

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
MERRICK UNION FREE SCHOOL DISTRICT,
Employer,

-and-

CASE NO. C-3037

MERRICK FACULTY ASSOCIATION,
Petitioner.

COOPER AND SAPIR, P.C. (ROBERT E. SAPIR, ESQ., of
Counsel), for Employer

MICHAEL MARGOLIS, for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Merrick Faculty Association (Association) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition for certification as the representative of a unit of certified teachers, librarians and counselors employed in the summer instructional and recreational programs of the Merrick Union Free School District (District).

Because this petition is for a unit of summer school employees, the Director applied the test for seasonal employees first articulated by the Board in State of New York, 5 PERB ¶¶3022 and 3039 (1972). That three-part test

requires such employees 1) to be employed at least six weeks a year, 2) to be employed at least 20 hours a week, and 3) at least 60% of such employees must return for at least two successive years. The Director found that the first and second criteria were met inasmuch as the instructional program of the District is held 4 hours daily for 30 school days during the summer. However, the third criterion was not met. The evidence showed that of 27 who worked in 1983, 7 returned in 1984, or a 26% return rate. Of 18 who worked in 1984, 9 returned in 1985, or a 50% return rate.

In its exceptions, the Association does not dispute the figures relied upon by the Director but argues that the third criterion should not be used in connection with summer school employment unless it is shown that the employees themselves have refused to return. Otherwise, the Association urges, the return rate criterion is unfair since it is dependent entirely on the hiring practices and decisions of the employer. Since the employer has sole control over the availability of work and the offering of employment, the employer has the ability, the Association contends, to manipulate staffing practices to prevent coverage under the Act.

The District responds that the Association's concern, if supported by the facts, could be the basis for an improper practice charge under §209-a.2(a). A deliberate effort on

the part of the District to manipulate the return rate to avoid coverage could be an improper practice but, urges the District, there is nothing in the record to warrant such a finding.

DISCUSSION


The test that we have adopted is relatively simple to apply and strikes a proper balance between possibly conflicting policies of the Act. On the one hand, wherever possible, public employees should be accorded collective bargaining rights under the Act. On the other hand, a casual and occasional employment does not provide a sufficient relationship between the employer and employees to warrant the application of the collective bargaining process.

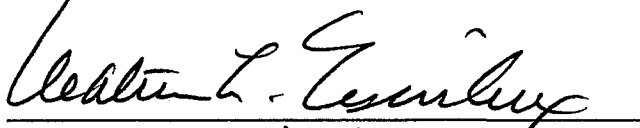
Our test looks to actual results rather than the imponderables of individual decision-making. The Association's approach could involve an extensive investigation of each individual situation. Furthermore, it is primarily because seasonal employment is subject to many uncertainties that there is a need to use objective criteria to determine whether there is a sufficient employment nexus between an identifiable group of employees and an employer so as to justify application of the collective bargaining process to the relationship.

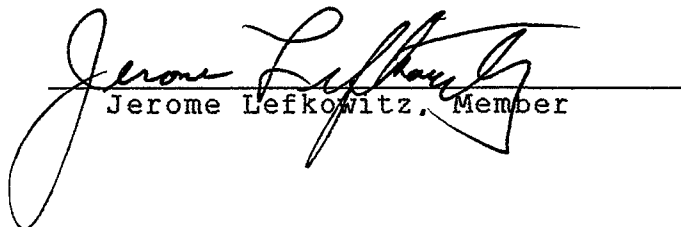
Finally, there is no question that it would be a cognizable improper practice for an employer deliberately to manipulate its hiring practices for the sole purpose of depriving employees of the right to organize. Therefore, the Association's concern can be addressed in an appropriate context. We agree with the Director that there is no evidence in this record that would support a finding of manipulation for an improper purpose by the District. Accordingly, we affirm the Director's decision.

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

DATED: September 10, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member


Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JACOB K. JAVITS CONVENTION CENTER OF
NEW YORK and/or ALLIED FACILITY
MAINTENANCE CORPORATION,

Employer,

-and-

CASE NO. C-3072

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Petitioner,

-and-

LOCAL 237, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Intervenor.

MANNING, RAAB, DEALY & STURM (IRA A. STURM, ESQ.,
of Counsel), for Petitioner

BOARD DECISION AND ORDER

Section 207.3 of the Civil Service Law requires that
prior to certification by PERB of an employee organization as
the representative of a unit of employees, the organization
must affirm:

that it does not assert the right to strike
against any government, to assist or
participate in any such strike, or to impose an
obligation to conduct, assist or participate in
such a strike.

Section 201.5 of PERB's Rules of Procedure implements this
section of the Taylor Law. This rule, which sets forth the

contents of petitions for certification and decertification, states, in pertinent part, that if the petition is filed by an employee organization, it must contain:

an affirmation that petitioner and the employee organization, if any, with which it is affiliated does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist, or participate in such a strike.

The forms supplied by PERB upon which petitions for certification or decertification may be filed contain, as item 14, the following question to be answered by employee organizations seeking certification:

Do you affirm that you and the employee organization you represent or support do not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist, or participate in such a strike? Yes No

In petitioning for certification, Local 32B-32J, Service Employees International Union, AFL-CIO (petitioner) did not answer question 14. A PERB Administrative Law Judge advised the petitioner's attorney by letter that, among other deficiencies, the petition did not contain a no-strike affirmation. The letter requested withdrawal of the petition. With respect to the lack of a no-strike affirmation, the petitioner's attorney responded by affidavit in which he stated that the petition was filed so that a determination could be had with respect to whether the employer is a public employer, it being the petitioner's

position that the employer is not a public employer. The affidavit states that if PERB were to determine that the employer is a public employer, the union would make the necessary affirmation.

In his decision dated June 27, 1986, PERB's Director of Public Employment Practices and Representation (Director) dismissed the petition because of the failure to complete the no-strike affirmation.^{1/}

The petitioner's exceptions to the Director's dismissal of its petition because of its failure to complete the no-strike affirmation, urge that the Director placed form over substance. The petitioner argues that the Taylor Law does not make the affirmation a condition precedent to the filing of the petition but only to ultimate certification and that the petitioner had advised PERB that it would not assert the right to strike if PERB found the employees to be public employees.

We affirm the decision of the Director. In implementing CSL §207, PERB promulgated its Rule of Procedure requiring that a representation petition contain a "no-strike affirmation". This was done to avoid needless dissipation of PERB's resources. It would be a waste of public funds for

^{1/}The Director also dismissed the petition on the ground that it was not accompanied by a declaration of authenticity as required by §201.4 of PERB's Rules of Procedure. We do not find it necessary to consider the exceptions to this part of his decision.

PERB to conduct representation proceedings, some of which, as in the instant case, could be lengthy, only to have to dismiss the petition because the petitioner will not affirm that it does not assert the right to strike as required by the statute. We consider the rule to be a reasonable implementation of the statute which the petitioner could easily have complied with.

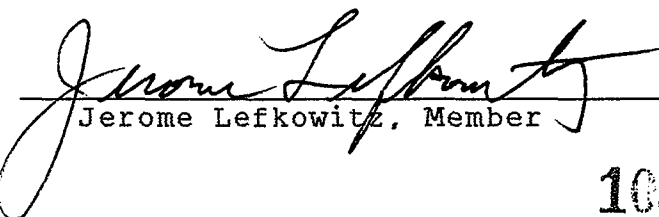
Inasmuch as the "no-strike affirmation" is directed solely to strikes against governments, in the event we were to find that this employer is not a public employer, the affirmation would be of no effect. The petitioner would therefore not be prejudiced by the application of the affirmation requirement in this case. Accordingly, we conclude that the petitioner's failure to comply with the rule warrants dismissal of the petition.

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

DATED: September 10, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member


Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JACOB K. JAVITS CONVENTION CENTER OF
NEW YORK and/or OGDEN ALLIED FACILITY
MAINTENANCE CORPORATION,

Employer,

-and-

CASE NO. C-3095

LOCAL 32B-32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Petitioner,

-and-

LOCAL 237, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Intervenor.

MANNING, RAAB, DEALY & STURM (IRA A. STURM, ESQ.,
of Counsel), for Petitioner

BOARD DECISION AND ORDER

On June 23, 1986, the Petitioner filed a petition seeking to represent certain employees of the Employer. The petition was filed on a form supplied by this Board. Instead of completing the no-strike affirmation by checking the "Yes" or "No" box contained thereon, the Petitioner stated the following on the form:

In the event a determination is made that the Employer is subject to PERB's jurisdiction, the Union would not assert the right to strike against any government or to assist or participate in any such strike or to impose any obligation to

conduct, assist or participate in such a strike.

The Director of Public Employment Practices and Representation (Director) issued a decision on July 29, 1986, dismissing the petition because of the Petitioner's failure to complete the no-strike affirmation.

A petition filed by this Petitioner on May 15, 1986, seeking representation of the same unit, was dismissed for the same reason by the Director in a decision in Case C-3072 dated June 27, 1986 (19 PERB ¶4035 [1986]). We affirmed the Director's decision today (19 PERB ¶3056 [1986]).

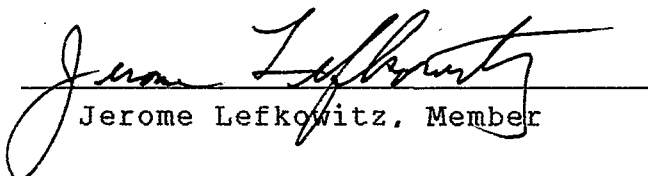
Petitioner excepts to the Director's decision in this proceeding on the ground that the Director relies on his earlier decision, which the Petitioner asserts is erroneous.

Upon the basis of the reasoning in our decision in Case No. C-3072, we affirm the Director's dismissal of the petition in this proceeding.

DATED: September 10, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member


Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WAPPINGERS CENTRAL SCHOOL DISTRICT

CASE NO. E-1199

Upon the Application for Designation of
Persons as Managerial or Confidential.

ROEMER AND FEATHERSTONHAUGH, P.C. (CLAUDIA R.
McKENNA, ESQ., of Counsel), for the Wappingers
Central School Office Unit, Dutchess County
Educational Local 867 of the Civil Service Employees
Association, Inc., AFSCME, AFL-CIO

RAYMOND KRUSE, ESQ., for the Wappingers Central School
District

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Wappingers Central School Office Unit, Dutchess County Educational Local 867 of the Civil Service Employees Association, Inc., AFSCME, AFL-CIO (CSEA) to the decision of the Director of Public Employment Practices and Representation (Director) granting the application of the Wappingers Central School District (District) to designate Marie Capogna as a confidential employee of the District.

Capogna is a typist in the personnel office of the District and her position is in a unit represented by CSEA. Capogna is one of three typists in the personnel office and performs normal clerical duties for two personnel assistants, who are characterized as "confidential" but whose positions

have never been designated as confidential or managerial by this Board. CSEA urges that the evidence does not establish that the person for whom Capogna works is a managerial employee within the criteria set forth in §201.7(a) of the Act nor does the evidence establish that Capogna is a confidential employee within the criteria of that section.

Section 201.7(a) states in part: "Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)." In determining whether a position is confidential, it has previously been held that there need not be a Board designation of managerial status of the superior of the allegedly confidential person, if the superior clearly performs managerial duties.^{1/}

Thus, there are two issues presented by CSEA's exceptions: 1) Does the evidence of record warrant the Director's conclusion that Mayen, the personnel assistant for whom Capogna works, clearly performs managerial duties within the criteria of the statute; and 2) does the evidence of record warrant the Director's conclusion that Capogna acts in a confidential capacity to Mayen within the criteria of the statute.

^{1/}Byram Hills School District, 5 PERB ¶3028 (1972).
See also North Salem CSD, 14 PERB ¶4021 (1981); East Ramapo CSD, 15 PERB ¶4041 (1982).

Mayen was the only witness at the hearing. She testified that she has direct involvement in all personnel matters. These include responsibilities in connection with hiring and firing of employees, involvement with disciplinary proceedings, the handling of grievances and the preparation of District material in connection with such proceedings. She also testified that she participates as a resource person in contract negotiations, has drafted contract proposals, and has participated in conferences with the District negotiators. She testified that Capogna works regularly as her secretary and as a typist in the personnel office. Capogna types and files correspondence and documents that Mayen prepares. She testified that Capogna, in the regular course of her duties, has access to and actually works with all the files of the office. These files include personnel files and other materials relating to personnel and contract administration.

The Director concluded that Mayen has direct input in the District's personnel matters and contract negotiations and clearly performs labor relations responsibilities which are not of a routine or clerical nature and require the exercise of independent judgment. Therefore, he found that Mayen exercises those responsibilities which would warrant her designation as managerial. The Director also concluded that, as Mayen's secretary, Capogna "is necessarily exposed

to information covering negotiations, contract administration, personnel and disciplinary actions on a regular basis."

CSEA argues that Mayen is, at most, a confidential employee and that the evidence in the record does not establish such exercise of independent judgment by her as to justify managerial designation. CSEA urges that the record does not reveal sufficient specific facts to warrant such a conclusion. CSEA also argues that the testimony is too general to warrant Capogna's designation as confidential.

DISCUSSION

Having reviewed the record, we conclude that the Director's decision should be affirmed. While the testimony does lack some specificity, it is sufficient to warrant his conclusions. The record contains an adequate description of the duties of both Mayen and Capogna. Mayen's description of her duties as personnel assistant supports a finding that she has a direct involvement in all personnel matters and sufficient labor relations responsibilities to warrant her designation as managerial.

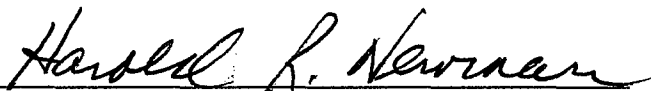
The evidence supports the conclusion that Capogna's duties relate to all of the activities of the personnel office. As such, it can reasonably be inferred that she is necessarily exposed to information which is inappropriate to the eyes and ears of rank-and-file personnel or their

negotiations representatives. The testimony is not simply that Capogna works in a personnel office and has physical access to the files. The evidence supports the conclusion that she actually uses and works with the files on a regular basis, without restriction.

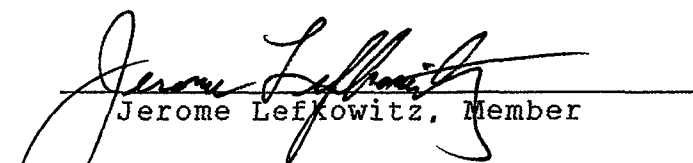
We conclude that the District satisfied its burden of proving that Capogna is a confidential employee.

NOW, THEREFORE, WE ORDER that Marie Capogna be, and she hereby is, designated as a confidential employee.

DATED: September 10, 1986
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member


Jerome Lefkowitz, Member

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