

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2A-8/9/83

NIAGARA COUNTY LEGISLATURE and
COUNTY OF NIAGARA,

Respondent,

-and-

CASE NO. U-6235

NIAGARA COUNTY WHITE COLLAR EMPLOYEES
UNIT, LOCAL 832, CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC.,

Charging Party.

NEGOTIATION CONSULTANTS AND CO. (EARL C. KNIGHT,
of Counsel), for Respondent

ROEMER AND FEATHERSTONHAUGH, ESQS. (STEPHEN J.
WILEY, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

The charge herein was brought by the Niagara County White Collar Employees Unit, Local 832, Civil Service Employees Association, Inc. (CSEA). It alleges that it had an agreement with the County of Niagara which expired on December 31, 1981. It further alleges that no successor agreement had been negotiated as of July 29, 1982, the day on which the newly enacted §209-a.1(e) of the Taylor Law became effective. The statute then provided that "[i]t shall be an improper practice for a public employer or its agents deliberately . . . to refuse to continue all the terms of an expired agreement until a new agreement is

negotiated."^{1/} The charge alleges that thereafter, on August 3, 1982, the County Legislature issued a legislative determination prescribing terms and conditions of employment for unit employees for the period between January 1, 1982, through December 31, 1982, which altered some of the terms of the agreement that had expired on December 31, 1981.^{2/} CSEA contends that the legislative determination constituted a violation of §209-a.1(e) of the Taylor Law.

The hearing officer dismissed the charge on the ground that the action of the County Legislature was not proscribed by §209-a.1(e) of the Taylor Law. He gave two reasons for this action. One was that the conduct of the County Legislature was specifically authorized by §209.3(e) of the Taylor Law which permits the legislative body of the public employer involved in a negotiation dispute to resolve a deadlock by taking "such action as it deems to be in the public interest, including the interest of the public employees involved." The second was that the County

^{1/}The statute was amended after the charge was filed and the hearing officer's decision was issued. The language of that amendment and its implications are discussed later.

^{2/}Among other things, the legislative determination revised the recognition clause, added provisions to the management rights clause, deleted an agency shop fee and altered provisions relating to wages, hours, health insurance and personal leave.

Legislature was performing a function that was exclusively legislative when it resolved the negotiation deadlock and that this Board cannot review such actions. The matter now comes to us on the exceptions of CSEA.

The parties are in agreement that the question before us is "whether, in the course of resolving an impasse under Civil Service Law §209.3(e), the legislative body of a public employer is precluded, by virtue of Chapter 868 of the Laws of 1982 [§209-a.1(e)] from imposing a settlement which changes the terms of an expired collectively negotiated agreement."

Answering in the negative, the County argues that §209-a.1(e) takes its place along side the preexisting §209.3(e) and does not replace it. According to the County, the two provisions should be read in concert as providing that a public employer cannot refuse to abide by the terms of an expired agreement until that agreement is replaced either by a new agreement or by a substitute for a new agreement that is imposed pursuant to other provisions of the Taylor Law.^{3/} CSEA argues, however, that a proper

^{3/}In addition to permitting the imposition of terms and conditions of employment by a legislative determination where the public employer is a government other than an educational institution (§209.3(f)), the Taylor Law also permits their imposition by an arbitration panel where the public employees are policemen or firefighters who work for certain departments of local government.

reading of the two provisions of the Taylor Law in concert limits a legislative body acting pursuant to §209.3(e) to dealing with matters not covered by an expired agreement.

The language of §209-a.1(e) and its legislative history persuade us that CSEA's reading is the correct one.^{4/}

Dealing with the language first, §209-a.1(e) provides that a public employer may not refuse to continue all the terms of an expired agreement until "a new agreement is negotiated". Section 201.12 of the Taylor Law defines the term "agreement" to mean "the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract" A legislative determination made pursuant to §209.3(e) clearly does not satisfy this definition.^{5/}

Reacting to this implication of the new statutory language, many of the representatives of public employers urged the Governor to veto the legislation, at least in part, because it would limit the role of legislative bodies

^{4/}Significant parts of this legislative history were not before the hearing officer. It came into existence when the new enactment was amended by Chapter 921 of the Laws of 1982, effective December 20, 1982.

^{5/}See County of Suffolk, 12 PERB ¶3014 (1979) and Fairview Fire District, 13 PERB ¶3102 (1980).

acting under §209.3(e).^{6/} Notwithstanding their complaints, the Governor signed the bill. However, he noted the concerns expressed by public employers in his approval memorandum, and he stated that he had received assurances from the Legislature that there would be a chapter amendment providing that a public employer's duty to abide by the terms of an expired agreement would extend only until a new agreement is negotiated "or negotiations are resolved pursuant to the procedures established in §209 or pursuant to §212 of this article."^{7/}

There was an extraordinary session of the State Legislature in December 1982, during the course of which a bill amending §209-a.1(e) was introduced at the request of the Governor. It would have amended the language to make it improper for a public employer

to refuse to continue all the terms of an expired agreement until a new agreement is negotiated or negotiations are resolved pursuant to the procedures established in section two hundred nine or pursuant to section two hundred twelve of this article, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this

^{6/}Relevant excerpts from their letters are found in Appendix A.

^{7/}The anticipated amendment was also intended to relieve public employers of a duty to abide by the terms of an expired agreement if the employee organization engaged in a strike. The relevant language of the Governor's approval memorandum is found in Appendix B.

article. (The underscored matter is that which the bill would have added.)

The bill was not passed in the form proposed by the Governor. Rather, the Legislature amended it to delete the words "or negotiations are resolved pursuant to the procedures established in section two hundred nine or pursuant to section two hundred twelve of this article,". The deleted language is precisely that which the Governor sought in order to permit legislative determinations to supersede expired agreements. All that survived of the amendment proposed by the Governor was the language of the bill relieving a public employer from an obligation to abide by the terms of an expired agreement if an employee organization engaged in a strike.

A colloquy on the floor of the Assembly indicates that the bill, as submitted by the Governor, was amended, not because of a sense that the law already treated legislative determinations as having the same effect as negotiated agreements, but in order to satisfy union opposition to the Governor's proposal.^{8/} The Director of the Governor's Office of Employee Relations recognized that the bill as passed did not accomplish the purposes of the Governor. Focusing on the language "such resolution of such

^{8/}The explanation of the amendment was given by Assembly Majority Leader Daniel B. Walsh, the sponsor of the July 29th bill. Page 130 of the record of proceedings of the Assembly for Wednesday, December 15, 1982, contains the relevant colloquy. It is found in Appendix C.

negotiations" (emphasis in original), he noted in a memorandum to the Counsel to the Governor on December 20, 1982 that "such resolution" must refer to the aforementioned new agreement. He therefore recommended that the bill be recalled and the word "such" be amended to read "any" or that the bill be disapproved. Notwithstanding his recommendation, the bill was approved.

The legislative history which we have recited in considerable detail, and most particularly the introduction of the Governor's proposed amendment at the extraordinary session and its rejection by the Legislature, support the conclusion that is inherent in the plain meaning of the words found in §209-a.1(e). A public employer is required to abide by the terms of an expired agreement until a new agreement is negotiated. For the purpose of the new law, a legislative determination made pursuant to §209.3(e) is not the equivalent of a negotiated agreement.^{9/}

^{9/}This reading of the new statute does not require a conclusion that it repealed §209.3(e). As acknowledged by CSEA, a legislative body is still free to impose terms and conditions of employment not dealt with in the expired agreement. It may also impose the terms and conditions of employment contained in the prior agreement for an additional year, thereby foreclosing further negotiations for that time period. (See Bethlehem CSD #6, 5 PERB ¶3010 [1972].) Further, an employee organization may consent to the issuance of a legislative determination by a legislative body or to a determination by a public arbitration panel, in which event it would waive its right to require the public employer to abide by the terms of the expired agreement. Finally, if an employee organization strikes, a public employer need not abide by an expired agreement thereafter.

Having reversed the hearing officer's determination that §209.3(e) of the Taylor Law permits the legislative body of Niagara County to issue a determination altering the terms of an expired agreement, we also reject his determination that the action of a county legislature is beyond the jurisdiction of this Board. The hearing officer based this determination upon decisions holding that the action of a legislative body cannot, by itself, constitute a violation of §209-a.1(d),^{10/} which declares it to be improper for a public employer "to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees." The basis of these decisions, however, is not that actions of a legislative body are beyond the jurisdiction of this Board,^{11/} but that legislative action cannot, by itself, constitute a violation of the duty to negotiate in good faith because no duty to negotiate is imposed upon legislative bodies.

^{10/}This principle does not apply where the public employer is structured so that its legislative and executive body are one and the same. Jefferson County Board of Supervisors, 6 PERB ¶3031 (1973), modified on other grounds, Jefferson County Board of Supervisors v. PERB, 44 AD2d 893 (4th Dept., 1974), 7 PERB ¶7009 (1974), affirmed as modified, 36 NY2d 534, 8 PERB ¶7008 (1975).

^{11/}See County of Suffolk, 15 PERB ¶3021 (1982), in which the adoption of resolutions by a county legislature were held to interfere with the rights of public employees and therefore to violate §209-a.1(a) of the Taylor Law.

8488

The decisions that the hearing officer relied upon in reaching this conclusion apply to §209-a.1(d). They are not relevant here. The Taylor Law makes a sharp distinction between the roles of the executive and legislative branches of government only with respect to §209-a.1(d) and the duty to negotiate.^{12/} No such distinction is drawn with respect to the other conduct prohibited by §209-a.1 of the Taylor Law. The prohibitions of §209-a.1(e), like those of §209-a.1(a), (b) and (c), apply to both the executive and legislative branches of a public employer.

Accordingly, we find that the legislative determination made by the legislature of the County of Niagara constitutes a violation of §209-a.1(e) of the Taylor Law in that it changed terms of an agreement that had expired.^{13/}

NOW, THEREFORE, WE ORDER the respondent to:

1. Cease and desist from refusing to continue the terms of an expired

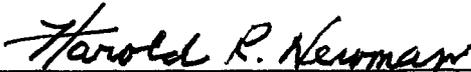
^{12/}City of Kingston, 15 PERB ¶8009 (1982), confirmed City of Kingston v. PERB, not officially reported (Sup. Ct., Albany County, 1983), 16 PERB ¶7002. See also City of Kingston v. Quick, not officially reported (Sup. Ct., Albany County, 1983), 16 PERB ¶7007.

^{13/}Although not specifically raised by the parties, the case raises the issue whether a finding of a violation constitutes retroactive application of §209-a.1(e). This issue has been considered by us in Cobleskill, 16 PERB ¶3057. In that case we concluded that the statute was not being applied retroactively if a public employer refuses to abide by the terms of an expired agreement after the statute became effective. This is so even though the agreement had expired before the statute became effective.

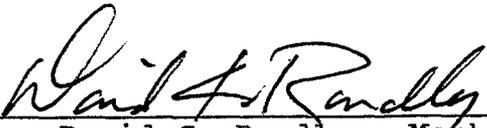
agreement until a new agreement is negotiated;

2. Rescind immediately the legislative determination of August 3, 1982 to the extent that it changes or modifies any of the terms of the agreement which expired December 31, 1981 and to restore simultaneously all terms of that agreement, making whole all unit employees and CSEA for any loss or diminution of benefits including interest on any sums owing to unit employees at the rate of 3 percent per annum from August 3, 1982 to December 31, 1982 and at the rate of 9 percent per annum thereafter; and
3. Sign and post notice in the form attached at all work locations normally used to communicate with unit employees.

DATED: August 9, 1983
Albany, New York



Harold R. Newman, Chairman



David C. Randles, Member

APPENDIX A

The Unified Court System wrote to the Counsel to the Governor on July 26, 1982:

By requiring the continuance of all terms of an agreement until a new agreement is negotiated, it would act to deprive the uniformed services of the statutory right (section 209(4) of the Taylor Law) to pursue binding interest arbitration, and local government of its right to impose a legislative determination (Section 209(3)(e)) in lieu of a contract to resolve an impasse. (emphasis in original)

The School Boards Association wrote on July 13, 1982:

[T]he bill would apparently repeal sub silencio some of the Taylor Law's carefully developed impasse resolution procedures While the bill does not speak expressly to the impasse procedure, its requirement that public employers "continue all the terms of the expired agreement until a new agreement is negotiated" (emphasis added) has the effect of prohibiting legislative determination of the terms and conditions of public employment following an impasse in negotiation.

The Conference of Mayors wrote on July 21, 1982:

The bill would require the continuation of all terms of an expired contract until a new contract were to be negotiated. Since the legislative hearing is not part of the negotiation process, any change in an expired contract would have to come prior to the legislative hearing. The effect is that the legislative body could not consider those items of an impasse which were already addressed in an expired contract. (emphasis in original)

The Business Council of New York State wrote on July 21, 1982:

[W]here mediation and fact finding steps have been exhausted, the legislative body of the state or municipality is empowered to impose the final terms of employment. This bill would require employers "to continue all the terms of the expired agreement until a new agreement is negotiated" (note distinction). (emphasis in original)

MEMORANDUM filed with Assembly Bill Number 6462, entitled:

"AN ACT to amend the civil service law, in relation to improper employer practices"

Concern has been expressed that the requirement proposed by this bill--namely, that all terms and conditions of an expired agreement, . . . continue until a new agreement is negotiated--is not realistic in the context of public sector labor negotiations. It is unclear whether the result of impasse resolution procedures would constitute a negotiated agreement

Prior to my taking action on the bill, assurances were sought and received that the Senate and the Assembly will later this year pass a chapter amendment to the bill which addresses these important concerns. The amendment to the new subdivision (e) in section 209-a(1) will result in a modification of the improper practice added by the bill, so that the improper practice will be the refusal to continue all the terms of an expired agreement until a new agreement is negotiated or negotiations are resolved pursuant to the procedures established in section two hundred nine or pursuant to section two hundred twelve of Article 14, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of such Article. (emphasis supplied)

RECORD OF PROCEEDINGS OF THE ASSEMBLY

WEDNESDAY, DECEMBER 15, 1982

MR. H. MILLER: Mr. Walsh, what is the difference between the B print and the prior print? Do you have any idea?

MR. D. WALSH: Yes, there was a provision taken out that dealt with legislative hearings and impasse.

MR. H. MILLER: Mr. Walsh, we have received a number of communications from the public employee groups. This change to 7-B, does this now satisfy their criticism of this measure?

MR. D. WALSH: They love it because all it does is just redefine current law.

DISSENTING OPINION OF BOARD MEMBER KLAUS

I do not find in legislative history or in other applicable guides to statutory interpretation the necessary support for the intent the majority has here attributed to the Legislature.

There may be sufficient basis for discerning a reasonably clear and specific purpose in the language in question to modify Board and Court improper practice law as to the subject-matter scope of an employer's duty to maintain the status quo established by an expired agreement. The history of efforts over the years to achieve such modification and the language of the amendment and its physical placement in the improper practice section of the statute can fairly be said to indicate such a purpose.

There is, however, no relevant background or statutory context from which reasonably to infer from the words of the amendment a legislative desire or purpose to modify in any way the disputes resolution authority of legislative bodies under Section 209 of the statute. That section is physically removed from the improper practice part of the statute, and it deals with a different aspect of the statutory program. Devoted to a careful delineation of various mechanisms of peaceful dispute resolution, Section 209 has stood as a cornerstone of the Taylor Law structure since the beginning, antedating the improper

practice provisions. In the sixteen years of its coexistence with the Taylor Law, Section 209 has been significantly amended in two respects: to make the legislative determination inapplicable to disputes in public education; and to provide for binding arbitration of police and fire disputes. Each amendment was achieved by the same technique: It was spelled out in carefully worded language specifically directed to the intended objective and it was physically placed in its logical position in that particular section of the statute.

By contrast, the change which the majority now reads into the disputes resolution Section 209 is not spelled out in carefully worded language specifically directed to the purpose which the majority sees in it. The words of the amendment do not speak in the language of disputes resolution, and no modifying language at all has been inserted in the disputes resolution section. The amendment is phrased only in terms of an improper practice, appears only in the improper practice section, and makes no reference whatever to the disputes resolution provisions. Moreover, the intent to modify the disputes resolution provisions which the majority draws from the amendment has no previously targeted legislative history and no background in Court or Board decisions or in any similar appropriate

source. There is in fact good reason to believe that the Legislature gave no thought to revising any part of Section 209 when it wrote and adopted the amendment.

I do not believe that a true legislative purpose to change the disputes resolution provisions has revealed itself in the action of the Governor after signing the bill and in the subsequent debate of the Legislature itself on the Governor's proposals. The Governor's letter and the proposed revision he sent to the Legislature express no more than a desire on his part to reassure others, even though he felt assured himself, that the amendment would have no effect on the disputes resolution section of the statute. The failure of the Legislature to enact his proposed clarification can be variously interpreted by reasonable minds. And I do not find in the short exchange on the Assembly floor a clear and unequivocal message of an intent to amend in so fundamental a way and so unusual a fashion the disputes resolution procedures.

Nor do I find reasonable warrant for attributing to the Legislature the insubstantial, if not meaningless, intention to allow Section 209(e) to survive for the limited purposes stated in the text of the majority decision and supplemented by footnote comment.

In short, I can see no compelling reason in the amendment for disturbing the established statutory modus

vivendi of continued peaceful coexistence between the improper practice and disputes resolution sections of the statute.

For these reasons, I would affirm the hearing officer.

DATED: August 9, 1983
Albany, New York

Ida Klaus

Ida Klaus, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Niagara within the unit represented by Niagara County White Collar Employees Unit, Local 832, Civil Service Employees Association, Inc., that the Niagara County Legislature and the County of Niagara will:

1. Not refuse to continue the terms of an expired agreement until a new agreement is negotiated.
2. Rescind immediately the legislative determination of August 3, 1982 to the extent that it changes or modifies any of the terms of the agreement which expired December 31, 1981 and to restore simultaneously all terms of that agreement, making whole all unit employees and CSEA for any loss or diminution of benefits including interest on any sums owing to unit employees at the rate of 3 percent per annum from August 3, 1982 to December 31, 1982 and at the rate of 9 percent per annum thereafter.

Niagara County Legislature and County of Niagara...

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.

8448

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
COUNTY OF ULSTER,

#2B-8/9/83

Employer/Petitioner.

-and-

CASE NO. C-2472

ULSTER COUNTY UNIT, ULSTER COUNTY
LOCAL 856, CIVIL SERVICE EMPLOYEES
ASSOCIATION,

Intervenor.

THEALAN ASSOCIATES (JOSEPH KELLY, of Counsel),
for Employer/Petitioner

ROEMER & FEATHERSTONHAUGH, ESQS. (WILLIAM
WALLENS, ESQ., of Counsel), for Intervenor

BOARD DECISION AND ORDER

On May 5, 1982, the County of Ulster filed a petition seeking to remove 33 job titles from a negotiating unit represented by Ulster County Unit, Ulster County Local 856, Civil Service Employees Association (CSEA) on the ground that the positions are supervisory. CSEA has been the representative of the unit since 1969, and it has consisted of both rank-and-file and supervisory positions throughout this period. This matter comes to us on the exceptions of the County to a decision of the Director of Public Employment Practices and Representation (Director)

8449

dismissing its petition.^{1/}

The record establishes that the 33 positions sought to be removed from the unit have most, if not all, of the following supervisory responsibilities: assign work and overtime, prepare work schedules, interview prospective employees and make effective recommendations for hiring, recommend employees for promotion, evaluate employee job performance, recommend disciplinary action, and receive and approve requests for leave and sick time.

The Director dismissed the petition on the basis of our decision in Village of Scarsdale, 15 PERB ¶3125 (1982). The County urges that our Scarsdale decision effectively denies an employer-petitioner a practicable method of seeking the separation of supervisory personnel from an overall unit. Because we are now persuaded that the standard we adopted in our Scarsdale decision placed too much emphasis on the need to show actual impairment of effective supervision, we have examined this record on a different basis and conclude that the County's petition should be granted. Accordingly, we reverse the Director.

^{1/} The County also filed an application for the designation of 43 employees as managerial or confidential. The Director granted the application in its entirety and no exceptions were filed to that part of the Director's decision.

DISCUSSION

Prior to Scarsdale, we issued a decision in Buffalo City School District, 14 PERB ¶3051 (1981), which dealt with a petition to remove 50 cook managers from a 13-year old unit of 400 blue-collar employees. There was no showing of conflict and the employer asserted that its administrative convenience would be served by continuing the existing combined unit. We recognized that the case presented a situation where two policies related to the "community of interest" standard set forth in §207.1(a) of the Act were in conflict. One was the establishment of separate negotiating units for rank and file employees and their supervisors whenever a party in interest objects to a combined unit; the other was the retention of long-standing units where the community of interest of the employees involved is established by the absence of evidence of any conflict among them. We ruled that while we might assume conflict of interest between supervisors and their subordinates, evidence of absence of conflict over a long period would be more persuasive in regard to this statutory criterion. Since the employer in Buffalo sought to retain the combined unit, we concluded that the third statutory standard (§207.1(c)) was also satisfied by doing so. Accordingly, we declined to remove the cook managers from the unit.

The Scarsdale case presented the question left open in Buffalo: the weight to be given to an employer's desire to remove supervisors from a combined unit on the basis of its "administrative convenience".^{2/} The employer sought the removal of fire captains from a long-standing unit of firefighters. We rejected the employer's petition because it failed to produce any evidence of a "subversion of effective supervision" during the 26-year history of the unit. We believed that absent evidence of an actual adverse effect upon supervision due to the combined representation, the third standard was not met and that, accordingly, the employer's petition must be dismissed.^{3/}

The effect of the Scarsdale decision, in conjunction with our earlier Buffalo decision, has been to impose an onerous burden of proof on an employer-petitioner seeking to remove any supervisory personnel from a long-standing unit containing rank and file employees. The employer must

^{2/} While this Board has often used the phrase "administrative convenience" in considering the statutory standard set forth in §207.1(c) of the Act, that standard actually includes more than the employer's administrative convenience. That standard requires that a unit be compatible with the joint responsibilities of the public employer and employees to serve the public. This means that a negotiating unit would be inappropriate if its structure and composition were found to interfere with the providing of services to the public.

^{3/} In doing so, we did not consider the additional argument made to us by the firefighters based on the special working relationship of the employees involved.

produce specific evidence of ineffective representation of the supervisors or specific evidence of ineffective supervision caused by the unit placement of the supervisors. We are now persuaded that this burden of proof is particularly difficult for an employer to meet. A challenging employee organization can expect the cooperation and testimony of those supporting its petition but the employer will have far more difficulty in obtaining the testimony required by our decisions. On the basis of further experience and consideration, we now believe that the consequence of the Scarsdale decision, in conjunction with our earlier Buffalo decision, has been to tilt the balance unduly in favor of maintaining existing joint units of supervisors and rank and file employees, regardless of the level of supervision, the nature and size of the unit and the nature of the service performed by the employees involved.

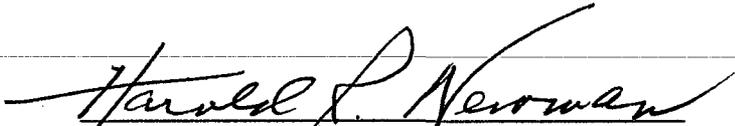
In Buffalo we dealt with cook managers whose supervisory functions we described as "relatively a low level" (14 PERB at p. 3084). In Scarsdale we dealt with six fire captains in a 26-year-old unit with 37 firefighters who had joint firefighting duties. In the instant case we deal with 33 job titles with high level supervisory functions in a county-wide unit of 1500 employees. The standard which we articulated in Scarsdale

can now be seen to be unduly restrictive. In considering whether supervisory personnel should be removed from a long-standing unit, we shall not henceforth impose on an employer-petitioner the prerequisite of producing evidence of actual subversion of effective supervision. Such evidence will, of course, continue to be relevant, but failure of proof in this regard will not necessarily require dismissal of the petition. In determining whether a proposed separate unit of supervisory personnel is compatible with the joint responsibilities of the employer and employees to serve the public, we shall consider, among other additional factors, the level of supervisory functions of the employees involved, the nature and size of the existing and proposed units, the nature of the service performed by the employees involved and any special working relationship between them. We believe that we will then be able to make a more reasonable judgment when the statutory criteria appear to point to different results.

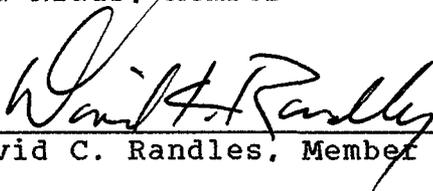
Having examined the record before us we conclude that the removal of the supervisory positions involved herein would be compatible with the joint responsibilities of the parties and that notwithstanding a demonstrated community of interest between the supervisors and the rank and file, these high level supervisors should be removed from the 1500-member county-wide unit of employees.

NOW, THEREFORE, WE ORDER that the 33 job titles set forth in Appendix A be, and they hereby are, removed from the existing unit represented by CSEA.^{4/}

DATED: August 9, 1983
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

^{4/} CSEA has not indicated any interest to separately represent these employees.

APPENDIX A

Safety Officer
Assistant Director, Real Property Tax Service Agency
Deputy Auditor
DMV Supervisor
Assistant Director, Data Processing
Probation Supervisor
Risk Management Officer
Chief Emergency Services Dispatcher
Associate Public Health Engineer
Director of Patient Services
Supervising Public Health Nurse
Task Force Supervisor
Administrative Director, Methadone
Director, Outreach Program
Alcohol Abuse Program Coordinator
Associate Director, Mental Health
Director, Day Treatment Program
Coordinator, CSS Diversion Program
Director, Regional Clinic
Director, Income Maintenance
Director, Medical Assistance
Director MIS/Fiscal
Director, Resource Recovery
Accounting Supervisor, Grade B
Comptroller
Director of Nursing Services
Assistant Director of Nursing Services
Resident Director
Field Operations Manager
Garage Supervisor
Bridge Supervisor
Section Supervisor, Public Works
Director, Social Services

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CITY OF NEWBURGH,

#2C-8/9/83

Respondent,

-and-

CASE NO. U-6642

LOCAL 589, INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS,

Charging Party.

WILLIAM M. KAVANAUGH, ESQ., for Respondent

CRAIN & RONES, P.C. (JOSEPH P. RONES, ESQ., of
Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of both the City of Newburgh (City), respondent herein, and Local 589, International Association of Firefighters (Local 589), the charging party, to a hearing officer's decision.^{1/} The hearing officer dismissed a specification of the charge alleging that the City violated §209-a.1(e) of the Taylor Law in that it refused to compensate firefighters for the

^{1/}The instant case is one of two that were consolidated for consideration by the hearing officer. In the other, U-6631, the hearing officer dismissed all the specifications of the charge. No exceptions were filed to that part of his decision.

8457

purchase of helmets, rubber coats and gloves.^{2/} He found a violation of Article IV.A of an expired collective bargaining agreement of the parties, and consequently of §209-a.1(e), in that the City directed a firefighter to accept a temporary promotion as acting lieutenant.^{3/} The City filed

exceptions which argue that the hearing officer should not have decided either the temporary promotion or clothing allowance issues, but should have deferred to arbitration. These exceptions do not challenge the merits of the hearing officer's decision. Local 589 filed exceptions complaining that the hearing officer erred in not finding a violation of §209-a.1(e) in that he misinterpreted the collective bargaining agreement of the City and Local 589 in concluding that it did not require compensation for the new uniforms.^{4/}

The City argues that the language of §205.5(d) of the Taylor Law which precludes the Board from exercising

^{2/}The hearing officer also dismissed a specification of the charge alleging that this conduct also violated §209-a.1(d). He concluded that the evidence did not support the specification.

^{3/}The hearing officer dismissed a specification of the charge alleging that this conduct also constituted a violation of §209-a.1(d). His reason was that the subject of assignments by the City is not a mandatory subject of negotiation and that §209-a.1(d) could not reach this conduct of the City.

^{4/}Local 589's exceptions do not complain about the hearing officer's dismissal of specifications of its charge alleging violations of §209-a.1(d).

jurisdiction over an alleged violation of a collective bargaining agreement must be read in concert with §209-a.1(e), which requires public employers to abide by the terms of expired collective bargaining agreements.^{5/} The effect of this, according to the City, requires that there be a determination by an arbitrator that there had been a contract violation before this Board can find that §209-a.1(e) had been violated. The hearing officer rejected this argument.

We affirm this determination. Section 205.5(d) provides, in pertinent part:

[T]he board shall 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.

Section 205.5(d) applies to the interpretation of current agreements, while the instant case deals with an expired agreement. By the terms of §209-a.1(e), the City's refusal to continue the terms of the parties' expired agreement constitutes an improper practice, and it is therefore subject to the jurisdiction of this Board.

^{5/}Section 209-a.1(e) provides:

It shall be an improper practice for a public employer or its agents deliberately . . . to refuse to continue all the terms of an expired agreement until a new agreement is negotiated

As the City's exceptions do not question the merits of the hearing officer's decision that it acted in violation of its expired agreement with Local 589 and, thereby, of §209-a.1(e) by temporarily promoting a firefighter, we do not reach this issue. This leaves standing the determination as made by the hearing officer.

As found by the hearing officer, the language of the parties' expired collective bargaining agreement dealing with the clothing allowance issue requires the City to purchase safety clothing or equipment for firefighters in two instances only, upon a firefighters appointment and if OSHA should require a change in such clothing or equipment.^{6/} The hearing officer correctly found that neither of the circumstances was present in the instant case and that the City therefore did not refuse to continue the terms of the expired agreement when it refused

^{6/}In pertinent part, the agreement states:

Upon permanent appointment to the Fire Department, the appointee is eligible for clothing allowance for the calendar year and the issuance by the department of helmet, rubber coat, boots and badge, without affect upon clothing allowance. Additionally, if OSHA should require changes in safety equipment, these items will be initially furnished by the Department at no cost to the employee. All other uniform items will be maintained and replaced by the employee from the clothing allowance.

to purchase helmets, rubber coats and gloves for its firefighters.

The hearing officer also rejected Local 589's argument that the parties' past practice establishes that the contract does not mean what it says but actually requires the City to purchase this equipment when, as here, the City has made a decision to change safety equipment. We agree with the hearing officer. On the record before us, Local 589 has not demonstrated that Article XVI of the parties' expired agreement required the City to bear this particular cost. Accordingly, we affirm the decision of the hearing officer dismissing this specification of the charge.^{7/}

NOW, THEREFORE, WE ORDER:

1. that the City continue the terms of Article IV.A of its expired collective bargaining agreement with Local 589;

^{7/}Local 589 makes an additional argument in support of its charge. It asserts that the City's action is, in any event, a circumvention of a clear provision of the contract requiring the City to bear the cost of the replacement of uniform items required by OSHA. It asserts that there is a proposal pending before OSHA for the requirement of helmets, rubber coats and gloves as required by the City. Thus, according to Local 589, the City is anticipating an OSHA requirement. We reject this argument because there is no record evidence in support of it.

2. that the City sign and post the notice in the form attached at all locations ordinarily used to communicate with unit employees; and

3. that in all other respects the charge herein be, and it hereby is, dismissed.

DATED: August 9, 1983
Albany, New York


Harold R. Newman, Chairman


David C. Randles, Member

MEMBER KLAUS CONCURRING IN THE RESULT:

I agree with the hearing officer that the charge of violation of the temporary promotion provision of the expired agreement was properly brought and sustained as a violation of §209-a.1(e) because it dealt with a nonmandatory subject of negotiation.

While I also agree that the §209-a.1(e) charge as to the clothing provision should be dismissed, I do so for the reason that §209-a.1(e) has not created a new and independent improper practice relating to the violation of a term of an expired agreement covering a mandatory subject of negotiation. A charge of that kind of violation is properly to be brought, and determined, as it was prior to the amendment, as an improper practice of refusal to negotiate in good faith under subsection (d).

DATED: August 9, 1983
Albany, New York



Ida Klaus, 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 all employees in the unit represented by Local 589 International Association of Firefighters that the City of Newburgh will continue the promotion provisions of Article IV.A of the parties' agreement which expired on December 31, 1982.

City of Newburgh

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.

8464

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2D-8/9/83

VILLAGE OF SKANEATELES,

Employer,

SKANEATELES POLICE BENEVOLENT
ASSOCIATION,

Petitioner,

CASE NO. C-2522

-and-

ONONDAGA LOCAL 834 OF THE
CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

JOHN E. FERRIS, ESQ., for Petitioner.

EDWARD W. LAVERY, ESQ., for Employer

ROEMER & FEATHERSTONHAUGH, ESQS. (MICHAEL J. SMITH, ESQ.,
of Counsel), for Intervenor.

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the petitioner to a decision of the Acting Director of Public Employment Practices and Representation (Director) dismissing its petition to establish a separate unit of four police officers which it seeks to represent. These employees are presently in a unit with blue-collar employees and dispatchers which is represented by the intervenor.

In the proceeding before the Director, the parties stipulated, in substance, to the following:

Since March 1972, the intervenor has been recognized as the exclusive representative of the aforesaid unit of employees, which currently totals 34. There is no claim by the petitioner that the intervenor has inadequately represented the police officers in collective negotiations or the administration of grievances. The grounds for seeking a separate unit are: that the performance by the police of their law enforcement duties creates a community of interest separate and apart from the other employees in the unit; and the availability only to the police of interest arbitration under Civil Service Law §209.4 to resolve impasses in negotiations.

The employer is a small one with a population of 2700 and an area of 2.8 square miles. Its mayor negotiates its labor contracts. The employer opposes the petition on the ground that a separate bargaining unit for four employees would lead to a plurality of bargaining units and cause substantial hardship to the employer in the administration of its affairs.

The intervenor opposes the petition on the basis of the long-standing existence of the bargaining unit without any actual conflict of interest.

The Director dismissed the petition in reliance upon our decision in Village of Potsdam, 16 PERB ¶3032 (1983). We believe that decision is not dispositive of the unit question raised herein.

This Board has followed "an almost uniform practice of establishing separate units for policemen" (City of Amsterdam, 10 PERB ¶3031, at p. 3061 [1977]).^{1/} What we referred to in the Amsterdam case as a "strong prevailing practice" has been based, in part, upon the recognition of a special and unique police community of interest deriving from their law enforcement duties and hazards attendant thereto, which affect the essence of their labor relations. Defining separate units for policemen is also based upon the recognition that a separate unit for such law enforcement employees is "compatible with the joint responsibilities of the public employer and public employees to serve the public..." (§207.1(c) of the Act).. (see Montgomery County, 12 PERB ¶3126 [1979]). The policemen's primary commitment to law enforcement is part and parcel of their employer's fundamental mission to preserve public order. That commitment exists even in the event of a strike by other public employees. Such a joint responsibility to the public is unique to police.

We believe that the enactment of §209.4 - establishing separate impasse resolution procedures for police and firefighters - reflects legislative recognition that police negotiations involve separate and unique concerns. The availability of those procedures only to the police members

^{1/} We are unaware of any decision by this Board or the Director which has defined a unit to include police officers with civilian employees.

of a combined unit of police and nonpolice personnel can create pitfalls to stable labor relations. While not alone mandating the fragmentation sought by the petitioner, the difference in applicable impasse resolution procedures is a significant and important reason for defining a separate unit for police officers.

We did not intend our decision in Potsdam to be a departure from our prevailing practice or a rejection of the principles which we believe strongly support separate units for police officers. In Potsdam we intended simply to remand the proceeding to the Director because we believed the record was insufficient for us to make an appropriate unit determination.

The intervenor herein opposes the petition because there is no claim by the petitioner that the intervenor had inadequately represented the public employees in collective negotiations or the administration of grievances. While many years of "meaningful and effective negotiations"^{2/} can be the basis for retaining a unit which we might not have established in the first instance,^{3/} we do not consider this factor to be persuasive in the case of police officers who seek a separate unit, since there always remains an inherent conflict of interest by virtue of their law enforcement functions.

2/ Town of Smithtown, 8 PERB ¶3015 at p. 3017 (1975).

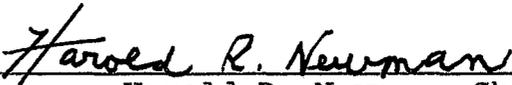
3/ Buffalo City School District, 14 PERB ¶3051 (1981).

In the instant case the employer opposes the petition because a separate unit of four policemen would cause substantial hardship in the administration of Village affairs by creating a plurality of bargaining units. Such a claim of administrative convenience is relevant by virtue of the provisions of §207.1(c) of the Act. Nevertheless, the same statutory standard permits us to recognize that a separate unit of police officers will be compatible with, and indeed further, the joint responsibilities of the employer and employees to serve the public. Thus, with regard to police officers, the employer's claim of administrative convenience cannot be given controlling weight.

Accordingly it continues to be our view that we should maintain our prevailing practice of defining separate units for police officers.

NOW, THEREFORE, WE REVERSE the decision of the Director, find appropriate a separate unit of police officers and remand the matter to the Director for further proceedings to determine the representative of the new unit.

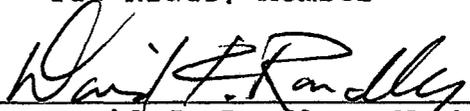
DATED: August 9, 1983
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#3A-8/9/83

In the Matter of
TOWN OF KENT,

Employer.

-and-

CASE NO. C-2603

TEAMSTERS, LOCAL 456,

Petitioner.

-and-

TOWN OF KENT UNIT, PUTNAM COUNTY LOCAL
840, CSEA, INC., 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 the Teamsters, Local 456 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.

8470

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
MOHAWK CENTRAL SCHOOL DISTRICT,

#3B-8/9/83

Employer,

-and-

CASE NO. C-2639

MOHAWK EMPLOYEES UNION, NYSUT, AFT,

Petitioner,

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 Mohawk Employees Union, NYSUT, AFT 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: All non-instructional employees,
including cafeteria employees,
custodians-cleaners, secretaries-
clerk typists, payroll clerk,
school nurses, school attendance
officer, bus drivers-mechanics.

8472

Excluded: Transportation Supervisor,
 Secretary to the Superintendent,
 Secretary to the Business
 Manager, Cafeteria Supervisor,
 Director of Maintenance,
 Certified Administrators and
 members of recognized units.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Mohawk Employees Union, NYSUT, AFT and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 9, 1983
 Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
WASHINGTON COUNTY (HIGHWAY DEPARTMENT),

#3C-8/9/83

Employer,

-and-

CASE NO. C-2637

CSEA, LOCAL 1000, AFSCME, AFL/CIO,

Petitioner,

-and-

TEAMSTERS LOCAL 294, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

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 Teamsters Local 294, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
COUNTY OF ERIE,

#3D-8/9/83

Employer,

-and-

CASE NO. C-2638

ERIE COUNTY NURSES' ASSOCIATION,

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the New York State Nurses Association has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

8476

Unit: Included: All full-time and regular part-time employees, either licensed or otherwise lawfully authorized to practice as a registered professional nurse, in the positions listed on the attached sheet.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Nurses Association and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 9, 1983
 Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

Anesthetist
Assistant Head Nurse
Assistant Supervising Public Health Nurse
Charge Nurse
Clinical Teacher
Clinical Teacher (Regular Part Time)
Coordinating Maternity Nurse
Coordinator, Well Child Conference
Discharge Assessment Nurse
General Duty Nurse
General Duty Nurse (Regular Part Time)
Head Nurse
Inservice Education Coordinator
Nurse - Diabetes Teaching Service
Nurse - Renal Teaching Service
Nurse Clinician - Alcoholism
Nurse Clinician (ENT)
Nurse Clinician - Cardiovascular
Nurse Clinician - Critical Care
Nurse Clinician - Neurology
Nurse Clinician - Neurosurgery
Nurse Clinician - Orthopedics
Nurse Clinician - Psychiatry
Nurse Clinician - Psychiatry (RPT)
Nurse Clinician - Renal
Nurse Epidemiologist
Nurse Practitioner
Nursing Care Coordinator
Nursing Coordinator - Family Planning
Nursing Inservice Coordinator
Nursing Supervisor (Home & Infirmary)
Nursing Team Leader
Public Health Nurse
Public Health Nurse Coordinator
Psychiatric Clinical Nurse Administrator
Registered Nurse
Supervising Public Health Nurse
Utilization Review Nurse