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State of New York Public Employment Relations Board Decisions from June 16, 2009

New York State Public Employment Relations Board

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Keywords
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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-5848**

VILLAGE OF WHITEHALL,

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 United Public Service Employees 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.

Included: All part-time Police Officers.

Excluded: All full-time Police Officers, all other employees and elected officials of the Village of Whitehall.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees 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: June 16, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100,

Charging Party,

-and-

CASE NO. U-26837

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

GLADSTEIN, REIF AND MEGINNISS, LLP (PETER ZWIEBACH of counsel), for Charging Party

MARTIN B. SCHNABEL, GENERAL COUNSEL AND VICE PRESIDENT (ROBERT K. DRINAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Transport Workers Union of Greater New York, Local 100 (TWU) to a decision by the Administrative Law Judge (ALJ) dismissing its charge alleging that the New York City Transit Authority (NYCTA) violated §§209-a.1 (a), (c) and (d) of the Public Employees' Fair Employment Act (Act) by unilaterally implementing new, more stringent standards limiting dual employment for certain unit employees.[1]

The ALJ determined that NYCTA had acted in accordance with the terms of its existing dual employment policy and therefore had not unilaterally changed that policy in violation of §209-a.1(d) of the Act.

[1] The TWU did not except to the ALJ's dismissal of the alleged violations of §§209-a.1(a) and (c) of the Act.

EXCEPTIONS

TWU excepts to the ALJ's decision, contending that, *inter alia*, the ALJ erred in finding that NYCTA had reserved the right to unilaterally implement heightened department-specific standards for off-duty employment and that NYCTA failed to meet its burden of demonstrating an objective need to implement the more stringent standards. NYCTA supports the ALJ's decision and argues, in the alternative, that the charge should be dismissed on the following grounds: the charge is not timely; the subject of the charge is nonmandatory; and TWU failed to demonstrate a breach of a binding past practice.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ and conclude that NYCTA violated §209-a.1(d) of the Act when it implemented the stricter dual employment standards.

FACTS

TWU represents train operators, conductors and tower operators employed by NYCTA in its Division of Rapid Transit Operations (RTO).

On April 19, 2000, NYCTA issued a Policy/Instruction for Dual Employment (2000 policy) applicable to employees of NYCTA, the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) and the Staten Island Rapid Transit Authority (SIRTOA).

NYCTA's dual employment policy states: "Full time employment with the Authority is deemed to be an employee's primary employment. All employees must be fit for duty during their working hours."

The guidelines, contained in the 2000 policy, state:

> Requests for dual employment will be reviewed and approved on a case-by-case basis. Employees' Department Heads, with the approvals of the Vice Presidents, Human Resources, Labor Relations and Law, may create and disseminate department-specific standards which may be more stringent than standards set forth in this P/I, as warranted to assure the safety of the public and of Authority employees.
>
> Employees who wish to engage in dual employment, and Division/Department Heads responsible for approval of dual employment requests, must determine whether the proposed outside employment complies with the following guidelines.

In addition, the guidelines require all employees to ensure, *inter alia*, that:

1. The dual employment shall not interfere with the proper and effective discharge of the employee's duties with the Authority or otherwise render the employee unfit for duty.

2. The dual employment shall not create a conflict of interest or an appearance of a conflict in the performance of the employee's employment with the Authority.

3. A current employee may not commence a secondary job until his/her dual employment has been approved in writing.

The 2000 policy defines public safety positions and safety sensitive positions. Four positions are identified as public safety positions: bus operator, conductor, tower operator and train operator. Safety sensitive positions are described in the policy as:

> Positions, as defined by the Federal Transit Administration, in which the incumbents perform the following functions: operate, dispatch, control or maintain revenue service vehicles including when not in revenue service; operate nonrevenue service vehicles that require drivers to hold Commercial Driver's License, or provide security services that require the incumbent to carry a firearm.

There are guidelines in the 2000 policy specifically applicable to public safety and safety sensitive positions:

1. The proposed outside employment may not result in total, combined work time that prevents the employee from having eight consecutive non-working hours in the 16-hour period before reporting to work for the Authority.

2. Employees who previously received approval for dual employment must seek new approval within five (5) days of notification of an assignment change, either in their NYC Transit employment or their outside employment, that results in changes in work days, shift changes, work location changes, and/or work assignments.

In addition, the four safety sensitive positions are subject to the following limitation under the 2000 policy guidelines:

1. Dual employment requests may be approved for a maximum of one year; employees must resubmit requests for review and approval annually, or as required by Subsection IV.B.2. above.

By letter dated February 8, 2006, NYCTA's Vice President, Office of Labor Relations advised TWU that NYCTA planned to issue and implement more stringent dual employment standards applicable to NYCTA train operators, conductors and tower operators and offered to negotiate the impact of the proposed standards, which were enclosed with the letter.[2] The following day, TWU responded, by letter, objecting to NYCTA's plan to unilaterally implement stricter standards and asserting that the subject was a mandatory subject.[3] In the letter, TWU referred to a series of arbitration decisions and awards sustaining separate grievances filed by a train operator and

[2] Joint Exhibit 1A.

[3] Joint Exhibit 1B.

various conductors challenging NYCTA denials of their respective dual employment applications under the 2000 policy.[4]

In a letter dated February 14, 2006, NYCTA's Vice President, Office of Labor Relations stated that:

> The proposed modifications to the dual employment standards for Train Operators, Conductors and Tower Operators are based upon providing a safer environment for our customers and employees. *Management did not rely upon any safety studies*. (emphasis added)

On April 26, 2006, NYCTA issued the new more stringent standards for dual employment applicable only to train operators, conductors and tower operators which reads as follows:

> Train Operators, Conductors and Tower Operators are required to have eight consecutive non-working hours in the 16-hour period before reporting to work for NYC Transit. In addition the following requirements apply:
>
> 1. The eight consecutive hours of non-work time is exclusive of the commuting time to and from both the NYC Transit and the secondary job, i.e. such commuting/travel time cannot be included in calculating the eight consecutive non-working hours.
>
> 2. No dual employment will be approved where the secondary employment plus commuting time is greater than four hours immediately preceding the employee's scheduled tour at NYC Transit.

[4] Joint Exhibit 4A-4E. On November 2, 2005, one of those arbitration awards was judicially confirmed pursuant to CPLR §7510. *Orr and Toussaint v NYCTA*, Index No. 109939/05 (Sup Ct, NY County 2005), nor. Joint Exhibit 5. In general, NYCTA Policy/Instructions are not incorporated into the parties' collectively negotiated agreements. An arbitrator, however, does have authority under the agreement to determine whether NYCTA has not complied with or has misinterpreted an unincorporated Policy/Instruction. Joint Exhibit 6, §2.1(a); Charging Party Exhibit 2.

3. No dual employment will be approved where an employee may work more than six days in a calendar week including NYC Transit work plus the secondary job, i.e. an employee must have at least one NYC Transit RDO free from work each week.

4. An employee requesting dual employment is required to list the estimated travel time to and from his/her NYC Transit and the secondary job. NYC Transit shall determine the reasonableness of the travel time listed. It is the responsibility of employees to notify NYC Transit immediately of changes in his/her work schedule at the secondary job or the commuting time to and from both jobs.

NYCTA and TWU met to discuss the impact of the new standards but were unable to reach an agreement, and the new standards became effective on May 1, 2006.

During the hearing before the ALJ, Kevin O'Connell (O'Connell), RTO Division Chief Transportation Officer, testified that NYCTA implemented the more stringent standards for conductors, tower operators and train operators because they are safety sensitive positions and NYCTA wanted to ensure that employees in those positions had sufficient rest between jobs to avoid train accidents resulting from fatigue.

The evidence presented at the hearing establishes that the new dual employment standards are not applicable to bus operators, the fourth public safety position identified in the 2000 policy, or to train dispatchers, a safety sensitive position, with responsibilities for monitoring the movement of trains, responding to accidents and determining whether a train crew member is fit for duty when she or he reports for work.

DISCUSSION

The charge alleges that NYCTA violated §209-a.1(d) of the Act when it unilaterally implemented the new standards on May 1, 2006, and required train operators, conductors and tower operators to comply with them.

The ALJ found that NYCTA had not acted unilaterally in implementing the new standards because the original 2000 policy reserved to NYCTA the authority to approve more stringent department-specific standards.

TWU contends that the ALJ erred in concluding that NYCTA did not violate §209-a.1(d) of the Act because of a reserved unfettered right to unilaterally implement more stringent department-specific standards for dual employment. In addition, it asserts that the ALJ erred because NYCTA failed to meet its burden of demonstrating an objective need warranting the implementation of the more stringent standards for RTO conductors, tower operators and train operators. We agree.

An employer's reservation of rights to act unilaterally with respect to a term and condition of employment constitutes a mandatory subject.[5] When an employer acts consistent with an unchallenged policy explicitly reserving for itself the unfettered discretion to determine whether to continue a specific term and condition of employment, the employer's decision to act pursuant to the reservation of right is not considered to be unilateral under the Act.[6] Unlike contract reversion to a specifically negotiated provision, however, a reservation of right in an employer's policy does not

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[5] *See generally Sachem Cent Sch Dist*, 21 PERB ¶3021 (1988); *County of Livingston*, 26 PERB ¶3074 (1993); *Garden City Union Free Sch Dist*, 27 PERB ¶3029 (1994).

[6] *State of New York (GOER and Dept of Health)*, 25 PERB ¶3005 (1992). *Cf, New Berlin Cent Sch Dist*, 25 PERB ¶3060 (1992).

stem from the employer satisfying its duty to negotiate under the Act.[7] Therefore, the Board must strictly construe a policy-based reservation of right in order to effectuate the policies of the Act.

In the present case, the 2000 policy guidelines did not reserve unfettered discretion to NYCTA to implement more stringent standards for dual employment on a department-specific basis. We interpret the phrase "as warranted" in the 2000 policy as establishing a pre-condition to NYCTA's exercise of its discretion: the existence of facts and circumstances warranting more stringent standards for dual employment in a particular department. The need to discern such facts and circumstances by NYCTA under the 2000 policy, prior to implementation of the stricter standards, is confirmed by the requirement that any proposed change be reviewed and approved by various NYCTA Vice Presidents.

Based upon the evidence in the record, we conclude that NYCTA failed to present sufficient evidence establishing that implementation of the at-issue standards is warranted consistent with its reservation of rights under the 2000 policy. Prior to the implementation of the stricter standards, NYCTA admitted to TWU that the standards were not based on safety studies. During the hearing before the ALJ, NYCTA did not present evidence of any events, since the promulgation of the 2000 policy, demonstrating that the policy had been ineffective as applied to conductors, tower operators and train operators in protecting the safety of the public and employees or that NYCTA had an immediate need to act unilaterally. Finally, NYCTA did not present any rationale for not applying the same new stricter standards to bus operators and train

[7] *NYCTA*, 41 PERB ¶3014 (2008).

dispatchers, as it did to train and tower operators and train conductors, given that fatigue by employees in all five positions, defined as either a public safety or safety sensitive position, might adversely impact public transportation safety. Therefore, we reverse the ALJ's conclusion that the adoption of the stricter standards is consistent with the rights reserved by NYCTA in the 2000 policy.

Based on this finding, we turn to NYCTA's alternative arguments in support of dismissing the charge.

Contrary to NYCTA's claim, TWU's charge is timely because it was filed within four months of NYCTA's implementation of the reserved right announced in its 2000 policy.[8]

In addition, we reject NYCTA's claim that the subject matter of the unilateral change is nonmandatory because it has a relationship to NYCTA's mission of protecting the safety of the public. In general, employer restrictions on employee use of non-working time for outside employment are mandatory subjects under the Act.[9] In determining whether a unilateral change to a work rule violates the Act, we first identify the subject matter of the rule and then apply a balancing test by examining the evidence to determine whether the employer's interests in a particular mission-related rule change outweigh the impact that the change has on the employees' terms and conditions of

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[8] *Middle County Teachers Assn*, 21 PERB ¶3012 (1988).

[9] *Local 589, Intl Assn of Fire Fighters,* 16 PERB ¶3030 (1983); *Ulster County Sheriff*, 27 PERB ¶3028 (1994); *City of Buffalo (Police Dept)*, 23 PERB ¶3050 (1990); *Hewlett-Woodmere Union Free Sch Dist*, 38 PERB ¶3006 (2005); *City of Albany*, 42 PERB ¶3005 (2009).

employment.[10] As we recently emphasized, the fact that a work rule may have some relationship "to an employer's mission does not permit the employer to act unilaterally in any manner it deems appropriate."[11]

In the present case, the subject matter of NYCTA's 2000 policy is the ability of TWU unit employees to engage in off-duty work which then must be balanced against NYCTA's obligation to provide safe public transportation services. Based upon our review of the record, we find no credible evidence that the new more stringent dual employment standards for conductors, tower operators and train operators were necessary to meet the needs of providing safe transportation services, or that NYCTA faced a new or acute problem requiring the more stringent standards. As noted above, NYCTA did not present evidence establishing that the 2000 policy was ineffective in ensuring public safety, and it is undisputed that NYCTA did not rely on safety studies to establish and implement the new standards. Furthermore, NYCTA did not present any rationale for not applying the same stricter standards to bus operators and train dispatchers who have responsibilities where fatigue can adversely impact safe public transportation services.[12]

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[10] *City of Albany*, *supra* note 9; *Hewlett-Woodmere Union Free Sch Dist*, *supra* note 10. *State of New York (Department of Transportation)*, 27 PERB ¶3056 (1994).

[11] *City of Albany*, *supra* note 9, 42 PERB ¶3005, at 3007.

[12] Based upon our conclusions today, we do not reach the issue of whether NYCTA violated an enforceable past practice under the Act. *See generally*, *Chenango Forks; Cent Sch Dist*, 40 PERB ¶3012 (2007); *City of Oswego*, 41 PERB ¶3011 (2008); *Inc Vil of Hempstead,* 19 PERB ¶3002 (1986), *reversed*, *Inc Vil of Hempstead v New York State Pub Empl Rel Bd*, 20 PERB ¶7010 (Sup Ct Alb County 1987), *reversed,* 137 AD2d 378, 21 PERB ¶7013 (1988), *lv denied*, 72 NY2d 808, 21 PERB ¶7018 (1988), *on remand*, 22 PERB ¶4522 (1989).

Based on the foregoing, TWU's exceptions are granted and the decision of the ALJ is reversed.

IT IS, THEREFORE, ORDERED that NYCTA shall forthwith:

1. Rescind the April 26, 2006 dual employment standards for train operators, conductors and tower operators that became effective on May 1, 2006;

2. Make whole any unit employees against whom the more stringent dual employment standards have been applied since its May 1, 2006 implementation until such time as the new standards are rescinded with interest at the maximum legal rate; and

3. Sign and post a notice in the form attached at all locations normally used by it to post written communications for unit employees.

DATED: June 16, 2009
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member

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 of the New York City Transit Authority (NYCTA) in the unit represented by Transport Workers Union of Greater New York, Local 100 that NYCTA will forthwith:

1. Rescind the April 26, 2006 dual employment standards for train operators, conductors and tower operators that became effective on May 1, 2006;

2. Make whole any unit employees against whom the more stringent dual employment standards have been applied since its May 1, 2006 implementation until such time as the new standards are rescinded with interest at the maximum legal rate.

Dated . . . . . **By** . . . . . .
on behalf of NYCTA

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.