieutenants.

Excluded: All other titles.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Albany Police Supervisors 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: October 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member