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State of New York Public Employment Relations Board Decisions from June 20, 2011

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

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

Petitioner,

-and-

CASE NO. C-6046

COLD SPRING HARBOR CENTRAL SCHOOL DISTRICT,

Employers,

-and-

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Intervenor/Incumbent.

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,[1]

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

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[1] During the processing of the petition, the incumbent employee organization, United Public Service Employees Union, disclaimed any interest in continuing to represent the petitioned-for unit.

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

Included: Head Cook, Cook, Food Service Worker, new hire (i.e. Food Service Worker with less than three years service).

Excluded: All other employees.

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

DATED: June 20, 2011
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RYE POLICE ASSOCIATION,

Charging Party, **CASE NO. U-29126**

- and -

CITY OF RYE,

Respondent.

THOMAS J. TROETTI, ESQ., for Charging Party

LAW OFFICE OF VINCENT TOOMEY (VINCENT TOOMEY of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Rye Police Association (Association) to a decision of an Administrative Law Judge (ALJ) deferring the subject matter herein[1] to the parties' grievance procedure.

The Association filed a grievance pursuant to the parties' collectively negotiated agreement (agreement), which asserts that the City of Rye (City) violated the past

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[1] A second distinct issue asserted in the Association's charge is being processed by the ALJ.

practice provisions of Article 27 of their agreement [2] by unilaterally altering the same procedures regarding workers' compensation benefits as are asserted in the instant charge. In support of the Association's exceptions, it acknowledges that Article 27(A) might be an arguable source of right if the City had initiated the workers' compensation procedural changes. It asserts in its brief, however, that Lovell Management Safety Co. (Lovell Management) is the party that initiated the changes rendering Article 27

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[2] Article 27 of the agreement states:

PAST PRACTICES

A. The Employer shall not eliminate any generalized benefit that has been continuously enjoyed by all employees for a substantial period of time without good cause.

B. Pursuant thereto, the Employer may change any of the present rules, regulations and long-standing practices or the working conditions of employees, provided that the Association is given recommendations concerning such change to the appropriate official of the Employer, except in an emergency. In the event that a change in procedure is made in an emergency without notice to the Association, upon termination of the emergency the change in the procedure will not be continued without having given the Association ten (10) days prior written notice to submit recommendations concerning such change.

C. Notwithstanding the provisions of Article 25A and B, the elimination of any generalized benefit that has been continuously enjoyed by all employees for a substantial period of time or a change of any of the present rules, regulations, long-standing practices or working conditions of the employees, which is implemented by the City, shall, upon the demand of the Association, be subject to impact bargaining pursuant to the Taylor Law.

D. This document constitutes the sole and complete agreement between the parties and embodies all the terms and conditions governing the employment of employees in the unit. The parties acknowledge that they have had the opportunity to present and discuss proposals on any subject which is (or may be) subject to

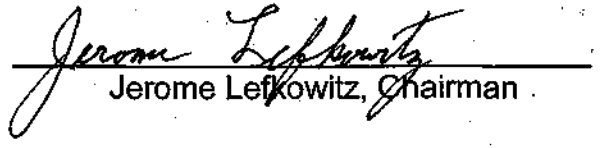
inapplicable to the charge.

We reject the Association's argument. Each of the four paragraphs in Article 27 has a potential application to a grievance and the charge. Article 27 is susceptible to interpretations that support the charge, but may also support the City's affirmative defense of duty satisfaction and waiver. We therefore affirm the ALJ's decision to defer.

Were we persuaded by the Association's argument that Lovell Management, rather than the City, changed the workers' compensation procedures, we would dismiss the charge unconditionally. Section 204.1(a)(1) of our Rules of Procedure (Rules) authorizes only charges against "any public employer or its agents, or any employee organization or its agents ...." We refrain from dismissing it unconditionally because the Association's charge is filed against the City, and we assume that the Association's statement in its brief was not a repudiation of its charge.

Now, therefore, the issue herein of the instant charge before us is hereby conditionally dismissed, subject to a motion to reopen it should the arbitrator's award not satisfy the criteria set forth in *New York City Transit Authority (Bordansky)*.[3]

DATED: June 20, 2011
Albany, New York



Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

[3] 4 PERB ¶3021 (1971).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HOWARD S. COOPER,

Charging Party,

CASE NO. U-30851

- and -

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT STONY BROOK) and UNITED UNIVERSITY PROFESSIONS,

Respondents.

HOWARD S. COOPER, *pro se*

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Howard S. Cooper (Cooper) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing an improper practice charge, as amended, filed by Cooper alleging that the State of New York (State University of New York at Stony Brook) (State) violated §§209-a.1(a), (b), (c) and (g) and §§209-a.2(b) and (c) of the Public Employees' Fair Employment Act (Act) by designating him as a managerial/confidential employee and by denying him representation by United University Professions (UUP). The amended charge also alleged that UUP violated §209-a.2(c) of the Act when it failed to provide him with representation.[1]

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[1] 44 PERB ¶4540 (2011).

PROCEDURAL HISTORY

Pursuant to §204.2 of the Rules of Procedure (Rules), the Director informed Cooper that his charge is deficient on the grounds that the State cannot violate §209-a.2(c) of the Act, the charge is untimely, and it fails to allege any facts that, if proven, would arguably establish the violations of the Act alleged in the charge.

In response to the Director's deficiency notice, Cooper amended his charge to allege that UUP violated §209-a.2(c) of the Act when it failed to represent him in a grievance challenging his termination. In addition, Cooper asserted that his case was timely. Following a review of Cooper's submission, the Director dismissed the amended charge.

EXCEPTIONS

In his exceptions, Cooper asserts that his amended charge alleges sufficient facts to demonstrate that the State and UUP violated his rights to representation under the Act because his position, Director of Finance and Administration for the School of Nursing, was inappropriately placed outside of the UUP bargaining unit. Furthermore, he claims that his charge is timely. Neither the State nor UUP filed a response to the exceptions.

FACTS

In considering Cooper's exceptions, we assume the truth of the allegations in his amended charge, granting all reasonable inferences to those alleged facts.[2]

Cooper was appointed to the position of Director of Finance and Administration at the SUNY Stony Brook School of Nursing on June 26, 2008. At the time he applied

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[2] *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶3010 2010).

for the position, the vacancy stated that the position of Director of Finance and Administration is designated as managerial/confidential. Moreover, when Cooper accepted the appointment on June 13, 2008, he signed an appointment letter which also stated that the position was managerial/confidential.

By letter dated May 25, 2010, the SUNY Stony Brook Director of Human Resource Services advised Cooper that he was being terminated effective July 1, 2010. In a letter to Dean of the School of Nursing Lee Ann Xippolitos (Xippolitos), dated July 28, 2010, Cooper submitted a grievance challenging his termination pursuant to Executive Order No. 42, which sets forth a grievance procedure applicable to certain state employees who are not within a collective bargaining unit. In his letter to Xippolitos, Cooper requested UUP representation, reinstatement to his former position and back wages and benefits.

Cooper's amended charge alleges that he spoke to a UUP representative and asked for representation to pursue his grievance, which UUP denied because he is not within the UUP-represented unit. He also alleges that on August 24, 2010, he received an e-mail from UUP denying him representation with respect to his grievance.

On August 16, 2010, SUNY Stony Brook Manager of Employee and Labor Relations Sally Lanigan (Lanigan) conducted a step 1 grievance hearing. Cooper was not represented by UUP at the hearing. Lanigan denied the grievance based upon her finding that Cooper knew before his appointment that his position was managerial/confidential.

Cooper appealed Lanigan's decision to the SUNY Assistant Vice Chancellor of Employee Relations. In his appeal, Cooper acknowledged that he was a

managerial/confidential employee but that he expected a year's separation notice. On November 9, 2010, Cooper's appeal was dismissed on jurisdictional grounds because Cooper was ineligible to pursue a grievance under Executive Order No. 42.

Cooper filed this improper practice charge with PERB on March 8, 2011.

DISCUSSION

Pursuant to §204.2(a) of the Rules, the Director is required to review all newly filed charges to weed out facially deficient claims.[3] Under the Rules, the Director has the authority to dismiss a charge on the grounds that it fails to allege facts that, as a matter of law, constitute a violation under § 209-a of the Act.

Following our careful review of Cooper's exceptions and the allegations of his amended charge, we affirm the Director's decision in all respects.

With respect to Cooper's allegation that his position should have been included in the UUP bargaining unit, we find that Cooper failed to allege sufficient facts to show that his position was improperly treated as managerial/confidential and outside of the UUP represented unit. In light of Cooper's failure to allege sufficient facts to support his claim that his position belonged in the UUP bargaining unit, the Director correctly dismissed all four specifications of the amended charge against the State.[4]

Regarding Cooper's allegation that UUP violated the Act by denying him representation during the processing of his grievance, we find that Cooper has not alleged sufficient facts demonstrating that he had a right to such representation.

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[3] *State of New York (Department of Correctional Services [Biegel])*, 42 PERB ¶3013 (2009).

[4] If Cooper had filed a timely charge alleging that the State unilaterally removed his position from the UUP-represented unit, we might have found that he stated a violation of §209-a.1(a) of the Act.

Indeed, Cooper alleges that UUP denied him representation because he is not a member of the UUP bargaining unit. Because Cooper was not in the bargaining unit, UUP did not have an obligation to represent him at any time, and consequently, it cannot be found to have violated §209-a.2(c) of the Act.

In addition, we affirm the ALJ's conclusion that Cooper's amended charge against the State and UUP is untimely pursuant to §204.1(a)(1) of the Rules. Commencement of the four-month filing period begins when a charging party knows, or should have known, of the facts constituting the unlawful conduct.[5] The time in which to file an improper practice charge is not tolled by the pendency of a related grievance.[6] The allegations against the State are untimely because Cooper was aware as early as June 2008 that his position was considered managerial/confidential. In addition, his claim against UUP is untimely because the charge was filed more than four months after UUP informed him that it would not be providing representation.

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

DATED: June 20, 2011
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

[5] *Onteora Cent Sch Dist*, 16 PERB ¶3098 (1983); *County of Suffolk (Dept of Labor Relations)*, 19 PERB ¶3003 (1986).

[6] *New York State Thruway Auth*, 40 PERB ¶3014 (2007) citing *NYCTA*, 10 PERB ¶3077 (1977); *County of Suffolk (Dept of Labor Relations), supra* note 5.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party, **CASE NO. U-28836**

- and -

COUNTY OF WESTCHESTER,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

CHARLENE M. INDELICATO, COUNTY ATTORNEY (FREDERICK M. SULLIVAN of counsel), for Respondent

BOARD DECISION AND ORDER

This charge comes to the Board on exceptions filed by the Westchester County Department of Public Safety Police Benevolent Association, Inc. (PBA) to a decision by an Administrative Law Judge (ALJ) conditionally dismissing a charge filed by PBA against the County of Westchester (County).[1] The charge alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally began deducting from a unit employee's biweekly paycheck to recoup alleged past overpayments, without negotiating a debt recoupment procedure with PBA.

The County filed an answer which, *inter alia*, denied a violation of the Act and asserted that the charge should be conditionally dismissed and deferred pursuant to the

parties' negotiated grievance arbitration procedure.

Following the submission of briefs on the deferral issue, the ALJ issued a decision concluding that the charge is subject to the Board's merits deferral policy premised upon the maintenance of standards clause in the parties' expired agreement and, therefore, conditionally dismissed the charge.

EXCEPTIONS

In its exceptions, PBA argues that the ALJ's decision should be reversed because PERB's merits deferral policy is inconsistent with the Act. The County supports the ALJ's decision.

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

FACTS

PBA represents a unit of police officers and sergeants employed by the County's Department of Public Safety. PBA and the County are parties to an expired January 1, 2001 – December 31, 2002 agreement, which contains the following maintenance of standards provision:

> Conditions of employment in effect prior to this agreement and not covered by this agreement shall not be reduced without good cause during the term of this agreement. "Good Cause" may be determined through the grievance procedure herein, including Step 3.

In addition, the agreement sets forth a grievance procedure which ends in binding arbitration.

On October 16, 2008, the County began deducting money from Detective Robert Outhouse's biweekly paycheck to recoup alleged overpayments without negotiating the

action.

DISCUSSION

As the ALJ correctly noted, in two prior decisions we held that the at-issue maintenance of benefits clause is an arguable source of right to PBA warranting a merits deferral of its improper practice charges.[2] In the present case, PBA asserts that our merits deferral policy violates the legislative mandate set forth in §205.5(d) of the Act for the Board to "exercise exclusive nondelegable jurisdiction of the powers granted to it." In its brief, PBA fails to cite to controlling authority that contradicts its argument.

We have applied the merits deferral policy since 1971 and the policy has been affirmed by the courts.[3] Among such judicial decisions is *Westchester County Police Officers' Benevolent Assn v New York State Pub Empl Rel Bd*[4] where the Appellate Division, Third Department, rejected PBA's challenge to the application of our merits deferral policy to the at-issue contract provision.

We deem it unnecessary to reiterate at length the public policy rationale that underlies our four-decade old merits deferral policy, especially in light of the need for

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[2] *County of Westchester*, 30 PERB ¶3073 (1997), *on remand*, 31 PERB ¶4623 (1998), *affd*, 32 PERB ¶3016 (1999), *petition dismissed*, *Westchester County Police Officers' Benevolent Assn v New York State Pub Empl Rel Bd*, 32 PERB ¶7023 (Sup Ct Albany County 1999), *revd and remanded*, 279 AD2d 847, 34 PERB ¶7002 (3d Dept, 2001), *lv denied*, 34 PERB ¶7016 (3d Dept 2001), *lv dismissed*, 96 NY2d 886, 34 PERB ¶7033 (2001), 97 NY2d 692, 35 PERB ¶7001 (2002), *on remand, petition dismissed*, 34 PERB ¶7032 (Sup Ct Albany County 2001), *affd*, 301 AD2d 850, 36 PERB ¶7001 (3d Dept 2003); *County of Westchester*, 42 PERB ¶3027 (2009).

[3] *See*, *Roma v Ruffo*, 92 NY2d 489, 31 PERB ¶7504 (1998); *CSEA v New York State Pub Empl Rel Bd*, 213 AD2d 897, 28 PERB ¶7004 (3d Dept 1995); *NYCTA (Bordansky)*, 4 PERB ¶3031 (1971); *City of Buffalo*, 4 PERB ¶3090 (1971); *Town of Carmel*, 29 PERB ¶3073 (1996).

[4] Supra, note 2

administrative economy. It is sufficient to note that deferral to the parties' grievance arbitration procedure is fully consistent with the policies of the Act, which encourage public employers and employee organizations to voluntary agree upon procedures for resolving disputes.[5]

Based upon the foregoing, we affirm the ALJ's decision.

IT IS, THEREFORE, ORDERED that PBA's exceptions are denied, and the charge is conditionally dismissed.

DATED: June 20, 2011
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

[5] Section 209(a) of the Act