

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2A-3/17/81
: :
UNITED FEDERATION OF TEACHERS, : BOARD DECISION AND ORDER
: :
Respondent, : :
-and- : CASE NO. U-4165
: :
DONALD. J. BARNETT, : :
: :
Charging Party. : :

JAMES R. SANDNER, ESQ. (NANCY E. HOFFMAN, ESQ.,
of Counsel), for Respondent

HOWARD N. MEYER, ESQ., for Charging
Party

This matter comes to us on the exceptions of the United Federation of Teachers (UFT) to the decision of a hearing officer that it violated §209-a.2(a) of the Taylor Law by refusing to furnish Donald J. Barnett, a nonmember, with representation at a hearing to review an unsatisfactory rating. UFT acknowledged that it furnishes representation at such hearings to members, while refusing to do so for nonmembers. It argued, however, that this is permissible conduct because such hearings derive from the by-laws of the employer and not from UFT's collective bargaining agreement with the employer.

FACTS

As noted by the attorneys during oral argument, a consequence of an unsatisfactory rating is that the recipient employee will not receive the incremental salary increase to which he would otherwise be entitled. Appeals from unsatisfactory ratings may

be taken pursuant to §5.3.4 of the by-laws of the employer. The appellate hearings are commonly called 105A hearings by reason of their former designation in the by-laws of the employer. The by-laws of the employer permit a unit employee who has initiated a 105A hearing,

"to be accompanied and advised by an employee of the board or a representative of the union recognized by the board as the collective bargaining representative of the employees....The adviser may not be an attorney."

UFT trains a cadre of lay personnel to represent fellow members of UFT in 105A cases. On occasion it assigns a full-time union representative to do so. When Barnett sought UFT representation at his 105A hearing, he was informed that, "The policy of the United Federation of Teachers is that we do not and we are not required to represent non-Union members at the 'U' Rating hearings." On the date of the 105A hearing, Barnett indicated his wish to be represented by the UFT and he requested an adjournment of the hearing to secure representation. His request was granted and the hearing was adjourned.

The hearing officer determined that UFT's refusal to furnish Barnett with representation at the 105A hearing violated §209-a.2(a) of the Taylor Law for three reasons. First, he determined that UFT's duty of fair representation extends to 105A hearings because they have a contractual basis. The basis is that the contract provides for the continuation of

"All existing determinations, authorizations, by-laws, regulations, rules, rulings, resolutions, ...affecting salary and working conditions of the employees in the bargaining unit shall continue in force...." (emphasis supplied)

Second, he further found that the duty of fair representation

would apply to benefits that are not based upon a collective bargaining contract so long as the benefits are job-related.

Finally, he found that representation in 105A hearings is a benefit of sufficient significance so that denial of this benefit to nonmembers would have the effect of coercing them to join UFT.

In support of its exceptions, UFT argues that the charge was premature because no 105A hearing has yet been held. On the merits it reasserts the argument that the 105A appeals procedure is based upon the by-laws of the employer only; thus, while UFT trains lay advocates, it has no legal responsibility for the appeals process. In support of this argument, it asserts that UFT has no exclusive status regarding representation of employees in 105A proceedings in that employees may be represented by other employees of the employer. It acknowledges the exclusivity of its status, however, to the extent that no representatives of any other employee organization may represent employees at a 105A hearing.¹

DISCUSSION

The charge, which alleges that UFT refused to represent Barnett because he is not a member, is not premature. UFT's refusal to represent Barnett was unequivocal and final. Whether or not the 105A hearing was held was, therefore, not a prerequisite to the filing of the charge.

¹ UFT notes that Barnett is an agency shop fee payer. It argues that this fact does not of itself impose upon it a duty to furnish him with representation at a 105A hearing. We do not reach this question.

The granting or withholding of representation in 105A hearings is not a private matter between UFT and its members. It goes to an important aspect of the relationship between unit employees and their employer. An unsatisfactory rating of an employee will affect that employee's eligibility for an incremental salary increase and may be considered as the basis for discipline. As such, it affects the employee's compensation and other terms and conditions of employment. UFT's refusal to represent nonmembers in such hearings, while affording representation to members, is a violation of its duty to represent nonmembers fairly. It coerces them in their right to refrain from joining or participating in the affairs of UFT.

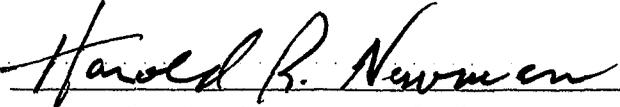
NOW, THEREFORE, we affirm the decision of the hearing officer, and

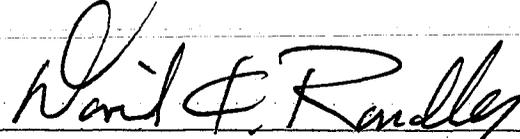
WE ORDER:

1. UFT, its officers, agents and affiliates, to cease and desist immediately from refusing to represent nonmembers at rating review proceedings, commonly known as 105A hearings, pursuant to §5.3.4 of the by-laws of the Board of Education of the City School District of the City of New York and to provide nonmembers with representation in any pending and future such proceeding on the same basis as it provides representation to its members; and
2. that UFT shall cease and desist from interfering with, restraining or coercing public employees in the exercise of their rights under the Act, and shall post a notice in the form attached, at each facility at which any unit personnel are employed, on bulletin

boards to which it has access by contract, practice
or otherwise.

DATED: Albany, New York
March 17, 1981


Harold R. Newman, Chairman


David C. Randles, Member

Board Member Ida Klaus did not participate in the discussion
and decision of this case.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Board of Education of the City School District of the City of New York employed in the following categories: teachers in the regular day school instructional program; all those employed as per session teachers; all those assigned as teachers at WNYE; all primary and non-primary adult education employees and teachers assigned to headquarters or district offices (except supervisors and occasional per diem substitutes) that:

- 1) The United Federation of Teachers (UFT), its officers, agents and affiliates will represent nonmembers at rating review proceedings, commonly known as 105A hearings, pursuant to section 5.3.4 of the Bylaws of the Board of Education of the City School District of the City of New York and will provide such representation at any pending or future such proceeding on the same basis as representation is provided to members of UFT.
- 2) The UFT will not interfere with, restrain or coerce any public employee in the exercise of rights under the Act.

..... United Federation of Teachers

Dated.....

By.....
(Representative) (Title)

6775

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2B-3/17/81

LEVITTOWN UNION FREE SCHOOL DISTRICT,

BOARD DECISION

Respondent,

AND ORDER

-and-

CASE NO. U-4616

ASSOCIATION OF LEVITTOWN SCHOOL
ADMINISTRATORS, COUNCIL OF ADMINIS-
TRATORS & SUPERVISORS, LOCAL 12,
AFSA, AFL-CIO,

Charging Party.

COOPER, ENGLANDER & SAPIR (ROBERT E. SAPIR, ESQ.
and DAVID M. COHEN, ESQ., of Counsel), for
Respondent

JOHN T. MURRAY, ESQ., for Charging Party

This matter comes to us on the exceptions of the Levittown Union Free School District (District) to a hearing officer's decision that it violated its duty to negotiate in good faith with the Association of Levittown School Administrators, Council of Administrators & Supervisors, Local 12, AFSA, AFL-CIO (Association). The hearing officer determined that the District violated its duty to negotiate in good faith by unilaterally eliminating a program which permitted unit employees who retire to be paid for up to 180 days of accumulated sick leave¹.

The record shows that the District and the Association had been parties to a collectively negotiated agreement which expired on June 30, 1979. The expired agreement provided, inter alia, for the payment of up to 180 days of accumulated sick leave to unit employees who retire and who apply for such payment "no later than February 1 of the last year of active service". To be eligible

¹ Other provisions not here applicable apply to those who resign or die.

for this sick leave/termination pay benefit, a unit employee must have had at least 20 years of credited service, 15 years of which were in the District. The contract set a maximum annual obligation for the District and provided that if there were too many applications, the money would be distributed on the basis of seniority.

In January 1980, eight unit employees indicated their intention to retire during 1980, contingent upon their receiving the sick leave/termination pay benefit. On February 27, 1980, the District wrote to one of the applicants: "Please be advised that these benefits are no longer available and have not been available since June 30, 1979." The charge herein was filed on March 21, 1980 and, on April 1 and 2, 1980, the District wrote to the Association and to the applicants indicating that it had received no letters of retirement and that it would not consider the eligibility of any of the applicants for the sick leave/termination pay benefit until an unqualified retirement application was received.

On these facts, the hearing officer determined that the District violated its duty to negotiate in good faith and the District has filed exceptions to that determination.² It makes

² The Association objects to our consideration of the exceptions on the ground that they were not served upon it. Respondent served a copy of its exceptions upon J. W. Trauernicht, who was the original representative of the Association. The Association asserts that the District knew or should have known that Trauernicht had been superseded as its representative. The record does not support this assertion. Neither does it show any prejudice by reason of the service upon Trauernicht. Accordingly, we deny the Association's objection to our consideration of the exceptions.

three arguments in support of its exceptions:

1. The charge was premature. The District could not be held to have repudiated the alleged obligation because the time for the performance of that obligation was not yet ripe, there being no unqualified resignations.
2. The duty to provide sick leave/termination pay did not survive the expiration of the contract. It is comparable to salary increments which, according to Rockland County BOCES, 41 NY2d 753, 10 PERB ¶7010 (1977), need not be provided after the expiration of a contract.
3. If distinguishable from increments, the District's conduct was authorized by Wappinger, 5 PERB ¶3074 (1972), because there was a compelling reason for the District to act unilaterally at the time it did and it had negotiated the matter in good faith to impasse before making the change.

These three arguments were all presented to the hearing officer and rejected by her. We affirm the decision of the hearing officer.

The charge was not premature. The District's letter of February 27 constituted an unequivocal repudiation of its obligation under the expired contract and a unilateral change in terms and conditions of employment. That repudiation is a sufficient basis for the charge. The subsequent letters of April 1 and 2, 1980, which followed the filing of the charge, are self-serving statements having no effect on the implication of the earlier letter of repudiation.

The sick leave/termination pay benefit is not comparable to increments. The concern of the Court of Appeals in Rockland County was that the payment of increments alters rather than maintains the status quo. It saw increments as being an increase over

6778

the benefits that the prior agreement required to be paid. The sick leave/termination pay benefits required by the contract clause in question were not increased after the expiration of the contract. The identical benefits were payable during the life of the expired contract.

The Wappinger conditions were not satisfied. As its letter states, the employer made the unilateral change on June 30, 1979, although it did not announce the change until February 27, 1980. Neither did it, at any time, notify the Association of its intention to make the change. The record does not establish a compelling need for the change at the time it was made. Certainly there is no indication that the parties had exhausted all available opportunities at that time to resolve the dispute through negotiations, and were at a genuine deadlock,³ or that the District was prepared to continue negotiating the matter after making the change. Any efforts it may subsequently have made to negotiate did not cure the earlier violation.⁴

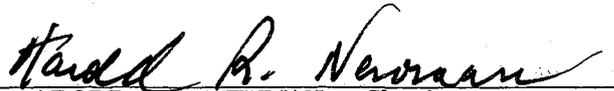
³ See Troy City School District, 11 PERB ¶3056 (1978).

⁴ This would be so even if the change were deemed to have been made on February 27, 1980, and not on June 30, 1979. As of the date of the close of the record herein, no agreement was reached to succeed the one that had expired on June 30, 1979, and the dispute was before a factfinder. Among the issues in dispute was whether the sick leave/termination pay provision should be continued.

NOW, THEREFORE, WE ORDER the Levittown Union Free School District to:

1. Cease and desist from making unilateral changes in terms and conditions of employment of the employees in the negotiating unit represented by the Association of Levittown School Administrators.
2. Process the applications for retirement and sick leave/termination pay of the eight unit employees submitted in January 1980 in accordance with the provisions of the contract that expired on June 30, 1979.
3. Negotiate in good faith with the Association of Levittown School Administrators.
4. Post a notice in the form attached at all locations ordinarily used for communications directed to the administrative staff.

DATED, Albany, New York
March 17, 1981


HAROLD R. NEWMAN, Chairman


IDA KLAUS, Member


DAVID C. RANGLES, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify our employees that: the Levittown Union Free School District

1. Will not make unilateral changes in terms and conditions of employment of the employees in the negotiating unit represented by the Association of Levittown School Administrators as embodied in the expired agreement between the District and the Association.
2. Will process the applications for retirement and sick leave/termination pay of the eight unit employees submitted January 1980 in accordance with the provisions of the contract that expired on June 30, 1979.
3. Will negotiate in good faith with the Association of Levittown School Administrators.

Levittown Union Free School District

.....
Employer

Dated

By
(Representative) (Title)

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.

6781

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2C-3/17/81
ISLAND TREES PUBLIC SCHOOLS,	:	
Respondent,	:	<u>BOARD DECISION AND</u>
-and-	:	<u>ORDER</u>
NASSAU CHAPTER OF THE CIVIL SERVICE	:	<u>CASE NO. U-4642</u>
EMPLOYEES ASSOCIATION, INC.,	:	
Charging Party.	:	

LIPP & RUBIN, P.C., for Respondent

ROEMER & FEATHERSTONHAUGH (MARJORIE KAROWE,
ESQ., of Counsel), for Charging Party

This matter comes to us on the exceptions of the Nassau Chapter of the Civil Service Employees Association, Inc. (CSEA) to a hearing officer's decision dismissing its charge that Island Trees Public Schools (respondent) discharged Scott Hyland in violation of the Taylor Law.

Hyland, who was employed by respondent as a maintenance helper, was first vice-president of the local unit of CSEA. On February 6, 1980, he and the other non-instructional personnel were informed by memorandum of the respondent that they were expected to work on February 12, Lincoln's Birthday. Hyland protested because he viewed the collectively negotiated contract as providing a holiday on Lincoln's Birthday. The contract language itself was not entirely clear on the subject. On

January 21, however, the CSEA unit president and respondent's assistant superintendent had reached agreement that custodial staff would work on Lincoln's Birthday - a day on which school was in session - and would receive compensatory time off. Pursuant to that understanding, the respondent issued the memorandum of February 6. Hyland, however, did not report for work on Lincoln's Birthday. All but one of the other unit employees reported for work and the other absence was not related to the issue herein.

The following day, while Hyland was at work, the superintendent asked about his absence the previous day. Hyland acknowledged that he had been absent and he said that there would also be future occasions when he would be absent. Moreover, he indicated that on such future occasions he would persuade other employees to stay out with him. Respondent's superintendent discharged Hyland because of his deliberate absence and his threat that he would absent himself in the future and take other employees out with him.¹

The hearing officer determined that Hyland's conduct was not protected by the Taylor Law and he dismissed the charge. In support of its exceptions, CSEA argues that the hearing officer did not give sufficient attention to the fact that Hyland believed, albeit mistakenly, that Lincoln's Birthday was a

¹ The hearing officer concluded that Hyland's absence on Lincoln's Birthday was the sole reason for the discharge. The record, however, does not support his finding that Hyland's threat of future absences by him and others played no role in the discharge.

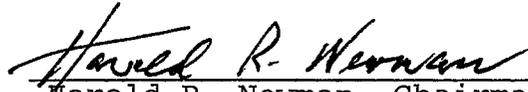
contractual holiday. It also argues that Hyland's threat to absent himself in the future and to take other employees with him was perceived by him to be contractually sanctioned and, therefore, was concerted action protected by the Taylor Law.

CSEA's arguments are rejected. Hyland had been directed to work on Lincoln's Birthday by respondent and he knew of this direction. His mistaken belief that the direction was in violation of the collective agreement between respondent and CSEA did not protect his absence as a proper exercise of his statutory rights. Even if he were correct in his belief, he would have been wrong in absenting himself. The "appropriate recourse for the employees [improperly required to work on vacation days] is to perform the work assignment while seeking redress through available legal channels." Farmingdale UFSD, 11 PERB ¶3055.

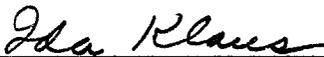
Hyland's threat to absent himself from work in the future and to take other employees with him was also unprotected by the Taylor Law. "The concerted refusal of public employees to perform work assigned to them is a strike within the meaning of Section 201.9 of the Taylor Law, even if the work assignment itself was improper." Farmingdale, supra. It follows a fortiori that it would be a strike for employees to refuse in concert to perform work because they mistakenly believe that the work assignment is improper. It would similarly violate the law to instigate or encourage such action. Hyland's statement constituted a threat to instigate and encourage a strike.

NOW, THEREFORE, WE DETERMINE that the Island Trees Public Schools did not violate any protected right of Scott Hyland when it discharged him, and we order that the charge herein be, and it hereby is, dismissed.

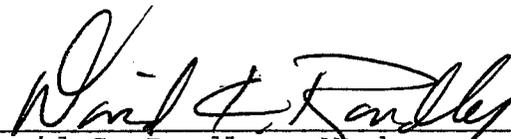
DATED: Albany, New York
March 17, 1981



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2D-3/17/81
HAMPTON BAYS TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,	:	<u>BOARD DECISION AND ORDER</u>
Respondent,	:	<u>CASES NOS. U-4372 and</u>
-and-	:	<u>U-4554</u>
FRANCIS L. SULLIVAN, I. JOHN MAGINSKY and VINCENT DOTY,	:	
Charging Parties.	:	

JAMES R. SANDNER, ESQ. (NANCY E. HOFFMAN, ESQ.,
of Counsel), for Respondent

THOMAS A. FARR, ESQ., for Charging Parties

On November 23, 1979, Francis L. Sullivan, I. John Maginsky and Vincent Doty (charging parties) filed an improper practice charge (U-4372) against the Hampton Bays Teachers Association, NYSUT, AFT, AFL-CIO (Association). The charging parties are non-members of the Association paying agency fees pursuant to §208.3(b) of the Act. The charge alleges that the Association did not provide information to the charging parties regarding agency fee refund determinations for 1978-79. Section 208.3(b) of the Taylor Law permits agency shop fee deductions on behalf of an employee organization provided that it

"...has established and maintained a procedure providing for the refund to any employee demanding the return any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

On February 21, 1980, the charging parties filed a second charge against the Association. This charge (U-4554) alleges that the Association's agency fee refund determination for 1978-79 was incorrect. The scope of this charge was enlarged by an amendment filed on April 4, 1980, alleging that the refund determinations made by and for the Association's affiliates, NYSUT and AFT, were also wrong.

After a hearing was held, the hearing officer issued his decision on August 25, 1980, sustaining both charges. He determined that the Association committed an improper practice in that it did not supply sufficient information regarding its agency shop fee refund determinations. He also determined that the Association committed an improper practice in violation of CSL §209-a.2(a) by refunding an incorrect amount to the charging parties in that it used the wrong test in determining the amount of the refund of the Association's share and the Association made no independent judgment with respect to the amount of the refund from that portion of the agency shop fees transmitted to NYSUT and AFT. The hearing officer rejected the Association's defense to each charge that the charging parties failed to exhaust the steps in the Association's refund procedure. He also rejected a separate defense to the second charge that, to the extent the charge questions the Association's refund calculation, it is untimely because it was filed more than four months after the Association's refund determination.

The hearing officer proposed a remedy as to both of the violations found. The remedy proposed with regard to the first charge is to direct the Association to provide appropriate finan-

cial information at the time of the refund determination. As to the second charge, the hearing officer proposed that the Association be directed to recalculate the refund with regard to monies retained by the Association and to pay any extra amount due with interest at the rate of six percent per annum and that with respect to the money transmitted to the affiliates, the Association be directed to refund the full amount of such money with interest at the rate of six percent per annum.

The Association and the charging parties have filed exceptions to the hearing officer's report and recommendations. In its exceptions, the Association argues:

1. PERB lacks jurisdiction as to the nature of the agency shop fee refund procedure, and, most particularly, PERB is not authorized to determine the correctness of the amount of the refund.

2. The charges herein are premature because the charging parties did not exhaust the Association's refund procedure.

3. The Association used the proper statutory standard for calculating the amount of the refund. The hearing officer's interpretation of the statute is not correct, and PERB may not interpret a statute contrary to its plain meaning in order to preserve its constitutionality.

4. The Association made appropriate inquiries with respect to the expenditures of its affiliates for political and ideological purposes and met its burden of proving the appropriateness and correctness of the total amount of the refund.

5. The remedies proposed by the hearing officer are beyond the authority of PERB.

In their exceptions the charging parties, in part, support the hearing officer's conclusions, but they also argue:

1. An improper practice charge may be filed immediately upon the payment of an inadequate refund, since internal union procedures cannot be binding upon nonmembers.

2. In any event, the employee organization's internal refund procedures are inadequate and PERB should find that the charging parties did, nevertheless, sufficiently comply with them.

3. The proposed remedy of the hearing officer is inadequate in that a complete refund of agency fee payments should now be ordered by PERB.

DISCUSSION

We consider first the jurisdictional issues raised by the Association. Neither charge challenges the Association's written refund procedure, as such, and we do not pass upon its adequacy under the statute. Nevertheless, we observe that much of the argument regarding the timing of the filing of the charges and the alleged failure to exhaust the organization's internal refund procedure arises from the imprecise terms used in the refund procedure adopted by the Association.

The Association's written refund procedure provides merely for an "appeal" to the President, and then to the Executive Board. As written, the language of the procedure appears to confuse the process of initial determination by the Association of the amount of the refund with recourse by the objector to an appeal from such determination. It refers to the request for a refund as "an appeal

re Agency Fee". The written procedure requires the President of the Association to notify the "Appellant" as to his "decision" within ten days. No refund would have been made at that point. The President's decision, in that short, ten-day period after the initial request for refund is submitted, would be the initial decision as to what the amount of the refund would be.

In this case, the President's decision was less than that. The evidence indicates that the President, when presented with the objectors' initial request for refund, made no determination of the amount of the refund. Instead, as stated in his letter of September 13, 1979, he referred the request to the Executive Board for decision. Nevertheless, the objectors interpreted his letter as a "decision" which served as the basis for their "appealing" to the Executive Board. Notwithstanding an "appeal" by the charging parties to the Executive Board on September 19, 1979, no decision was ever rendered by the Executive Board.

It appears obvious that the Association did not understand the nature of the procedures it had adopted and consequently treated the appellate procedure as the process for making the initial refund determination. In actuality, it cannot be said that there was any appeal procedure, as such, which the charging parties could have utilized. They pursued whatever recourse was reasonably available to them, and the Association's President did not indicate to them any other course.

Under these circumstances, we need not pass upon the validity of the Association's contention that this Board should not entertain a charge until the organization's internal review procedures have been exhausted. We conclude that the Association's conten-

tion that the charging parties failed to exhaust the internal employee organization refund procedure before filing their charges is simply not applicable to the facts here presented and it must be rejected. The Association's defense with regard to the timeliness of the second charge must also be rejected because the time when the refund determination was finally made cannot be ascertained.

Charge U-4372

We find, as the hearing officer did, that there is merit to the first charge. No financial information was furnished to the charging parties until after a prehearing conference held by this Board on January 10, 1980. At that time, the Association gave each charging party a one-page auditor's statement of the Association's receipts and disbursements for the year ending June 30, 1979. No information whatever has been provided to the charging parties as to how much of the refund represents monies forwarded to the Association's state and national affiliates.

In UUP and Barry, 13 PERB ¶3090, we concluded that an objector should not be required to pursue the organization's appellate process without prior financial information furnished by the employee organization regarding the basis for its initial determination of the amount of the refund. We held that a refusal or failure to provide financial information at the time of the refund would so frustrate the nonmember's efforts to obtain an appropriate review under the employee organization's appellate procedures as to discourage an appeal and permit the employee organization to retain monies otherwise refundable to him, thereby coercing him into relinquishing his right to refrain from participating in the organization.

In this case, we are confronted with a refund procedure which, in reality, contains no appellate recourse. As applied by the Association, the procedure consists simply of a determination of the amount of refund by the President and Executive Board acting together.¹ We conclude, nevertheless, that the Association is required to furnish financial information to objectors at the time of the refund determination so as to permit them to evaluate the basis of the refund and, if necessary, to pursue whatever recourse may be appropriate to review its propriety. The objector has no basis for judging whether further amounts are due him unless the employee organization makes available adequate financial information. Such a release of information should also tend to discourage frivolous appeals and encourage expeditious conclusion of the refund procedure. The obligation to provide such information, therefore, must be considered a necessary part of any refund procedure, including that involved here.

We conclude that the Association's failure or refusal to provide adequate financial information as to the basis of the refund at the time the refund was made constitutes a failure to maintain a proper refund procedure under §208.3(b) of the Act and consequently violates the employees' rights under §§202 and 209-a.2(a) of the Act.

The information furnished by the Association at the time of the prehearing conference was inadequate, as well as late. We

¹ Since the charges before us do not challenge the provisions of the Association's refund procedure, it is not necessary for us to determine whether those provisions comply with the requirements of §208.3(b) of the Act.

have previously endeavored in the Barry case to specify the minimum information which we believe an objector has a right to receive at the time of the refund. We stated that sufficiently detailed information should be provided,

"so that the employees may understand the basis on which their refund has been calculated and thus be able to determine whether an appeal is warranted and likely to succeed."

While this does not mean that the employee organization must support its determination of the amount of the refund at that time in the same detail as it will have to when the amount of the refund is litigated, it does mean that the employee organization should identify those disbursements which it has determined to be refundable and those which it has determined not to be.

In the light of the U.S. Supreme Court decisions relating to the rights of objectors, a public sector employee organization, if it wishes to enjoy the benefits of any agency shop statute, is required to establish an internal accounting system that will readily identify the refundable disbursements. We do not prescribe in detail the system of accounts necessary to provide adequate information under this agency shop provision. We determine, however, that the Association must, at the time of making any future refunds of any portion of agency fee payments, furnish to all individuals who apply for and receive refunds, an itemized audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of its revenues from agency fees. This statement should indicate the basis of the Association's determination of the amount of the refund, including identification of those disbursements of the Association and its

affiliates that are refundable and those that are not.²

Charge U-4554

This case presents a question not previously considered by this Board. Do we have jurisdiction to consider a charge that alleges only that the amount of an agency shop fee refund is incorrect? The hearing officer answered this question in the affirmative. We disagree.

Heretofore, we have asserted jurisdiction over charges alleging that prescribed agency shop fee refund structural procedures have been inadequate to satisfy the requirements of §208.3(b) that an employee organization "establish and maintain" a refund procedure as a condition for receiving agency shop fees. In UUP and Eson, 11 PERB ¶3068 (1978), we ruled that a refund procedure was inadequate, on its face, because its appellate mechanism imposed an unreasonable cost upon an agency shop fee payer who might choose to invoke it. We also found it inadequate because

² We note that this is not in any event an onerous task for many employee organizations. Many public sector unions are now required by this State's Labor Law §727 to maintain detailed accounting records describing their receipts and disbursements which must be made available to members. Much of this information must be furnished to members on a form prescribed by the Industrial Commissioner. 12 NYCRR §550-2.1 and Appendix E. The supporting records must be maintained by public sector unions and be made available for examination by members. 12 NYCRR §550-3.1. An employee organization enjoying the benefits of agency shop would appear to satisfy its obligation to furnish information to agency shop fee payers if, with one addition, it makes available to them the same information that an employee organization covered by Labor Law §727 is required to make available to members. The addition would be to specify the extent to which each of the disbursements (Items 116 through 134 on Appendix E) is refundable.

it did not apply to funds transmitted by the employee organization to its state and national affiliates. Subsequently, in the same case, we ruled that the implementation of the refund procedure was faulty because the appellate steps were being processed too slowly. 12 PERB ¶3093 (1979), confirmed UUP v. Newman, 77 AD2d 709 (Third Dept., 1980), 13 PERB ¶7010, mot. for lv. to appeal den., 51 NY2d 707 (1980), 13 PERB ¶7016.

We have also asserted jurisdiction to determine if an agency shop fee refund procedure was properly maintained, as required by the statute. This issue was raised by the charge that the employee organization did not provide the agency shop fee payer with sufficient information to make an intelligent choice whether or not to invoke the appellate steps. We did so in UUP and Barry, supra, and in companion Case U-4372, herein before us.

We are now asked to go beyond the structural provisions of the refund mechanism and examine into the accuracy of its substantive final product. To determine whether this Board has the authority to make such inquiry, we must look at the express language of the agency shop fee provision and its relation to the basic rights granted to the employees by the statute. Section 208.3(b) provides that in order to be eligible for agency shop fee payments an employee organization must have "established and maintained" a refund procedure. We understand this language as referring to a process. The absence of such a process disqualifies an employee organization from receiving agency shop fee payments, and an employee organization which collects agency shop fee payments without such a process commits an improper practice subject to the jurisdiction of this Board. The requirement that the amount of the refund be correct is not stated in the Taylor

6795

Law but it is, of course, understood. The implication of this omission from the explicit provisions of the Taylor Law is that the improper practice jurisdiction of this Board may not be invoked to resolve disputes concerning the precise amount of the refund and a party aggrieved must look elsewhere for relief. We understand this to be the intent of the Legislature.

There is logic to the distinction made by the Legislature between the structure of the refund process which is subject to PERB's jurisdiction and the precise amount of a refund which is not. The latter involves a question of civil liability of the type that is traditionally resolved by courts in civil litigation while the former involves the area of organizational conduct that is traditionally committed to the jurisdiction of labor relations agencies. The right to a refund in a particular amount is analogous to the right to a particular benefit promised by a collectively negotiated agreement. The Legislature has distinguished between the duty to negotiate in good faith, which is a process, and the obligation to comply with the terms of an agreement, which involves substantive rights. Failure to participate in the process is an improper practice that is subject to the jurisdiction of this Board, but, to prevent this Board from going further than inquiring into the process, in L.1977, c.429, the Legislature provided that this Board:

"shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper . . . practice."

We accordingly conclude that a substantive determination as to the correctness of the amount of the refund produced by the application of the procedure is beyond the statutory power and special

competence of this Board.

REMEDY

In UUP and Barry, supra, we found no purpose in requiring the employee organization to furnish the charging party with detailed information stating which of its past disbursements were refundable because he had already appealed from the employee organization's determination of the amount of the refund. Accordingly, we found it sufficient, in that case, to order the employee organization to provide such detailed information when, in the future, it makes agency shop fee refunds. In the instant case, we have determined that the Association has not provided any internal appellate procedure concerning the amount of the refund. The sole appellate procedure is, therefore, a plenary action in court and that appeal has not yet been initiated. Thus, information identifying those disbursements which it and its affiliates deemed not to be refundable might still serve a useful purpose by enabling the charging parties to make informed judgments whether or not to sue.

NOW, THEREFORE, in Case U-4372,

WE DETERMINE that Hampton Bays Teachers Association,
NYSUT, AFT, AFL-CIO has violated
§209-a.2(a) of the Taylor Law, and

WE ORDER Hampton Bays Teachers Association, NYSUT,
AFT, AFL-CIO:

1. Within 60 days of the date of this decision, to furnish all individuals who applied for and received agency shop fee

6797

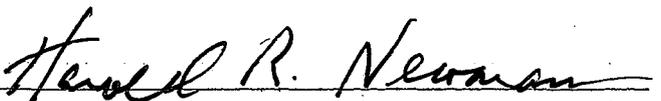
refunds for 1978-79, an itemized audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of its revenues from agency fees.

2. At the time of making any future refunds, to furnish, together with those refunds, such explanations and information in the detail described herein.

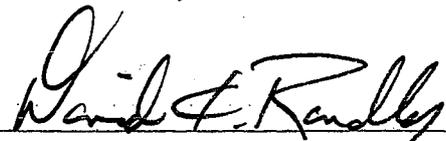
3. To post a notice in the form attached, at each facility at which any unit personnel are employed, on bulletin boards to which it has access by contract, practice or otherwise.

WE FURTHER ORDER, in Case U-4554, that the charge be, and it hereby is, dismissed.

DATED: Albany, New York
March 17, 1981


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify our employees that:

1. We will furnish all individuals who applied for agency shop fee refunds for 1978-79, an itemized audited statement of our receipts and disbursements, and those of any of our affiliates receiving any portion of its revenues from agency fees.
2. We will furnish, together with refunds, an itemized audited statement of our receipts and disbursements, and those of any of our affiliates receiving any portion of its revenues from agency fees.

Hampton Bays Teachers Assn., NYSUT, AFT,
 Employee Organization AFL-CIO

Dated.....

By.....
 (Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2E-3/17/81
HUDSON FALLS PERMANENT FIREFIGHTERS, LOCAL 2730,	:	<u>BOARD DECISION AND ORDER</u>
Respondent,	:	<u>CASE NO. U-4905</u>
-and-	:	
VILLAGE OF HUDSON FALLS,	:	
Charging Party.	:	

HOWARD CORNELL, for Respondent

CAFFRY, PONTIFF, STEWART, RHODES & JUDGE (J. LAWRENCE
PALTROWITZ, ESQ., of Counsel), for Charging Party

This matter comes to us on the exceptions of both the Village of Hudson Falls (Village) and the Hudson Falls Permanent Firefighters, Local 2730 (Local 2730) to different parts of a hearing officer's decision determining that some demands made by Local 2730 in negotiations with the Village were mandatory subjects of negotiation and others were not. The charge, which was brought by the Village, alleges that Local 2730 violated its duty to negotiate in good faith by submitting to compulsory binding arbitration six demands which do not constitute mandatory subjects of negotiation. The hearing officer found merit in the charge with respect to four of the demands and dismissed the charge with respect to two. In its exceptions, Local 2730 asserts that the hearing officer erred in that each of the four demands found by her to be nonmandatory are, in fact, mandatory subjects of negotiation. In its exceptions, the Village argues that one of the two demands found by the hearing officer to be a mandatory subject¹ of negotiation is, in fact a nonmandatory subject of negotiation.

¹ Neither party refers to the sixth demand in its exceptions and we do not address it herein.

6800

The first of the demands found by the hearing officer to be nonmandatory is for hospitalization benefits which would be provided to retired employees, including those who have retired and those yet to retire. The hearing officer ruled that the demand, insofar as it would apply to former employees who have already retired, is not a mandatory subject of negotiation because those former employees are not in the negotiating unit represented by Local 2730.² In support of its exceptions, Local 2730 argues that the demand is a mandatory subject of negotiation because it involves a benefit which is already available to past as well as to present Village employees.

We affirm the decision of the hearing officer. We conclude that the total demand is for a nonmandatory subject of negotiation because it is presented as a unitary demand (Haverstraw, 11 PERB ¶3109 [1978]), an inseparable part of which deals with the non-mandatory area of former employees. The fact that benefits which do not constitute a mandatory subject of negotiation are being provided does not create a duty to negotiate a demand that these benefits continue to be provided.

The second demand found by the hearing officer to be non-mandatory is that there shall be "at least five (5) full-time paid firefighters in the Hudson Falls Fire Department". The hearing officer ruled that a demand for a minimum manpower standard is not a mandatory subject of negotiation. Local 2730

² The hearing officer apparently concluded that the demand for hospitalization for retirees would be nonmandatory as applied to current employees who have not yet retired because it would constitute a prohibited payment to retirees. This conclusion is incorrect. It was based upon Lynbrook v. PERB, 64 AD2d 902 (Third Dept., 1978), 11 PERB ¶7012, which was reversed by the Court of Appeals at 48 NY2d 398 (1979), 12 PERB ¶7021.

excepts to this ruling and argues that this is a mandatory subject of negotiation because the present contract between the parties provides for a minimum complement of five full-time paid firefighters. The existence of such a provision in the current agreement does not make it a mandatory subject of negotiation. Board of Education, N.Y.C., 5 PERB ¶3054 (1972).

The third demand found by the hearing officer to be non-mandatory would require the Village to appoint a qualified unit employee whenever it is necessary to fill a vacancy in a newly created position. The hearing officer ruled that this is not a mandatory subject of negotiation because the demand is not limited to the filling of vacancies in positions that are, themselves, within the negotiating unit. We affirm this ruling. In its argument in support of its exceptions, Local 2730 indicates that an element of the demand is that vacant positions "be filled as soon as feasible". With this clarification of Local 2730's intent, there is a second reason why the demand is not a mandatory subject of negotiation. It would require the Village to fill vacancies whether or not the Village deemed it necessary to do so. It would thus impose an obligation to maintain a minimum manpower complement.

The last demand found by the hearing officer to be non-mandatory provides that,

"An off-duty fireman, if available, will report to duty when the fire alarm and/or alert system is activated and will remain on duty until he is relieved by the paid fire chief of the department."

The hearing officer determined that this demand would interfere with the management prerogative of the Village to determine

whether or not to call in off-duty personnel. In support of its exceptions, Local 2730 argues that the Village has already determined that off-duty firefighters who are available shall answer a fire alarm. While not articulated by Local 2730, the implication of its argument is that this demand merely would impose a minimum call-in provision. Even so, it is not a mandatory subject of negotiation. By its terms, the demand would prevent the Village from deciding that it no longer wishes off-duty firefighters to answer fire alarms.³

The Village takes exception to the determination of the hearing officer that Local 2730 committed no wrong by insisting that a recognition clause contained in the past contract be included in the successor contract. That recognition clause includes the paid fire chief of the Village within the negotiating unit. The parties agree that the fire chief has been in the negotiating unit. The Village, however, does not now wish the fire chief to be continued in the unit and it asserts that the status of the fire chief should be resolved in a representation proceeding.

The issue posed by this demand is not a typical scope of negotiation matter. In the absence of certification by this Board, the employer may voluntarily grant recognition by an express clause of a collectively negotiated agreement describing

³ Nothing herein precludes the negotiation of a demand for call-in compensation so long as an obligation to call in off-duty firefighters is not contractually imposed upon the Village.

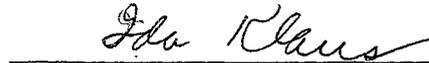
the negotiating unit covered by the contract. Where the parties are subsequently in disagreement as to whether the described unit agreed upon should be continued, they may, at appropriate times, bring the dispute to this Board to be resolved by certification. A public employer may unilaterally withdraw its recognition of an employee organization where it has serious doubt as to the scope of the unit, provided that it does so by notice to the employee organization during the period when a representation petition may be filed, thereby affording the employee organization an opportunity for recourse to this Board.⁴ Here, the record does not show any action by the Village at that appropriate time. Rather, it waited until the commencement of negotiations with Local 2730 in the existing unit established by recognition and covered by prior collectively negotiated agreements, and then sought to change the unit. This it cannot do. As the Village did not provide timely notification to Local 2730 that it no longer deems the existing unit to be appropriate, it may not now impede the negotiating process by insistence upon that position. Thus it is required to negotiate with Local 2730 in good faith as to the terms and conditions of employment of all the employees in that unit and it may not object to the inclusion of a definition of that unit in the contract.

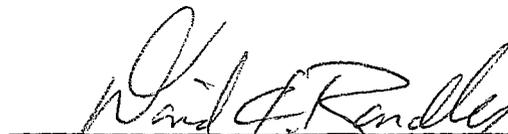
⁴ See Southern Cayuga Central School District, 9 PERB ¶3056 (1976), aff'd Skaneateles Teachers Assoc. v. PERB, 88 Misc.2d 816 (Onondaga County, 1976), 9 PERB ¶7024, and Southern Cayuga Teachers Association v. PERB, not officially reported (Montgomery County, 1977), 10 PERB ¶7008, aff'd (4th Dept., 1977), 59 AD2d 1032.

NOW, THEREFORE, WE ORDER that all the exceptions herein of both the Hudson Falls Permanent Firefighters, Local 2730 and the Village of Hudson Falls be, and they hereby are, dismissed.

DATED: Albany, New York
March 17, 1981


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
TOWN OF SMITHTOWN,	:	#3A-3/17/81
Employer,	:	
- and -	:	
LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES,	:	Case No. C-2103
UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMAN'S	:	
ASSOCIATION, AFL-CIO,	:	
Petitioner,	:	
- and -	:	
CIVIL SERVICE EMPLOYEES ASSOCIATION,	:	
LOCAL 1000, 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 Local 342, Long Island Public Service Employees, United Marine Division, International Longshoreman's Association, AFL-CIO.

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

Unit: Included: Clerk of the Works, Sr. Civil Engineer, Chief Building Inspector, Director of Planning, Traffic Engineer III, Deputy Town Clerks, Assessor, Asst. to Assessor/Deputy Assessor, Deputy Receiver of Taxes, Sr. Dog Warden, Town Engineer, Sanitation Supervisor, Town Parks Supervisor, Supt. of Recreation II, Ordinance Inspector (Town Investigator), Sr. Planner, Asst. Director of Planning, Asst. Town Engineer, Highway Engineer, Sr. Citizens Program Supvr., Drug & Alcohol Program Coordinator.

Excluded: Data Processing Supervisor, Assistant Town Attorneys.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 342, Long Island Public Service Employees, United Marine Division, International Longshoreman's Association, AFL-CIO 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 16th day of March, 1981
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member