#2A-8/13/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEWARK VALLEY CENTRAL SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-7807

NEWARK VALLEY CARDINAL BUS DRIVERS, NYSUT, AFT/AFL-CIO, LOCAL 4360,

Charging Party.

HOGAN & SARZYNSKI, ESQS., for Respondent

JOHN M. CALLAHAN, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Newark Valley Cardinal Bus Drivers, NYSUT, AFT/AFL-CIO, Local 4360 (Local 4360) to a decision of an Administrative Law Judge (ALJ) dismissing its charge against the Newark Valley Central School District (District). The charge alleges that the District violated §209-a.1(d) of the Taylor Law by unilaterally altering a term and condition of employment in that it changed health insurance plans on October 1, 1984.

The change in health insurance involved the manner of funding of the coverage. Prior to October 1, 1984, the District covered its employees directly with Blue Cross and Blue Shield (Carriers) by paying a premium to them. Thereafter, the Carriers provided the same benefits, but the

District had become a participant in the Broome-Tioga-Delaware Health Plan (Plan), paying its share of the premium to the Plan with the Plan making payments to the Carriers.

The immediate result of the change was a substantial drop in costs. For example, an employee's contribution for family coverage which, pursuant to the collective bargaining agreement reached by Local 4360 and the District, is 15% of the total charge, had been $26.08 prior to October 1, 1984, and thereafter $21.02. Obviously, the District's 85% contribution dropped proportionately.

The primary reason for the reduced costs was that billing was changed from a premium-based system to a claims-based system. Before October 1, 1984, the Carriers billed the District on the basis of actuarial assumptions, including the risk of unanticipated excessive claims. Thereafter, the Carriers billed the Plan for reimbursement of claims that it paid, the risk of unanticipated excessive claims being borne by the Plan. This risk, however, was capped by a stop-loss policy issued by the Carriers at 125% of the anticipated claims. Accordingly, while the change resulted in an immediate drop in employee and District contributions, there is a risk that those contributions will increase.

The ALJ determined that the change made did not constitute a violation. He found that the employees' coverage both before and after the change were identical, and

that they were provided by the Carriers under their own administration, which made the process subject to the scrutiny of the New York State Insurance Department. Affirming these findings, we conclude that the benefits have not been changed.[1/]

On the other hand, the cost of the benefits have been changed for both the employees and the District, and while the change has been beneficial for them, there is a risk that it may become detrimental. Obviously, a change in the actual or potential cost of health insurance benefits to unit employees is a mandatory subject of negotiation. The ALJ did not deal with this issue, viewing the charge as being limited to whether the District could unilaterally decide to participate in the plan. Local 4360's exceptions now focus our attention on this issue and we find that the subject actual or potential costs to unit employees has been dealt with in the parties' collective bargaining agreement. The sole relevant reference in that agreement is: "The school district will contribute 85% of the premium for health and dental insurance. The employee will contribute 15%." This language was carried forward from their prior agreements. During negotiations for the current agreement, the District

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[1/] Cf. CSD of the City of Corning, 16 PERB ¶3056 (1983) and City of Batavia, 16 PERB ¶3092 (1983).

had sought to cap its contributions. Local 4360 had responded that there should be no change in the contract clause, and it had been successful.

We understood these events as indicating that the subject of insurance costs assessible to unit employees have been negotiated. Local 4360 neither sought nor obtained an assurance that those assessments would be capped. Instead, it relied upon the District which had to contract for the insurance coverage and to pay the major part of its cost, to hold the line on costs. Accordingly, we conclude that the District satisfied its duty to negotiate the costs assessible to the unit employees for the health insurance benefits.[2/]

Local 4360 argues that the change constituted improper unilateral action because by joining the Plan, the District had committed itself to the Plan for two years, and thereby diminished its ability to negotiate the subject of health insurance in the future. The ALJ correctly rejected this argument, noting that the District's statutory duty to negotiate health insurance continues unimpaired, its entry into the Plan notwithstanding.

2/Having reached this conclusion, we need not consider the merits of the ALJ's decision and, in particular, one of its alternative grounds for dismissal, that under the circumstances recited in his decision, Local 4360 had been obligated to object to the change before it was adopted, and therefore had waived its right to negotiate the matter by its silence.

In addition, Local 4360 makes four other arguments for the proposition that the change was so substantial as to constitute unilateral action: 1) the District is no longer the policy holder, the policy holder now being the Plan; 2) the District no longer pays the premium, but merely pays an assessment to the Plan; 3) the District would be bound by changes made jointly by the Plan and the Carriers; and 4) by joining the Plan the District has obligated employees to make contributions that go beyond their proportionate share of the premium and cover the proportionate share of the administrative costs of the Plan. Having reviewed the record, we reject each of these arguments on the ground that it is not supported by the evidence.

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

DATED: August 13, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HUDSON VALLEY COMMUNITY COLLEGE,

Respondent,

-and- CASE NO. U-7817

HUDSON VALLEY COMMUNITY COLLEGE
NON-TEACHING PROFESSIONALS
ORGANIZATION, NEA/NY,

Charging Party.

ROBERT E. GRAY, ESQ., for Respondent

DR. G. J. FABIANO, NEA/NY, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Hudson Valley Community College (College) to the determination of an Administrative Law Judge (ALJ) that it violated §209-a.1(a) and (c) of the Taylor Law. The violation is that the College failed to pay increases to some employees which would have been paid but for the pendency of a representation petition.

The record shows that prior to 1984, non-teaching professionals were given salary increases effective each

September 1. The salary increases were distributed on the basis of merit and ranged from zero to a maximum amount determined by the President and the Board of Trustees of the College. There was an appellate procedure available to those dissatisfied with the amount of their increase.

In January 1984, the Hudson Valley Community College Non-Teaching Professionals Organization, NEA/NY (Union) filed a petition to represent a number of the College's non-teaching professionals. That petition was still pending in September 1984, at which time the College gave increases to nine non-teaching professionals not covered by the petition, but not to any of the other non-teaching professionals. After the decision of the Director excluding 12 of the non-teaching professionals covered by the petition on the ground that they were managerial or confidential employees[1/] the College gave increases to these employees retroactive to September 1984.

On January 2, 1985, this Board affirmed the decision of the Director, with one change; one of the positions excluded as managerial by the Director was placed in a unit.[2/]

1/ County of Rensselaer, 17 PERB ¶4060 (1984).

2/ County of Rensselaer, 18 PERB ¶3001 (1985).

The effect of all this is that those who were not sought or who were excluded from the unit found to be appropriate were considered eligible for an increase, while, with the exception of the one employee whose status was changed by this Board's decision, those placed in the unit were not. The union was certified on January 29, 1985.[3/]

The ALJ ruled that the College's conduct constituted improper coercion of unit employees and discriminated against them by reason of the filing of a petition. The basis of the finding is that the College altered a preexisting term and condition of employment when it did not consider all non-teaching professionals for salary adjustments as it had done each September in the past.

The matter now comes to us on the exceptions of the College. It first argues that its decision not to grant increases to non-teaching professionals with respect to whom it might be required to negotiate was necessary in order to permit the terms and conditions of employment of those employees to be set by collective negotiations. This position is erroneous. A public employer's duty to negotiate with a union on behalf of a unit of employees commences when the union is recognized or certified as the representative of those employees.[4/] In the instant

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[3/] County of Rensselaer, 18 PERB ¶3000.04. (1985).

[4/] Section 204.3 of the Taylor Law; Town of Clay, 45 A.D.2d 292, 7 PERB ¶7012 (4th Dept 1974).

situation this did not occur until January 29, 1985. Prior to that date, and going back to the filing of the petition in January 1984, the obligation of the College was to maintain the status quo so as not to give the impression to the employees covered by the petition that the College might take any steps to punish or reward employees for their exercise of protected rights.[5/] In the instant situation that status quo included eligibility for salary increases each September 1.

The College disturbed this status quo. Its reason as articulated in its exceptions is that it wished to avoid "an escalated 'floor' from which it is anticipated the parties are expected to negotiate an agreement." In other words, the College, in anticipation of a statutory obligation to negotiate, refused to consider employees for raises that they might have earned in order to depress the salary base for such negotiations.

The College's second argument is that its conduct could not be a violation of §209-a.1(a) or (c) because, as found by the ALJ, it had had no "hostile motive". The ALJ used the words "hostile motive" in the same sense as this Board had used the word "animus" in State of New York (PEF),

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[5/] Section 202 of the Taylor Law; Spencerport CSD, 12 PERB ¶3074 (1979); State of New York (PEF), 10 PERB ¶3108 (1977).

supra, meaning hostility to the Union in particular or to unionization in general. As we said in State of New York (PEF), such hostility and/or animus is not an essential element of a violation of §209-a.1(a). Neither is it an essential element of a violation of §209-a.1(c). A party is presumed to have intended the consequences that it knows or should know will inevitably flow from its actions. Here, the College conveyed a coercive message to the non-teaching professionals that by seeking representation rights they had lost eligibility for pay raises for September 1984, and it knew, or should have known, that this communicated an additional message that unionization would exact further costs which might be avoided by withdrawal of the petition or by voting against the Union should there be an election. Indeed, this is not far from the avowed intention of the College to maintain a lower wage floor pending unionization and negotiations.

The final argument made by the College is that the ALJ erred in ordering it to pay interest to any non-teaching professional who might have been entitled to an increase in September 1984 in that the assessment of such interest constitutes exemplary damages. We reject that argument. Interest is merely part of the compensation to which wronged employees are entitled in order to make them whole for the wrong suffered.

NOW, THEREFORE, we affirm the decision of the ALJ and impose the remedial order that he recommended.

Accordingly, WE ORDER the Hudson Valley Community College:

1. to apply to the non-teaching professionals who are in the negotiating unit, the existing criteria retroactively for annual salary adjustment for the 1984-1985 academic year, with interest at the legal rate, with respect to those who are thereby determined to be eligible to receive such increase; and
2. to cease and desist from interfering with, restraining, coercing or discriminating against any unit employee because of the exercise of any rights protected under the Act; and
3. to sign and post a notice in the form attached at all places ordinarily used for communication with unit employees.

DATED: August 13, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, 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 non-teaching professional employees within the unit represented by the Hudson Valley Community College Non-Teaching Professionals Organization, NEA/NY:

1. That the Hudson Valley Community College will apply to the non-teaching professionals who are in the negotiating unit, the existing criteria retroactively for annual salary adjustment for the 1984-1985 academic year, with interest at the legal rate, with respect to those who are thereby determined to be eligible to receive such increase, and

2. That the Hudson Valley Community College will not interfere with, restrain, coerce or discriminate against any unit employee because of the exercise of any rights protected under the Act.

Hudson Valley Community College

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.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF PORT CHESTER,

Respondent,

-and- CASE NO. U-7856

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Charging Party.

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondent,

-and- CASE NO. U-7941

VILLAGE OF PORT CHESTER,

Charging Party.

ROEMER & FEATHERSTONHAUGH, P.C. (CLAUDIA R. MC KENNA, ESQ., of Counsel), for CSEA

GEORGE A. O'HANLON, ESQ., for Village of Port Chester

BOARD DECISION AND ORDER

The Civil Service Employees Association, Inc., (CSEA) and the Village of Port Chester (Village) entered into negotiations for a collective bargaining agreement to succeed one that had expired on March 31, 1984. They reached an agreement on May 22, 1984, on all but two issues, longevity and the identity of a health insurance carrier, and incorporated their agreement into a memorandum,[1/] which

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[1/] The memorandum indicated that the parties had yet to agree upon mutually acceptable language regarding the two issues.

was ratified by the CSEA membership and the Village's Trustees. Thereafter, the Village prepared a collective bargaining agreement which it submitted to CSEA for execution. CSEA refused to execute the proffered document, claiming that it did not reflect the actual terms agreed upon. The parties then filed the charges herein. CSEA's charge (U-7856) complains that the Village reneged on an agreement to increase the pay grade of "sanitation men" from grade nine to ten. The Village's charge (U-7941) complains that CSEA refused to execute a document embodying the parties' agreement.

The crux of the dispute is whether the parties agreed to an increase in the pay grade of approximately 12 "sanitation men". The memorandum of May 22, 1984 refers to an upgrading of "laborer". The Village relies upon Schedule A of the parties' expired agreement to indicate that "laborer" and "sanitation man" are two distinct occupations. Accordingly, it claims, the memorandum establishes that it agreed to the upgrading of the one "laborer", but not of the twelve "sanitation men".

CSEA claims that the term "laborer", as used during negotiations and in the memorandum of May 22, 1984, included "sanitation men". It supported this proposition by the testimony of four witnesses, each of whom testified that the terms were used interchangeably throughout negotiations. Thus, it asserts, the memorandum indicates an agreement that the twelve "sanitation men" would be upgraded.

The ALJ found that the record evidence supports the position of CSEA. In doing so, she made a credibility determination that the testimony of CSEA's witnesses was more reliable than that of the witness of the Village, who denied that the term had been so used during negotiations. Accordingly, she found merit in CSEA's charge and none in that of the Village.

The matter now comes to us on the exceptions of the Village. It argues that the ALJ erred in her assessment of the evidence and that, in any event, she was obligated by the parol evidence rule to ignore the testimony as to the meaning of the word "laborer" in the May 22 agreement, and to give it the same meaning as it had in the parties' expired agreement. It also argues that the agreement was subject to ratification by its Board of Trustees and that if the term "laborer" were intended to have a meaning other than that which it had in the expired agreement, the trustees were not so informed before they ratified the agreement and are not bound by it.

Having reviewed the evidence we find no basis for reversing the findings of fact of the ALJ. Even without the benefit of observations of the demeanor of the witnesses, we would find the testimony of CSEA's witnesses more persuasive than that of the Village's witness. The ALJ's resolution of the credibility issue, based on the demeanor of the

witnesses, is therefore consistent with our own conclusions.[2/]

The parol evidence rule gives no support to the Village's position. It provides that where a written contract fully integrates all the terms of an agreement so that there is no uncertainty as to the object and extent of that agreement, extrinsic evidence of discussions tending to substitute a different agreement is inadmissible in a judicial or administrative proceeding.[3/] The parties' memorandum of May 22, 1984, was not intended to be a fully integrated statement of the parties' agreement; both parties anticipated the subsequent preparation and execution of a formal contract. Moreover, the term "laborer" has no precise meaning in the circumstances before us without reference to some extrinsic evidence, be it Schedule A of the parties' expired agreement or testimony as to the negotiations.

Finally, we reject the Village's argument that it can impose the understanding of its Trustees as to the content of the agreement upon CSEA. While the record supports the

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[2/]See F.I.T. v. Helsby, 44 A.D.2d 550, 7 PERB ¶7005 (1st Dept. 1974).

[3/]See N.Y. Jurisprudence Evidence §597 et seq.

proposition that the Village's chief negotiator did not provide a thorough explanation of the agreement to the Trustees before they ratified it, that ratification process is of no consequence with respect to the validity of the agreement. It was an internal matter involving only agencies of the Village. The Trustees sought as much information from their negotiator as they thought necessary in order to consider the agreement. If their understanding of that agreement was inadequate, the reason is not attributable to CSEA. The agreement made by the Village's negotiator was ratified and the Village cannot repudiate it now.

NOW, THEREFORE, WE AFFIRM the decision of the ALJ, and WE ORDER the Village of Port Chester to:

1. Cease and desist from refusing to include in any collective bargaining agreement offered for execution a pay grade increase for sanitation men from grade nine to grade ten;
2. Negotiate in good faith with the Civil Service Employees Association, Inc.; and
3. Sign and post the attached notice at all locations used by it for written communications to members of

the bargaining unit represented by the Civil Service Employees Association, Inc.

DATED: August 13, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, 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 employees of the Village of Port Chester represented by the Civil Service Employees Association, Inc. (CSEA) that the Village of Port Chester:

1. Will not refuse to include in any collective bargaining agreement with the CSEA offered for execution a pay grade increase for sanitation men from grade nine to grade ten, and

2. Will negotiate in good faith with CSEA.

Village of Port Chester
.....

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

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL/CIO,

Respondent,

-and-

CASE NO. U-7934

DAVID LEEMHUIS,

Charging Party.

RICHARD CASAGRANDE, ESQ., for Respondent

DAVID G. LEEMHUIS, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of David Leemhuis to a decision of an Administrative Law Judge (ALJ) dismissing his charge against New York State Public Employees Federation, AFL/CIO (PEF) on the merits. We also have cross-exceptions complaining that the ALJ erred in rejecting affirmative defenses alleging that the charge should have been dismissed because Leemhuis had no standing to bring it, that it was barred by res judicata, that it was not timely filed, and that Leemhuis had failed to exhaust remedies available to him before PEF.

PEF also objects to our consideration of Leemhuis' exceptions on the ground that the exceptions were served upon it one day late. Leemhuis, in a reply to PEF's

cross-exceptions, acknowledges that the exceptions were mailed a day late, but argues that they should be considered by us because PEF was not prejudiced by the delay. We reject this argument. "Absent the consent of all parties, this Board has consistently applied its timeliness rules in a strict manner."[1/] However, even if Leemhuis' exceptions were timely, we would dismiss them on the merits. Moreover, as a courtesy to Leemhuis, who is appearing pro se, we explain our reasons for this.

Leemhuis is in a negotiating unit represented by PEF but is not a member of that employee organization. Accordingly, he pays an agency shop fee pursuant to §208.3(a) of the Taylor Law. As a consequence of the decision of the U.S. Supreme Court in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,[2/] PEF revised its prior agency shop fee refund procedure on May 11, 1984 to provide for a predetermination of the amount of money it would spend in aid of political or ideological causes only incidentally related to terms and conditions of employment and for an escrow account to hold this rebatable share of

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[1/] County of Nassau, 14 PERB ¶3014, aff'd, County of Nassau v. PERB, 14 PERB ¶7023 (Sup. Ct. Nassau Co. 1981).

[2/] ___ U.S. ___, 104 Sup. Ct. 1883, 17 PERB ¶7511 (1984).

the agency shop fees of nonmembers who demand a refund. A state court found this procedure to satisfy constitutional standards articulated in Ellis, but it directed Leemhuis to exhaust his PERB remedies to the extent that he had alleged other than constitutional claims.[3/] PEF further revised its refund procedure in October 1984. It segregated from its general fund an amount of money equal to 100% of the agency shop fees paid by nonmembers who demanded the return of part of their agency shop fee deductions. These monies were placed in an escrow account. The actual agency shop fee monies for these and other nonmembers, which were sent by the State Comptroller to PEF on a bi-weekly basis thereafter, were then deposited in PEF's general fund and used by it for all purposes including political and ideological ones.

Leemhuis' charge complains that this procedure constitutes improper commingling of agency shop fees with membership dues and improper expenditure of agency shop fee monies for political and ideological purposes. He therefore asserts that it violates §208.3(a) of the Taylor Law.

[3/] Leemhuis v. PEF, 17 PERB ¶7518 (Sup. Ct. Schenectady Co. 1984).

This argument rests upon a theory that the actual dollars themselves that comprise an individual's agency shop fee payments must be identified and segregated from those constituting the dues of union members and even from the agency shop fee payments of nonmembers who have not demanded partial return of their monies. This is an absurd position. Money is fungible. Moreover, PEF never collects identifiable dollars from any persons paying agency shop fees. All it receives regularly is a check from the State Comptroller crediting it with the sum of the money payable by all nonmember unit employees for a stated period. We therefore find that the procedure adopted by PEF satisfies §208.3(a) of the Taylor Law.

Leemhuis also appears to be arguing that PEF must segregate all agency shop fee payments, whether or not the payer has demanded a refund. This is not required. Section 208.3(a) of the Taylor Law merely provides for the establishment and maintenance of:

> a procedure providing for the refund of 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. (emphasis supplied)

We now address PEF's cross-exceptions. The ALJ did not err in finding that Leemhuis has standing to file a charge. The basis of PEF's argument is that while Leemhuis

had filed demands for agency shop fee refunds for prior years, he had not filed such a demand for the year covered by the charge. Leemhuis is a member of a class that is affected by whether or not PEF's refund procedure is valid, and his failure to file a refund demand would have affected the remedy had he been successful in the charge, but not his standing. By not filing a demand he would not have been entitled to a make-whole remedy because §208.3(a) of the Taylor Law provides that only agency shop fee payers making a demand are entitled to refunds. We might, however, have issued a cease and desist remedy which could have been of benefit to Leemhuis even without his having filed a refund demand for any particular year.

We affirm the ALJ's determination that Leemhuis' charge was not barred by res judicata. It was not barred by the court determination that its procedure of May 1984 was constitutional because the court did not dispose of the claims not relating to constitutionality, leaving them to this Board. Neither was Leemhuis' claim barred by his withdrawal of an earlier charge which had originally raised, inter alia, aspects of the issue before us.[4/]

[4/] See PEF (Leemhuis), 17 PERB ¶3037 (1984). Leemhuis withdrew that charge after a pre-hearing conference at which the ALJ informed him that he would not rule on any of the issues before him other than one that is not relevant to this charge.

We also affirm the determination of the ALJ that the conduct complained of by Leemhuis, if wrongful, would have constituted a continuing violation and therefore his charge was not untimely. Finally, we affirm the ruling that Leemhuis need not have exhausted procedures made available by PEF before filing the charge herein.[5/] Accordingly, we find no merit in PEF's cross-exceptions.

Having found Leemhuis' exceptions untimely and no merit in those filed by PEF, WE ORDER that all exceptions be, and they hereby are, dismissed.

DATED: August 13, 1985
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

Walter L. Eisenberg

Walter L. Eisenberg, Member

5/See UUP (Barry), 13 PERB ¶3090 (1980).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL/CIO,

Respondent,

-and-

CASE NO. U-7950

DAVID LEEMHUIS,

Charging Party.

BOARD DECISION ON MOTION

This matter comes to us on a motion of David Leemhuis to reopen the decision of the Board in the matter herein.[1/] The motion is opposed by the Public Employees Federation.

Leemhuis asserts that we failed to deal with two aspects of his charge. The first is that the Public Employees Federation's refund procedure is inadequate because it leads to incorrect refund amounts. This, he argues, is different from a complaint that the amount is incorrect, and it is the latter rather than the former question which lies beyond this Board's jurisdiction.

We reject this argument on the ground that the distinction made by Leemhuis is of no consequence.

[1/] Decided at 18 PERB ¶3051 (1985).

The second basis of Leemhuis's motion is his assertion that his charge complained that the information furnished him with respect to the amount of his refund was inadequate and that we dismissed this charge on the basis of a misunderstanding that he had complained that the information was inaccurate. His assertion is in error. We specifically determined in the instant case that the minimum information which must be provided was provided by the Public Employees Federation.

NOW, THEREFORE, WE ORDER that the motion herein be, and it hereby is, denied.

DATED: August 13, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF AMSTERDAM,

Employer,

-and-

CASE NO. C-2876

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

Petitioner.

THEALAN ASSOCIATES, INC. (JOSEPH KELLY, of Counsel), for Employer

ROEMER & FEATHERSTONHAUGH, P.C. (RICHARD L. BURSTEIN, ESQ., of Counsel), for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Civil Service Employees Association, Inc., Local 1000 AFSCME, AFL-CIO (CSEA) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition to represent the noninstructional employees of the Enlarged City School District of the City of Amsterdam (District) in a single unit.[1/] Most of the noninstructional

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[1/]A few noninstructional job titles are not covered by the petition; their exclusion raises no issue before us.

employees of the District are presently represented by CSEA in three units, a custodial-maintenance unit, a clerical unit and an aides unit. These units have existed from 12 to 17 years and have been represented by CSEA from 7 to 14 years. CSEA also seeks the inclusion of seven unrepresented titles in the consolidated unit. They are physical therapist, physical therapist assistant, occupational therapist, occupational therapist assistant, senior computer operator, junior computer operator and teacher registry agent.

It is the position of the District that the three existing units should not be consolidated and that the additional titles sought by CSEA should constitute a separate unit.

The Director decided that consolidation of the existing units was inappropriate because there has been "a long history of effective negotiations." He also agreed with the District that the unrepresented titles sought by CSEA should be placed in a new and separate unit.

CSEA argues that the record demonstrates a long history of ineffective negotiations. The basis of this proposition is that the negotiations in each of the three units for at least the last three rounds have gone to impasse, that several have gone to fact-finding and that none was resolved prior to the expiration of the predecessor agreement, with several of the impasses continuing over a year after that expiration. It also argues that the seven unrepresented

titles constitute too small a group for effective representation and should be included in an existing unit.

We are not persuaded by CSEA's argument that consistent resort to impasse procedures is so clear an indicia of ineffective negotiations as to justify a change in the unit structure. Moreover, there is nothing in the record that suggests that the consolidation of the three units would lead to easier negotiations or quicker settlement. On the contrary, there are some indications that it might exacerbate the negotiation difficulties. Accordingly, we affirm the determination of the Director that the three existing units should not be combined.

The remaining issue is what to do with the unrepresented employees covered by the petition.

The record indicates that the four therapist positions and the two computer positions[2/] are professional or quasi-professional, a college degree being a requirement for appointment. As such, they share a community of interest among themselves which is not shared with the members of any of the three units.[3/]

2/These involve programming rather than clerical responsibilities.

3/At one time there was a unit consisting of the therapist positions. Subsequently, the District subcontracted the work of the unit, but it later returned to the use of employees to provide therapy services.

The same is not true of the Teacher Registry Agent. This employee keeps track of teacher absences and seeks substitutes as needed. At a previous time this work was performed by employees in the clerical unit; indeed, the 1983-85 collective bargaining agreement for that unit has a provision applicable to that work.[4/] Accordingly, we place this title in the existing clerical employees unit.[5/]

NOW, THEREFORE, WE ORDER:

1. that the Custodial/Maintenance Unit and the Aides Unit continue unchanged;
2. that the Teacher Registry Agent be added to the Clerical Unit which shall now consist of the following titles:

   Included: typist, stenographer, keypunch operator, telephone operator, account clerk, senior stenographer, principal stenographer, teacher registry agent.

   Excluded: All other employees.

   The District is hereby directed to submit to the Director within ten days of its receipt of this decision, with copy to the petitioner, an alphabetized

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[4/] Article V. I.

[5/] For the appropriateness of our defining negotiating units not proposed by any party, see County of Erie, 18 PERB ¶3045 (1985).

list of the current employees within this unit. It is ordered that an election by secret ballot shall be held under the Director's supervision among the employees in the above unit unless CSEA submits, within fifteen days after receipt of the employee list, evidence sufficient to satisfy the requirements of §201.9(g) of the Rules for certification without an election.

3. that there be a unit, as follows:

Included: physical therapist, physical therapist assistant, occupational therapist, occupational therapist assistant, senior computer operator and junior computer operator.

Excluded: All other employees.

The District is hereby directed to submit to the Director within ten days of its receipt of this decision, with copy to the petitioner, an alphabetized list of the current employees within this unit. As CSEA's showing of interest consisted of proof of the then current membership in the existing units, it is hereby directed to submit

to the Director, within fifteen days of its receipt of the alphabetized employee list, the requisite thirty percent showing of interest from the employees in the unit; otherwise the petition will be dismissed.

Conditioned upon the submission of the requisite showing of interest as stated above, it is ordered that an election by secret ballot shall be held under the Director's supervision among the employees in the above unit unless CSEA submits, within the above described fifteen days, evidence sufficient to satisfy the requirements of §201.9(g) of the Rules for certification without an election.

DATED: August 13, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF HEMPSTEAD,

CASE NO. S-0003

for a determination pursuant to
Section 212 of the Civil Service Law

BOARD DECISION AND ORDER

Section 212 of the Civil Service Law (CSL) declares certain provisions of the Taylor Law inapplicable to those local governments which have adopted their own provisions and procedures which have been submitted to this Board and as to which "...there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent..." to those which control this Board (emphasis supplied).

To permit this Board to ascertain annually whether the continuing implementation of local provisions and procedures are substantially equivalent to those which govern it, this Board's Counsel canvasses the appropriate governments each year to gather data on the operation of the local government's public employment relations boards (local PERBs).

In early February, 1985, a letter and questionnaire were sent to the last-known chairman and last-known counsel of the Town of Hempstead local PERB. Follow-up letters were sent in

March and April. The April communication advised that failure to receive a response would result in a recommendation to this Board that the Hempstead local PERB be determined not to be in substantial compliance with the requirements of the Taylor Law. Receiving neither acknowledgment nor a response to the questionnaire, Counsel, as he had advised the local PERB in his April letter, made the indicated recommendation, which this Board considered at its May 8, 1985 meeting. The Deputy Chairman of this Board was thereupon directed to advise the Hempstead local PERB that this Board had considered the recommendation of Counsel, was offering the Hempstead local PERB an opportunity to respond to the recommendation by May 31, 1985, and that submission of the completed questionnaire would make further action unnecessary. Such advice was sent to the Hempstead local PERB by letter dated May 14, 1985.

To date, we have received neither an acknowledgement of our letters nor a response to the questionnaire. We are no longer warranted in concluding that the continuing implementation by the Town of Hempstead local PERB of its provisions and procedures, if indeed they are being implemented at all, is substantially equivalent to the provisions and procedures governing this Board.

NOW, THEREFORE, WE ORDER that the determination of this Board dated April 11, 1968,[1/] approving the enactment establishing a local PERB for the Town of Hempstead be, and the same is hereby, suspended subject to reinstatement upon application and demonstration by the Hempstead local PERB that the continuing implementation of its local provisions and procedures is substantially equivalent to those governing this Board;

FURTHERMORE, PLEASE TAKE NOTICE that unless such application is filed by September 6, 1985, this Board shall, without further notice, rescind, pursuant to CSL §212, its order dated April 11, 1968, approving the Town of Hempstead's local enactment and such other orders as approved amendments to its local

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[1/] 1 PERB ¶395

enactment[2/] upon the ground that the continuing implementation of said local enactment and amendments thereof is no longer substantially equivalent to the provisions and procedures applicable to this Board.

DATED: August 13, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

[2/] 4 PERB ¶3019; 5 PERB ¶3041; 6 PERB ¶3081; 11 PERB ¶3059

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF BROOME,

Employer,

-and- CASE NO. C-2945

TEAMSTERS, LOCAL 693,

Petitioner,

-and-

LOCAL 1912, COUNCIL 66, 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 Local 1912, Council 66, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective

negotiations and the settlement of grievances.

Unit: Included: All employees employed in the titles as set forth in Appendix A.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 1912, Council 66, AFSCME, AFL-CIO and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 13, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

Appendix A

HIGHWAY DIVISION

MEO Heavy
Shovel Operator
MEO Light
Painter
Carpenter
Laborer
Carpenter Helper
Mechanic Heavy
Motor Equipment Clerk
Stock Clerk
MEO Medium
Mechanic Helper
Apprentice Mechanic
Assistant Heavy Mechanic

DRAINAGE, SANITATION AND WATER SUPPLY DIVISION

MEO Heavy
Sanitary and Landfill Mechanic
Sanitary Landfill Clerk
Laborer

BUILDING AND GROUNDS DIVISION

Janitor
Bldg. Maint. Man I, II & III
Parking Lot Attendant
Electrician
Elevator Operator
Auto Mechanic

PARKS DEPARTMENT

MEO Heavy
Mechanic
Construction Worker
Park Technician
Arborist
Sr. Park Technician