STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-9/15-16/77

In the Matter of

CENTRAL COUNCIL OF TEACHERS - NASSAU BOCES - LOCAL 2551, AFL-CIO,

Upon the Charge of Violation of Section 210.1 of the Civil Service Law.

BOARD DECISION & ORDER

Case No. D-0139

On November 18, 1976, Counsel to this Board filed a charge against the Central Council of Teachers - Nassau BOCES - Local 2551, AFL-CIO (Local 2551) alleging that it violated Section 210.1 of the Taylor Law by engaging in a seven-day strike against the Board of Cooperative Educational Services of Nassau County (BOCES) on October 18, 19, 20, 21, 22, 25 and 26, 1976. Local 2551 answered the charge by denying its material allegations and by asserting that its responsibility for the strike, if any, was diminished by reason of acts of extreme provocation engaged in by the BOCES and its agents.

In lieu of a formal hearing, the parties stipulated that the transcript of testimony presented during a non-jury trial held to determine whether Local 2551 officers and members violated a temporary restraining order should constitute the record in this case. All parties submitted briefs.

The hearing officer determined that Local 2551 did engage in a seven-day strike as charged in violation of Section 210.1 of the Taylor Law. He also found that during the strike student attendance dropped substantially. Thus the strike had negative impact on the welfare of the community, but there is no evidence that it had a negative impact upon public health or safety.

The hearing officer rejected the proposition that the strike was precipitated by acts of extreme provocation on the part of BOCES or its agents. He determined that Local 2551 "struck to persuade BOCES to improve its financial offer." He also determined that BOCES's refusal to offer any salary increase was motivated only by economic considerations.

Having reviewed the record and the briefs of the parties, we affirm the findings of fact and conclusions of law of the hearing officer.

ACCORDINGLY, WE ORDER that the rights of Central Council of Teachers - Nassau BOCES - Local 2551, AFL-CIO to membership dues deduction and to any agency shop fee deductions which may be negotiated shall be forfeited for a period of six (6) months commencing on the first practicable date and that they shall be restored at the end of such period (six months) only after Central Council of Teachers - Nassau BOCES - Local 2551, AFL-CIO affirms that it no longer asserts the right to strike against any government; provided, however, that if it becomes necessary to utilize the dues deduction process for the purpose of paying the whole or any part of a fine imposed by order of a court as a penalty in a contempt action arising out of a strike herein, the suspension of dues deduction privileges ordered hereby may be interrupted or postponed for such period as shall be sufficient to comply with such order of the court, whereupon the suspension order hereby shall be resumed or initiated, as the case may be, and shall continue for such duration as may be necessary to result in a total period of suspension of six months.

DATED: New York, New York
September 15, 1977

Joseph R. Crowley

Joseph R. Crowley

Ida Klaus

Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-9/15-16/77

In the Matter of	:	
LOCAL 1041, AFSCME and SECURITY AND LAW ENFORCEMENT EMPLOYEES COUNCIL 82, AFSCME	:	BOARD DECISION AND ORDER
upon the Charge of Violation of Section 210.1 of the Civil Service Law.	:	CASE NO. D-0130

As amended, the charge herein, which was filed by Counsel to the Public Employment Relations Board, alleges that Local 1041, AFSCME, violated §210.1 of the Taylor Law "in that it caused, instigated, encouraged, condoned and engaged in a strike against the State of New York on August 4, 1975...." The alleged strike occurred when "Security personnel assigned to the 7:20 a.m. shift at Eastern New York Correctional Facility, including members of Local 1041, AFSCME, did not commence performance of their duties until approximately 8:40 a.m." After a hearing which lasted three days, the hearing officer determined that there had been no strike and he dismissed the charge. Both the charging party and New York State, which intervened in the proceeding, have filed briefs in opposition to the hearing officer's determination.

FACTS

On August 3, 1975 there was considerable unrest among the inmates at the Eastern New York Correctional Facility. Many inmates appeared to be armed and one was stabbed. When the president of Local 1041 reported to work on August 4, 1975 at 7:20 a.m, he found notes in the union box requesting a frisk of the inmates. This request was transmitted to Lieutenant Demskie, the officer in charge of the shift, who told the two representatives of the correction officers that he was not empowered to authorize a frisk and that he would seek clarification from the deputy superintendent of security services and/or the superintendent. Meanwhile, Demskie instructed that the men should "stay

put".[1]

Thereafter, Demskie reported that a frisk of the inmates had been authorized after breakfast.[2] This report was met by silence and inaction on the part of the correction officers. At this point, the deputy superintendent of security services met with representatives of the correction officers. Shortly afterwards, instructions were received from the superintendent for a frisk and the correction officers commenced working. Many weapons were seized during the frisk.

The charging party and the State argue that even if the correction officers had been instructed to "stay put" while Demskie affirmed whether a frisk was authorized, they had engaged in a strike when, thereafter, Demskie told them that a frisk would be held after the inmates were taken to breakfast. We do not agree that what transpired at this time constituted a strike. Ordinarily the failure of employees to perform their regularly scheduled duties is a strike. In the instant situation, however, the work assignment was one that involved unusual danger and the correction officers were within their rights in seeking a clarification of their assignment under the circumstances. They were also entitled to have that clarification stated to them in plain and unambiguous terms. Absent an explicit order, their conduct cannot be deemed so serious a matter as a strike. The message given to the correction officers by

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1 There is a conflict in the testimony on this point and the State, in its brief, urges us to credit the testimony of Demskie that he did not instruct the correction officers to wait until he had a response concerning the frisk. The hearing officer, however, made a contrary credibility resolution. He determined that Krom, the president of Local 1041, had a clearer recollection of events. Nothing in the record persuades us to upset the hearing officer's findings of facts.

2 Here, too, there is a conflict in the testimony. The witnesses on behalf of Local 1041 testified that Demskie did not offer a frisk after breakfast, but a "partial" frisk which, according to them, evoked no reaction because the correction officers did not know what was meant by a "partial" frisk. Again, we accept the version of the testimony that was accepted by the hearing officer.

Lieutenant Demskie that a frisk would be held after breakfast was not a sufficiently clear and explicit order. It could easily have been, and apparently was, understood as a proposal in an ongoing discussion of what should be done in an unusual and dangerous situation.

ACCORDINGLY, WE CONFIRM the determination of the hearing officer, and WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: New York, New York
September 15, 1977

Joseph R. Crowley

Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2C-9/15-16/77
UNIFORMED FIRE FIGHTERS ASSOCIATION, INC., LOCAL 273, I.A.F.F., Respondent, -and- CITY OF NEW ROCHELLE, Charging Party.	BOARD DECISION AND ORDER Case No. U-2280

The Uniformed Fire Fighters Association, Inc., Local 273, I.A.A.F. (Local 273) and the City of New Rochelle (New Rochelle) have been in negotiations for an agreement to succeed an expired one. When Local 273 presented certain demands to a factfinder, New Rochelle filed the instant charge alleging that Local 273 violated §209-a.2(b) of the Taylor Law by improperly insisting upon the negotiation of non-mandatory subjects of negotiation. While the matter was pending before this Board, the parties continued to negotiate and the impasse was submitted to interest arbitration pursuant to §209.4 of the Taylor Law. These negotiations and the conciliation procedures of the Taylor Law resolved all the negotiation issues between the parties but one. That issue is presented by Local 273's Demand #16, which would establish a health and safety committee. Therefore, it is only that issue which is before us. Because the issue is one that primarily involves a dispute as to scope of negotiations under the Taylor Law, it was processed under §204.4 of our Rules which provides for a determination by this Board upon the record, without any report or recommendation from a hearing officer.

The disputed contract proposal of Local 273 would provide:

> "16. A general Health and Safety Committee should be created consisting of two representatives appointed by the City and two representatives appointed by the Union. The Committee's jurisdiction shall cover all matters of safety to the members of the Fire Department, including but not limited to, the total number of employees reporting to a fire and the minimum number of employees to be assigned to each piece of firefighting apparatus. The foregoing is intended to be illustrative and not inclusive. Decisions of the Committee shall be made by a majority vote, provided, however, that an equal number of representatives appear at such Committee meetings, which shall be held at least quarterly or on special call of any two of the representatives. In the event of a deadlock between the Union and City representatives, the issue in dispute shall be submitted to binding arbitration."

This demand presents a difficult problem, but one with which we have dealt in the past. The problem is one of balancing the statutory right of a public employee organization to negotiate as to terms and conditions of employment of the employees whom it represents, including the protection of their health and safety from job-connected injury, against the prerogative of a public employer to make a unilateral determination as to how it will deploy its personnel in order to best serve its constituency. In two recent cases, we determined that a public employer need not negotiate over a demand that a specified number of policemen or firefighters be assigned to a particular vehicle. In the first of these two cases, Matter of White Plains PBA, 9 PERB ¶3007 (1976), we said (at page 3010):

> "Government has the general right to fix manning requirements unilaterally. Safety as a general subject is a mandatory subject of negotiations. To attempt to provide in an agreement all aspects of safety would be an exercise in futility in that one could not anticipate in specific language all possible eventualities....
>
> "We suggest that the parties through the negotiating process could create a joint safety policy committee that operates under general guidelines that are recited in the contract to consider issues of safety that relate to manning standards. This process could be made subject to the grievance arbitration procedure. A demand to establish such a joint safety policy committee would be a mandatory subject of negotiations."

This proposition was restated in the second case, Matter of I.A.F.F. of the City of Newburgh, 10 PERB ¶ 3001 (1977), in which we said (at page 3003):

> "As we have found here and in other cases, the general subject of safety as a means of protecting employees beyond the normal hazards inherent in their work is a mandatory item of negotiation. Hence, the presence of a general safety clause in the collective bargaining agreement should provide a basis for testing the safety guarantee in individual fact situations which may arise during the life of the agreement by presentation of disputes in such specific situations for resolution through the grievance procedure."

The demand herein was drawn to the specifications of our opinions in the White Plains and Newburgh cases and it is a mandatory subject of negotiation.

New Rochelle advances three arguments in opposition to the negotiability of the demand.[1] It argues that the proposed clause is devoid of standards that would guide a grievance arbitrator in the event that the union and management members of the Health and Safety Committee do not agree. We reject this argument. The thrust of the White Plains case was to reject specific language and precise standards because they might constrict the flexibility of a public employer to make decisions regarding deployment of its personnel where no significant safety factors were involved. In our judgment, the reference to the safety of employees would provide sufficient guidance to the members of the Health and Safety Committee and to the arbitrator. The employer might, if it wishes, propose some additional general standards, but this goes to the merits and not to the negotiability of Local 273's proposal.

The second argument of New Rochelle is that in our White Plains and Newburgh decisions we imposed a balancing test between the legitimate interests

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1 A fourth argument is that the demand is too broad in that it attempts to cover all employees of the Fire Department and not just unit employees. While the demand can be read in that way, we do not understand that to be the design of Local 273. In any event, the demand is a mandatory subject of negotiation only to the extent that it applies to unit employees.

of public employers and their employees and that this test requires an application of the Taylor Law that can only be made by PERB and not by an arbitrator. This is directly contrary to our opinion in the two prior cases. We reaffirm that opinion.

The third argument of New Rochelle would have us withdraw the balancing test. Thus, no degree of employee safety, no matter how great, could interfere with the management prerogative of deploying personnel no matter how slight the impact of the management determination on the nature and extent of its service to its constituency. This absolutist argument regarding management prerogatives is plainly without merit. Balancing tests are appropriate in deciding whether or not a matter is a mandatory subject of negotiation (see in re Ridgefield Park Board of Education, 3 N.J. PERC, June 21, 1977, summarized at 719 GERR 11; see also American Smelting and Refining Co. v. NLRB, 404 F.2d 552 [CA 9, 1969]) and, in cases such as this, they are essential.

ACCORDINGLY, we determine that Demand #16 of Local 273 is a mandatory subject of negotiation and

WE ORDER that the charge herein be, and hereby is, dismissed.

DATED: New York, New York
September 15, 1977

Joseph R. Crowley

Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2D-9/15-16/77

In the Matter of	:	
PORT CHESTER-RYE UNION FREE SCHOOL DISTRICT,	:	
Respondent,	:	BOARD DECISION AND ORDER
-and-	:	
PORT CHESTER TEACHERS ASSOCIATION, LOCAL 2934, AFT,	:	CASE NO. U-2390
Charging Party.	:	

On November 5, 1976, the Port Chester Teachers Association, Local 2934, AFT (charging party), filed an improper practice charge alleging that while the parties were negotiating a successor contract to the one that had expired on June 30, 1975, the Port Chester-Rye Union Free School District (respondent) had violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) by refusing to entertain a grievance or to submit it to arbitration pursuant to the grievance arbitration procedure in the expired contract. The respondent's answer asserted as an affirmative defense that as there was no contract in existence, there was no longer a grievance arbitration procedure. The hearing officer found "that the respondent's curtailment of the grievance arbitration procedure constituted a violation of §209-a.1(d) of the Act." Respondent filed exceptions to the decision of the hearing officer.

FACTS

The parties have waived a formal hearing; the case was submitted on the following stipulation of facts:

1. That the previous agreement between the parties terminated on June 30, 1975, and the parties did not enter into a new agreement until August

18, 1976.

2. That on or about June 3, 1976 respondent's Board of Education offered an early retirement inducement to all of its employees, including members of the bargaining unit represented by the charging party, which offer, by its terms, was to terminate on November 1, 1976.

3. On or about June 16, 1976 the charging party filed a grievance with respondent concerning the early retirement offer made by respondent, which grievance respondent Superintendent of Schools refused to entertain.

4. On or about June 30, 1976 the charging party presented this same grievance to the respondent Board of Education, which, on July 6, 1976, also refused to entertain said grievance.

5. On or about August 2, 1976 the charging party filed a Demand for Arbitration with the American Arbitration Association concerning the same grievance.

6. Respondent, on or about August 26, 1976, moved to stay the arbitration proceedings on the basis that no contract was then in effect between the parties.

7. The charging party, on or about October 8, 1976, withdrew its Demand for Arbitration and, on or about December 8, 1976, the Supreme Court of Westchester County denied the motion to stay the proceedings on the basis that there were no grounds on which the Court could grant the stay of arbitration since the arbitration proceedings had been withdrawn by the charging party.

8. No grievances had been heard by respondent Board of Education between the termination of the contract on June 30, 1975 and the new contract agreed to on August 18, 1976, but grievances were submitted by charging party at Levels One and Two of the provisions of the previous contract which terminated on June 30, 1975. Respondent denies that hearings took place regarding these grievances, but admits that each of the grievances so submitted were signed by

its principal, Superintendent or Acting Superintendent, with comments regarding the grievance disposition.

DISCUSSION

The hearing officer, in finding a violation, relied upon the decision of this Board in Matter of Board of Education of Malone Central School District, 8 PERB ¶3078.[1]

Without considering whether the underlying complaint concerning the employer's retirement offer should more appropriately have been presented in the form of an improper practice before this Board, rather than as a grievance, the employer's position that it would hear no grievances regardless of their substance cannot be sustained. As we read §208 of the Act, the employer has a continuing duty to deal with the union with respect to grievances. In this case, the employer violated that duty. The obligation of an employer to accept and hear grievances is not terminated upon the expiration of a contract. As provided in §208.1(a) of the Act, the public employer is required to extend to a recognized or certified employee organization the right to represent employees in the settlement of grievances. Thus, the obligation to bargain with respect to grievances continues as long as the employee organization remains certified or recognized.

We believe, however, that a distinction should be made as to the obligation of the employer itself in such circumstances to entertain and attempt to adjust grievances which arise subsequent to the termination of the contract and its obligation to permit such unresolved grievances to proceed to arbitration.

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1 To the extent that the Board's decision in Malone relates to Matter of Triborough Bridge and Tunnel Authority, 5 PERB 3037, we do not find it applicable here.

The obligation to arbitrate must be regarded as wholly contractual, deriving its existence from the terms of the actual bargain of the parties, rather than from the statutory mandate (see CPLR §7501 et seq.). Here, the contract had expired. As found by the Appellate Division, Second Department In the Matter of Board of Education (Poughkeepsie Teachers Association), 44 A.D. 2d 598 (1974), a contract having expired, the provision to arbitrate is no longer in effect.

We, therefore, find that the failure of the employer to entertain the grievance was a violation of the Act, but that the refusal of the employer to permit the grievance to proceed to arbitration was not a violation by reason of the fact that there was no agreement to arbitrate then in existence between the parties. In reaching this determination, we do not overrule the majority opinion in the Malone case, supra, because in that case there was a stipulation between the parties to the effect that they had "agreed that all items in the then current contract which was due to expire on June 30, 1974 would remain the same unless either party requested that a particular item be modified or amended" and that neither party had sought a modification or amendment of the grievance arbitration procedure. There was no such agreement in the instant case. Therefore, we find the Malone decision to be inapposite.

NOW, THEREFORE, WE ORDER the Port Chester-Rye Union Free School District to negotiate in good faith with respect to grievances.

DATED: New York, New York
September 15, 1977

Joseph R. Crowley

Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2E-9/15-16/77
THE ORANGE COUNTY COMMUNITY COLLEGE FACULTY ASSOCIATION,	BOARD DECISION AND ORDER
Respondent,	
-and-	CASE NO. U-2579
THE COUNTY OF ORANGE,	
Charging Party.	

The charge herein was filed on March 1, 1977 by the County of Orange on behalf of the Orange County Community College (employer). It alleges that the Orange County Community College Association (Association) violated §209-a.2 of the Taylor Law by failing to negotiate in good faith in that it insisted upon the negotiation of nonmandatory subjects of negotiation. The employer alleges that more than twenty of the Association's demands which it has insisted upon during factfinding are not mandatory subjects of negotiation. The Association responds that all of the demands complained about by the employer are mandatory subjects of negotiation. It also argues that the charge is not timely.

At the request of the parties, and in accordance with §204.4 of our Rules, we have dispensed with an intermediate report from a hearing officer. After a conference with the hearing officer, the parties submitted their briefs directly to us. In its brief, the employer withdraws its objection to several of the Association's demands. In some instances it does so explicitly; in others it does so by making no argument in support of that specification of the charge. In its brief, the Association also diminishes the number of the issues presented to us by the pleadings by withdrawing some of its demands. Nevertheless, there remain fifteen demands in contention.

The parties are in negotiations for a successor to an agreement that expired on September 1, 1976. Those negotiations commenced before the expiration of that agreement. From the outset, the employer refused to negotiate about certain demands of the Association that it alleged to be nonmandatory and on May 28, 1976, the Association charged the employer with failure to negotiate in good faith in that it refused to negotiate with regard to twenty-three such demands. On September 24, 1976, we issued a decision in that case (9 PERB ¶3068) in which we held some of the demands to be mandatory subjects of negotiation and others not. Most of the demands challenged by the employer in this case were not before us in the earlier one. In some instances, however, the demands now in question are reformulations of demands that were previously determined not to be mandatory subjects of negotiation.

In our prior decision in this dispute, we wrote:

> "Our determination that a particular matter is not a mandatory subject of negotiation does not preclude the public employer from negotiating with the Association with respect to that item. Similarly, our determination that a particular matter is a mandatory subject of negotiation does not require that the parties reach agreement as to it in their negotiations."

Regrettably, the parties could not resolve the dispute regarding the substance of the demands and had to resort to the filing of yet another charge.

The Association argues that the charge is not timely because it was not filed within four months of the presentation of the demands that it complains about. The implication of this defense is that the mere raising of a nonmandatory subject of negotiation would be an improper practice. This is not the case. The parties are permitted to make demands in nonmandatory areas and they are encouraged to negotiate about such demands. Therefore, the charge was timely filed.

DEMAND #12

> "No student advisees shall be assigned to the President of the Faculty Association. The teaching load of said president shall be at least three credit hours each semester less than the normal load set forth herein. In addition, the employer would assign a teaching schedule that will maximize the president's availability for performing official duties."

This is a mandatory subject of negotiation. In the prior decision, we determined that a demand that no member of the teaching faculty be required to have student advisees was not a mandatory subject of negotiation, saying, "Whether or not students should have access to members of the teaching faculty for advice on their academic pursuits and course-related matters is an aspect of educational policy." This is a demand for a reduced work assignment for the president of the Association. In Matter of City of Albany, 7 PERB ¶3078 (1974), affirmed 38 NY 2d 778 (1975), we determined that such a demand is a mandatory subject of negotiation because "The ability of an employee organization to provide effective representation to its constituency is predicated upon having employee leaders of that organization available to devote time to the work of the organization."

DEMAND #18

> "Members of the unit shall be paid 1/560 of $20,000 for each student in excess of each of the following numbers: (schedule deleted)"

This is a variation of a demand which, in the earlier case was held to be a nonmandatory subject of negotiation but, in this form, it is a mandatory subject of negotiation. The employer argues that it continues to be a demand to restrict class size. The Association argues that it is for premium pay for increased workload. Although the effect of such premium pay might be to make larger classes less attractive to the employer, the demand would not impose any

legal restrictions upon the employer from establishing the size of its classes unilaterally. The Court of Appeals has so ruled in West Irondequoit Teachers Association v. Helsby, 35 NY 2d 46 (1974) when it wrote:

> "The decision whether, say, sections of the fourth grade should contain 25, 28 or 32 pupils is a policy decision and not negotiable; whereas whether the teachers responsible for the sections are to receive varying consideration and benefits depending on the ultimate size of each section as so determined is mandatorily negotiable as a condition of employment."

DEMAND #19

> "A. Faculty Members shall be asked what they would like to teach.
>
> B. The rationale for the rejection of a faculty member's schedule shall be communicated to the faculty in writing."
>
> C. [not contested by the employer]

Paragraph A. is a variation of a demand previously held to be a nonmandatory subject of negotiation and as reformulated it continues to be nonmandatory. Paragraph B. derives from paragraph A. and has no independent status. Thus, it, too, is a nonmandatory subject of negotiation.

The Association concedes that it is the duty of the employer to determine what courses should be offered and who should be assigned to teach each course. It distinguishes the instant demand, however, by pointing out that it only requires the employer to listen to faculty suggestions. A proposal that the employer consult with the faculty regarding a nonmandatory subject of negotiation matter may be reasonable, but that does not change the character of the demand to a mandatory subject of negotiation.

DEMAND #20

> "A faculty member's teaching schedule shall be arranged over a maximum of four (4) days per week, Monday through Friday, and shall be scheduled within a five (5) hour time period each day."

This is not a mandatory subject of negotiation because it would preclude

the offering of classes on Saturdays and Sundays and thus restrict the schedule of the services that may be offered by the employer. As such, it is similar to Demand #27, which was found to be a nonmandatory subject of negotiation in the prior case.

DEMAND #22

> "The Association recognizes that nothing contained in this Agreement shall be deemed to limit the County, the Board of Trustees or the College in any way in the exercise of their regular and customary functions of management including but not limited to (1) the scheduling of classes and other activities; (2) the right to introduce new or improved methods or facilities; (3) the right to formulate any reasonable rules and regulations; (4) the right of employment of faculty and initial placement on the salary schedule; (5) the use and control of College property; and all other rights that have traditionally belonged to the County, the Board of Trustees or the College. No new policies or customs affecting working conditions shall be instituted without prior notification, discussion, and written consent of the Association." (emphasis supplied)

The final sentence of the demand renders this a nonmandatory subject of negotiation to the extent that it would restrict the alteration of policies and practices that are management prerogatives even though they may have some effect upon working conditions. Although an employee organization may demand negotiation over the impact of such an alteration upon terms and conditions of employment, it may not insist upon a demand that it be given the opportunity of vetoing the alteration itself.

DEMAND #24

> "If the employer changes any counselor duties, the Association shall have the right to negotiate salaries and any other impact on hours and working conditions. If the ratio of one counselor to 250 students is exceeded:
>
> 1. there shall be additional remuneration provided,
>
> 2. there shall be additional support services provided,
>
> 3. counselor participation in committee work shall be limited to a maximum of one hour per week,

4. paperwork and the number of reports required shall be reduced,

5. changes in method will be required, i.e. group counselling versus individual counseling."

The Association's brief in support of this demand makes it clear that the five enumerated sentences are alternatives and that the employer would be free to decide which would be used to relieve the impact of increased student load.

This is a mandatory subject of negotiation. Unlike Demand #22, it deals with the impact of a management determination upon terms and conditions of employment. Were the demand to require the imposition of number 5, either alone or in concert with some of the other four, it would not be a mandatory subject of negotiation, but because number 5 is one of several alternatives, the choice of which is left to the employer, the demand is a mandatory subject of negotiation.

DEMAND #25

"Each part-time day faculty member teaching proportional full-time load shall be paid a proportional salary based upon placement on step as a full-time faculty member. Such persons shall have all the responsibilities and duties of full-time faculty unless both parties consent to a part-time salary arrangement with no duties outside of teaching."

This is a mandatory subject of negotiation. The negotiating unit represented by the Association includes both the full-time and part-time faculty. This is a demand concerning the rate of compensation and job duties of part-time employees.

DEMAND #31

"Sponsorship and attendance at student activities shall be voluntary. All sponsorship of student activities and coaching shall be compensated at the continuing education rate. The credit load equivalent shall be determined by the Faculty Association and the Administration. Full-time

> members of this unit shall have first opportunity in sponsorship of student extra-curricular and co-curricular activities."

The first sentence of the demand is not a mandatory subject of negotiation. It is a prerogative of the employer to decide whether it requires faculty attendance at student activities. The remainder of the demand is a mandatory subject of negotiation. In the prior decision, we determined that the employer must negotiate over a demand that "relates to the opportunity of an employee within the negotiating unit to earn extra compensation in other teaching and related assignments."

DEMAND #34

> "A. Candidates for a teaching vacancy within any Division shall be screened and interviewed by a committee including two (2) members of the Faculty Association elected by the Division. The Academic Dean shall sit as an ex-officio, non-voting member of the committee. The committee shall send its recommendations to the Academic Dean for his approval and recommendation to the president of the College.
>
> B. Candidates for the position of Academic Dean and any other academic administrator shall be screened and interviewed by a committee including at least five (5) members selected by the Faculty Association. This committee shall forward its recommendation to the President of the College. Each committee shall elect its own chairman."

This is not a mandatory subject of negotiation. As in the case of Demand #19, the Association argues that all that is required is faculty consultation and that the employer is free to ignore the advice that it received in such consultations. An employer need not negotiate over a demand that it solicit the advice of the Association in a matter of management prerogative.

DEMAND #38

In the prior decision we determined that the following demand was not a mandatory subject of negotiation.

> "Textbooks and other teaching materials shall be selected by the faculty member involved in teaching a specific course."

The Association revised that demand in its presentation to the factfinder to provide

> "that time limits on the promulgation of a required textbook be established and that if these are not adhered to that a one course or three credit hour abatement be provided. The rationale for this demand is that if a professional is asked to teach from a new textbook, he needs either advance time for preparation or additional time during the semester to prepare adequately."

In its present form, the demand is a mandatory subject of negotiation, as it deals with the impact of a management decision upon terms and conditions of employment, rather than with the decision itself.

DEMAND #50.9

> "If an employee is ineligible for any benefit, he shall receive the cash equivalent."

This demand is designed to provide alternative benefits to employees who are ineligible to receive benefits provided by the agreement by reason of having retired from other public employment. It is a mandatory subject of negotiation. The employer contends that an employee who is ineligible for a benefit provided by the agreement by reason of having retired from other public employment might also be ineligible to receive payment of its cash equivalent because of the provision of a statute, such as Retirement and Social Security Law §213-a. This is not a reason to declare an otherwise mandatory subject of negotiation nonmandatory. On occasion, a term of a collectively negotiated agreement may be illegal when applied in a particular situation. In such a situation, the provisions of law would take precedence.

DEMAND #50.10

> "Upon retirement, members of this unit shall be granted identification cards, faculty and staff parking stickers, and first opportunity after full-time faculty in teaching part-time courses in the day and evening."

This is a mandatory subject of negotiation. It is not a retirement benefit, the negotiation of which is barred by §201.4 of the Taylor Law (see Matter of Lynbrook PBA, 10 PERB ¶3065). Like Demand #31, it is that, for the duration of the contract period, employees who are in the unit when the contract is executed be given an opportunity to earn extra compensation in other teaching and related assignments in the event they retire during that period.

DEMAND #53

> "The printed schedule of classes shall be considered a permanent schedule unless a faculty member requests a change, or unless a course is cancelled due to lack of enrollment."

This is not a mandatory subject of negotiation. The planning of course schedules commences months before the beginning of a school semester. There are reasons why the employer may wish to change the schedule of classes other than the cancellation of a course due to lack of enrollment. Such reasons involve a matter of educational policy. This demand would impose a restriction upon the authority of management to make such educational judgments.

DEMAND #54

In the earlier case we determined that the following demand was not a mandatory subject of negotiation.

> "No member of the teaching faculty will be required to have advisees. The ratio of professional counselors to full-time students shall not exceed 1 to 250."

The Association revised that demand in its presentation to the fact-finder to provide that "the faculty association would withdraw this demand in

favor of present practice." Neither the record nor the prior contract between the parties specifies what the present practice is. If the revised demand is that the employer agree to retain the present practice, and if that practice imposes any numerical limitations, the demand is not a mandatory subject of negotiation. If it does not impose such limitations, the matter cannot now be considered because the demand is too vague to permit any ruling.

DEMAND #61

> "The President's Committee on Reappointment and Tenure shall include tenured members of the unit. The President shall define all criteria to be used for promotion, retention and tenure and shall give a copy to all faculty members by September 1 of each academic year. Written rationale for the decision shall be given to the faculty member when promotion, retention, or tenure is denied."

This is not a mandatory subject of negotiation. It involves the governance of the college. (see Matter of Board of Higher Education of the City of New York, 7 PERB ¶3028 [1974]). Like Demands Nos. 19 and 34, it would require the employer to consult with faculty before making management decisions.

NOW, THEREFORE, in view of the above conclusions of law, with respect to those matters herein that we determine to be mandatory subjects of negotiation, we find that the Association did not insist upon negotiations improperly because there is a duty to negotiate as to them, and we dismiss the charge. With respect to those matters that we determine not to be mandatory subjects of negotiation, we find that the Association did insist upon negotiations improperly, and

WE ORDER the Association not to insist upon those demands as a condition of reaching agreement.

DATED: New York, New York
September 15, 1977

Joseph R. Crowley

Joseph R. Crowley

Ida Klaus

Ida Klaus

CONCURRING OPINION OF BOARD MEMBER IDA KLAUS

In the decision of this Board of April 7, 1977 in Matter of Monroe Woodbury Teachers Association, 10 PERB ¶3029, I dissented from the Board holding that it is a per se violation of the duty to negotiate in good faith for one party, over the objections of the other, to carry a demand for a nonmandatory subject of negotiation into factfinding. It is my view, there expressed, that factfinding is an extension of the bargaining process and that the majority had used a "mechanistic" test in finding that the mere submission to factfinding constituted unlawful insistence and, hence, a refusal to negotiate in good faith. The dissent proposed that the test should be one of whether there had been a showing of insistence on inclusion of the clause as a condition to any agreement. It reasoned that the theory underlying that test was that insistence on a nonmandatory clause prevented bargaining on mandatory matters and, hence, obstructed the fulfillment of the fundamental purposes of the collective bargaining process, which is to reach agreement as to terms and conditions of employment governing the employer-employee relationship. It noted also the absence of an evidentiary record in the case and concluded that no such finding could, in any event, be made in that case solely on the pleadings. As an alternative to dismissal of the charge, it concluded that the record be reopened and the case sent to hearing for a full and complete evidentiary record.

While the record in the instant case presents a fuller background, there is no clear proof that there was insistence on the nonmandatory items as a condition of reaching any agreement as to the mandatory matters.

However, since the majority of the Board has already declared Board doctrine on this issue, I am constrained to adopt it, and I concur in this decision and order.

DATED: New York, New York
September 15, 1977

Ida Klaus

Ida Klaus

#2F-9/15-16/77

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK CITY TRANSIT AUTHORITY,

Respondent,

- and -

SYLVESTER KING, GUERINO DENUNCIO, EDELBERTO CAMACHO and PAUL CASEY,

Charging Parties.

BOARD DECISION AND ORDER

Case No. U-2262

This matter comes to us on the exceptions of Sylvester King, Guerino Denuncio, Edelberto Camacho and Paul Casey (charging parties) from a hearing officer's decision which dismissed their charge on the ground that it was not filed within the time limits authorized by Section 204.1(a)(1) of our Rules of Procedure. That Rule authorizes the filing of a charge within four months of the act complained about. The charge was mailed to the New York State Public Employment Relations Board(PERB) on August 20,1976 and it complains of an act of the New York City Transit Authority (TA) that occurred on January 4, 1976.

On that day, the charging parties, all surface line dispatchers who had been employed in Queens where they had been represented by the Queens Supervisory Association, were transferred to different locations where their job title was represented by the Subway Surface Supervisory Association. Allegedly, the effect of the transfer was that they lost all seniority in title and were placed at the bottom of the lists for picks of schedules.

The Queens Supervisory Association had brought a grievance on behalf of the charging parties, but that grievance was dismissed on April 23, 1976 on the ground that the charging parties were then in a negotiating unit represented by the Subway Surface Supervisory Association and that the Queens Supervisory Association no longer had any standing to represent them.

The hearing officer dismissed the charge as untimely. In doing so, he rejected two contentions of the charging parties: (1) that the loss of seniority was a continuing violation, and (2) that the time during which to file a charge with PERB did not begin to run until April 23, 1976 which is when charging parties had exhausted their contractual remedies. The charging parties' exceptions are directed to the hearing officer's conclusion that the time during which to file the charge ran from January 4, 1976 and not from April 23, 1976. Charging parties argue that the grievance procedure is like an administrative remedy which had to be exhausted before the charge could have been filed. This analogy to administrative law and the principle of the exhaustion of administrative remedies is not appropriate. The grievance procedure is not an administrative law proceeding; it is a contractual procedure designed to protect the private rights of employees and parties to the contract. By way of contrast, the improper practice procedures set forth in §209-a of the Taylor Law are designed to protect the statutory rights of employees, employee organizations and public employers. That such rights do not always coincide is made clear in a recent amendment of §205.5(d) of the Taylor Law which provides that this Board does not have authority "to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice" (L.1977, c.429) Because of this distinction, it is not unusual for an aggrieved individual to file an

improper practice charge and a grievance simultaneously. This is recognized by charging parties who argued before the hearing officer that their time to file a charge should have been tolled during the pendency of the grievance because this Board might have deferred consideration of the charge at that time.

We agree with the hearing officer that from January 4, 1976 on the charging parties were free to file their charge with PERB and preserve their rights, if any, and that in not doing so, they acted at their peril.

NOW, THEREFORE, WE ORDER that the charge herein be, and hereby is, dismissed.

DATED: New York, New York
September 15, 1977

Joseph R. Crowley
JOSEPH R. CROWLEY

Ida Klaus
IDA KLAUS

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATION. .ARD

In the Matter of :

COUNTY OF ROCKLAND, :

Employer, :

- and - :

CORRECTION OFFICERS ASSOCIATION OF ROCKLAND COUNTY, :

Petitioner. :

#2G-9/15-16/77

CASE NO. C-1517

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 Correction Officers Association of Rockland County

has been designated and selected by a majority of the employees of the above-named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: INCLUDED: Jailer and Senior Jailer

EXCLUDED: All other employees.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Correction Officers Association of Rockland County

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 15 day of September , 1977 .

Joseph R. Crowley

Ida Klaus

4803

Ida Klaus

PERB 58
(10-75)