STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2A - 1/24/84

NANUET UNION FREE SCHOOL DISTRICT and
NANUET TEACHERS ASSOCIATION,

Respondents,

-and-

CASE NO. U-6162

DIANE S. BERGERMAN,

Charging Party.

RAYMOND G. KUNTZ, P.C. (RAYMOND G. KUNTZ, ESQ., of Counsel), for the Nanuet Union Free School District

JAMES R. SANDNER, ESQ. (JANIS LEVART BARQUIST, ESQ., of Counsel), for the Nanuet Teachers Association

JAY F. JASON, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Diane S. Bergerman to a hearing officer's decision dismissing her charge against the Nanuet Union Free School District (District) and the Nanuet Teachers Association (Association), that the District and the Association collusively deprived her of a contractual right to the liquidation of accumulated sick leave. The hearing officer determined that the Association acted properly when it refused to support Bergerman's claim for liquidated sick leave benefits, that the District acted correctly in denying Bergerman's claim, and that the discussions between the Association and the

District did not constitute collusion but rather a legitimate effort to discuss and resolve the underlying dispute.

Bergerman had taught for the District for 23 years but was only 46 years old when, in early 1981, she sought to receive payment for the 200 days of sick leave that she had accumulated. The relevant provision of the collective bargaining agreement permits payment for sick leave by any teacher who retires with a minimum of 20 years' service in the Nanuet School District. Under the State Education Law a teacher is not eligible for retirement until reaching age 55.[1/] Appearing to recognize that the agreement did not authorize her to collect for her accumulated sick leave, she asked Stedge, the Association president, if an exception could be made on her behalf and he promised to look into the matter.

In June 1981, Bergerman asked Lucanera, the newly-elected Association president, to seek a special provision for her during the forthcoming negotiations. Lucanera responded that, in her opinion, Bergerman might have some rights under the existing agreement and agreed to explore the matter. After doing so, Lucanera advised

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1/Education Law §§511-a, 533 and 535 are the relevant provisions. They permit retirement only at age 55 or older, except for teachers with at least 35 years of service.

Bergerman that she had concluded that the collective bargaining agreement was not intended to and did not apply to teachers who resigned before the age of 55. Bergerman was also advised that the Association would not seek an exception on her behalf during negotiations because it felt that the taking of such a position would not be in the interest of unit employees generally.

In March 1982 Bergerman asked Superintendent Mackin whether she would be eligible for the sick leave benefit if she retired at the end of the 1981-82 school year and he told her that she would not. Bergerman then filed a grievance. When it was rejected by Mackin, she asked the Association to carry the grievance to the next step, i.e., to the Board of Education. The request was considered and rejected by the Association's grievance committee and Bergerman was told that she might appeal the grievance on her own.

At about this time, Bergerman learned that an arbitrator had ruled that contract language in the nearby Pleasantville School District, which was similar to the language in the Nanuet contract, permitted payment for sick leave upon the resignation of a teacher who was less than 55 years old. The decision in that case turned upon the testimony of the union's negotiator that the language was intended to cover such resignations and that the reference to retirement

contemplated a deferred retirement.[2/] When she called this award to the Association's attention, Bergerman was told that the negotiating history in Nanuet evidenced a contrary intent. She then filed the charge herein.

The hearing officer wrote to Bergerman's attorney, Jason, that the specification against the District was defective in that it merely alleged a contract violation and that the specification against the Association was defective in that it did not allege improper motivation, gross negligence or irresponsibility. Bergerman clarified her charge to allege improperly motivated and collusive conduct and the matter went to a hearing.

Respondents moved to dismiss the charge after Bergerman completed her testimony. Each argued that Bergerman's testimony established that it acted reasonably in rejecting her claim for payment for sick leave and that there was no evidence of improper discussions between them.

Before ruling on the motion, the hearing officer asked Jason for an offer of further proof. While protesting the procedure, Jason indicated that Bergerman's husband would be called to testify about conversations that he had with various representatives of the District and the Association.

[2/]Education Law §512-a, entitled "Deferred Retirement", authorizes teachers with at least ten years of service who resign before reaching age 55 to receive a reduced pension benefit upon reaching age 55.

The proposed testimony merely corroborated the proposition that both the District and the Association were of the opinion that Bergerman was not entitled to payment for her sick leave and that the Association would not support her claim. Jason also indicated that he would call the members of the Association's grievance committee, its past and present officers and the NYSUT field representative who negotiated on behalf of the Association. He indicated that he had no idea what their testimony would be, but that he would question them about their conversations with each other and with the superintendent.

The hearing officer adjourned the hearing at this point and, after receiving briefs from the parties, she granted respondents' motion and dismissed the charge.

In her exceptions, Bergerman argues that the hearing officer's handling of the matter was procedurally defective and indicative of bias. According to Bergerman, the indications of bias are the hearing officer's letter to Jason noting the deficiencies in the charge, her refusal to issue or enforce subpoenas and her refusal to declare the Association personnel subpoenaed by her attorney as hostile witnesses. She also claims that the procedure of dismissing the charge before the completion of her case was inappropriate. Finally, she argues that the hearing officer erred in not recognizing that she had a vested interest in

payment for her sick leave which therefore took precedence over the interest of other unit employees in the outcome of the negotiations then taking place. Thus, according to Bergerman, the Association was obligated to press her interests even if it would complicate the negotiations and compromise the interests of other unit employees.

None of these arguments is persuasive. The record reflects no bias on the part of the hearing officer. The deficiency letter, which was sent as a matter of routine, was accurate and appropriate. The hearing officer refused to issue a subpoena because Bergerman's attorney was empowered by law to do so himself. This, too, is routine and appropriate procedure. Neither is there any merit in Bergerman's allegation that the hearing officer refused to enforce the subpoenas. When asked by Jason to direct witnesses subpoenaed by him to attend adjourned sessions of the hearing, she responded that she did not have authority to do so. She added, however, that any further hearing dates should be considered to be in continuation of the hearing for which the subpoenas were originally issued. Clearly, this does not reflect any bias against Bergerman.

Finally, Bergerman argues that the hearing officer demonstrated bias by refusing to rule that the witnesses her attorney subpoenaed were hostile witnesses merely because they were Association officers. It was also proper for the hearing officer to indicate that she would rule on

Bergerman's claim, that the witnesses should be declared hostile, after she observed each witness' demeanor when testifying.

The hearing officer's request for an offer of proof was appropriate.[3/] So was her conclusion that the proposed further testimony would not establish a prima facie case. The proposed testimony of Mr. Bergerman added nothing and as attorney Jason admittedly had no idea what the testimony of the other witnesses might be, the hearing officer correctly found he was engaged in a "fishing expedition". A continuation of the hearing at that point would have been an unnecessary burden upon respondents, as it would be for this Board.

Finally, Bergerman's argument that she had a "vested right" to the liquidated sick leave is without substance. Her alleged right would not vest until she reached age 55. On the record before us, we find that the Association gave measured consideration to Bergerman's request that the Association negotiate a special benefit for her and that it support her grievance, and its conclusion not to support her request was reasonably arrived at.

[3/] See Village of Spring Valley PBA, 14 PERB ¶3010 (1981).

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

DATED: January 24, 1984
New York, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #2B - 1/24/84

THE CITY OF BATAVIA FIREFIGHTERS, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 896,

Respondent,

-and- CASE NO. U-6850

CITY OF BATAVIA,

Charging Party.

HOVEY & MASSARO, ESQS. (ANGELO MASSARO, ESQ., and THOMAS J. CASERTA, JR., ESQ., of Counsel), for Respondent

HARTER, SECREST & EMERY, ESQS. (BARRY R. WHITMAN, ESQ., and SUE A. JACOBSON, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Batavia (City) to a hearing officer's decision dismissing two of three specifications of its charge against the City of Batavia Firefighters, International Association of Firefighters, Local 896 (Local 896). The charge alleges that Local 896 violated §209-a.1(d) of the Taylor Law by submitting a petition for interest arbitration pursuant to §209.4 of such law covering three

nonmandatory subjects of negotiation. It further argues that Local 896 acted improperly because the subject matter of the petition for arbitration covers matters in the parties' expired agreement, and the enactment of §209-a.1(e) of the Taylor Law prevents it from implementing an eventual arbitration award.[1/]

We affirm the decision of the hearing officer that the enactment of §209-a.1(e), which declares it improper for a public employer to refuse to continue the terms of an expired agreement until a new agreement is negotiated, does not make the filing of a petition for interest arbitration as to such terms improper. The problem for the employer would arise, if at all, only when the employer actually altered the terms of an expired agreement pursuant to such an arbitration award. A majority of this Board addressed this issue in a footnote in Niagara County Legislature, 16 PERB ¶3071 (1983), and stated that an employee organization waives its right to complain under §209-a.1(e) when it consents to a determination by a public arbitration panel or by a legislative body. While the dissenting opinion in Niagara County Legislature does not accept the reasoning of

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1/Local 896 did not except to the hearing officer's determination that one of the matters submitted to interest arbitration was nonmandatory.

the footnote, it is even more directly supportive of the propriety of Local 896's action in filing the petition. The dissenting opinion is that the improper practice created by §209-a.1(e) does not apply to the impasse resolution procedures to resolve a deadlock in negotiations pursuant to §209.3(e) of the Law, including the procedure for binding arbitration. We therefore hold that the authority of an arbitration panel appointed pursuant to §209.4, appointed pursuant to Local 896's petition, would not be diminished by the provisions of §209-a.1(e).

The first specific demand challenged by the City as nonmandatory is for the 20-year retirement plan authorized by the State Retirement and Social Security Law §384-d relating to firefighters and policemen. The City's argument is that this plan is unconstitutional in that it conflicts with the Age Discrimination in Employment Act of 1967. We rejected this claim in Watervliet PBA, 16 PERB ¶3026 (1983), saying:

> The authorities cited to us by the City do not represent any definitive determination that the State law is illegal (footnote omitted), and we do not have the authority to make such a determination on our own.

Since our decision in Watervliet, the United States Supreme Court has held, in EEOC v. Wyoming, ___ U.S. ___, 103 Sup. Ct. Rep. 1054 (1983), that the federal Age

Discrimination in Employment Act was applicable to the states, and it found a Wyoming statute mandating the retirement of game wardens at age 55 to be in unconstitutional conflict with the federal law. In his dissenting opinion, the Chief Justice indicated that the majority opinion would have the effect of declaring many state statutes unconstitutional, including New York State Retirement and Social Security Law §381-b. Relying upon this dissenting opinion, the City argues that §384-d is also unconstitutional.

That decision is not a definitive determination on the issue before us. There is a significant factual difference between the Wyoming statute and §384-d of the New York Retirement and Social Security Law, the statute challenged here. The Wyoming statute imposed involuntary retirement while §384-d merely authorizes the retirement of firefighters and policemen after 20 years service or at age 62. Under §384-d, the individual must elect to participate in the plan and may revoke that election. Moreover, the dissenting opinion in EEOC v. Wyoming is not controlling as to the constitutional status of

§381-b.[2/] We therefore find our analysis in Watervliet PBA to remain applicable and unaffected by EEOC v. Wyoming. Accordingly, we affirm the hearing officer's decision that Local 896's demand for the benefits made available by §384-d is a mandatory subject of negotiation.

The City's remaining challenge is to a compensation demand relating to out-of-title work. It provides: "Out of Title Work: . . . Acting-Officers should be paid at top grade." The City argues that since officers are not unit employees, the salaries of firefighters working as acting officers is also beyond the negotiating reach of Local 896. As the record stipulations of fact do not show the duration or regularity of the out-of-title work of the unit employees, we cannot find that acting officers have ceased to be unit employees. Accordingly, we affirm the decision of the hearing officer that the demand is "for premium pay for unit employees engaged in a special assignment [and therefore] a mandatory subject of negotiation."[3/]

[2/]The constitutionality of that law is now being challenged in an action brought by the EEOC against New York State. The State is arguing that, for the police employment covered by §381-b, mandatory retirement at age 55 is a bona fide occupational qualification. If established, this proposition would be a defense to the EEOC's lawsuit.

[3/]See City of Yonkers, 10 PERB ¶3056 (1977).

NOW, THEREFORE, WE ORDER that the exceptions herein be, and they hereby are, dismissed.

DATED: January 24, 1984
New York, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2C - 1/24/84

In the Matter of

UNITED UNIVERSITY PROFESSIONS, INC.,

Respondent,

-and-

CASE NO. U-6878

THOMAS C. BARRY,

Charging Party.

THOMAS C. BARRY, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Thomas C. Barry to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge against United University Professions, Inc. (UUP) on the ground that the facts as alleged do not, as a matter of law, constitute a violation of the Taylor Law.

Barry is in the negotiating unit represented by UUP and, not being a member of that union, he pays an agency shop fee to it pursuant to §208.3(a) of the Taylor Law. His charge contains six specifications, all of which relate to a "Conference on Academic Unionism" which UUP announced for the

fall of 1983. He complains that the conference, which would be financed in part by agency shop fee payments, would interfere with, restrain and coerce him in his right to refrain from joining or participating in UUP.

In the first specification of his charge Barry complains that UUP is engaged in "sinful and tyrannical" conduct which violates his constitutional rights by compelling him to support a conference designed to justify trade unionism. The Director dismissed this specification on the ground that §208.3(a) of the Taylor Law permits UUP to collect an agency shop fee from Barry and to spend part of that money in support of political and ideological causes so long as it has established and maintained a procedure providing for the refund to him, upon his demand, of his "pro-rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature...."

In his exceptions, Barry argues that the Director misinterpreted §208.3(a) of the Taylor Law, which imposes upon UUP the obligation to establish and maintain a refund procedure as a condition for collecting agency shop fees. Barry asserts that the statute neither imposes an obligation upon him to utilize that procedure nor precludes him from complaining about political or ideological expenditures of agency shop fee moneys by UUP in an improper practice

charge. We do not agree. Prior to the enactment of §208.3(a) in 1977, agency shop fees were barred by §§202 and 209-a of the Taylor Law. Section 208.3(a) both mandated the payment of agency shop fees by certain state employees and imposed a restriction on the use by the organization of agency shop fee monies for political and ideological purposes. It also provided a remedy where agency shop fee monies were spent for political and ideological purposes. That remedy is the exclusive one afforded by the statute to challenge political and ideological expenditures.

The second specification of Barry's charge complains that a refund after UUP has spent part of his money on its conference is inherently inadequate because "political power once generated and ideologies once promoted by the forced and illegal use of my money cannot be recovered and taken back. Their evil effect remains." This specification challenges the wisdom of §208.3(a) of the Taylor Law in permitting the use by the employee organization of the entire agency fee and requiring the return of that portion improperly spent only after a demand for refund is made. In effect, Barry asks us to find that UUP committed an improper practice when it followed the statutory procedure. This we are not authorized to do. As we have stated, the refund procedure is the only remedy provided by the statute.

Barry's third specification is that the refund procedure established and maintained by UUP is legally inadequate because it is inherently unfair in that all its steps are under the control of UUP. As noted by the Director, we have already determined that UUP's refund procedure satisfies the requirements of §208.3(a).[1/] We have also held that a nonmember filing for a refund need not exhaust the appellate steps of the refund procedure.[2/] Thus, at his own option, Barry can commence an action against UUP complaining that his refund is inadequate either upon receipt of that refund or upon the exhaustion of those appellate steps which Barry complains are in the control of UUP.

The fourth specification of Barry's charge is that UUP is, in essence, a political organization "whose chief function is to promote the political, social, economic and ideological ideals of trade unionism...". Thus, according to Barry, the rights that might have been accorded to it by §208.3 of the Taylor Law do not apply. We reject this argument. UUP, which is the certified representative of

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1/See UUP (Eson), 11 PERB ¶3074 (1978).

2/See UUP (Barry), 13 PERB ¶3090 (1980), conf'd. UUP v. Newman, 86 AD2d 734 (3rd Dept. 1982), 15 PERB ¶7001, mot. for lv. app. den. 56 NY2d 504, 15 PERB ¶7010 (1982)

the faculty of the State University,[3] is an employee organization within the definition of §201.5 of the Taylor Law and the meaning of §208.3(a) of that law. Accordingly, it is entitled to agency shop fee deductions provided that it has established and maintained an appropriate refund procedure.

In the fifth specification of his charge, Barry complains that UUP's sponsorship of the conference compromises his "academic freedom". Whether or not that is so is irrelevant to the merits of the charge herein, that the holding of such a conference violates §§202 and 209-a.2(a) of the Taylor Law.

The final specification of the charge is that UUP has discriminated against Barry and other nonmembers by refusing to represent them in actions against itself in connection with their complaints regarding the alleged misuse of agency shop fee monies. This specification is rejected because an employee organization is not obligated to represent unit employees in proceedings against itself.[4]

For the reasons stated herein we affirm the decision of the Director dismissing the charge of Thomas C. Barry and all its specifications.

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[3]See State of New York (State University), 12 PERB ¶3101.1 (1979).

[4]See East Ramapo Teachers' Association, 11 PERB ¶3036 (1978).

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

DATED: January 24, 1984
New York, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #2D-1/24/84

MERRICK UNION FREE SCHOOL DISTRICT,

Respondent,

-and- CASE NO. U-6546

MERRICK ASSOCIATION OF ADMINISTRATORS AND SUPERVISORS,

Charging Party.

COOPER, ENGLANDER & SAPIR, P.C. (ROBERT E. SAPIR, ESQ., of Counsel), for Respondent

PAUL J. DERKASCH, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Merrick Association of Administrators and Supervisors (Association) to a hearing officer's decision dismissing its charge that the Merrick Union Free School District (District) violated §209-a.1(a) and (d) of the Taylor Law by threatening that it would not agree to retroactive wage increases because the Association declared impasse. The hearing officer determined that the District's raising of the retroactivity issue flowed from bona fide negotiation

concerns and that it was neither intended to undermine the Association nor inconsistent with a sincere desire to reach an agreement.

The parties were negotiating an agreement to succeed one that expired on June 30, 1982, with the Association concentrating on a salary increase and the District on ten productivity proposals. At the fifth negotiation session, on December 16, 1982, the Association's spokesman indicated that the negotiations appeared to be deadlocked and that "he was going to declare impasse." The District's spokesman replied that he had no objection to the declaration of impasse. He further stated that as the passage of time had reduced the benefits that the District could realize from the attainment of its productivity demands during the current school year, he had questions as to whether salary increases should be given retroactively. It is this statement which precipitated the charge.

In support of its exceptions, the Association notes that the District's negotiator had expressed no reservation about paying a salary increase retroactively until after it announced its intention to declare impasse. It asserts that its announced intention to declare impasse terminated the face-to-face phase of the negotiations and, with it, the possibility of either party making new demands. Thus,

it contends, the District's raising the issue of retroactivity constituted a violation of its duty to negotiate in good faith and a per se violation of §209-a.1(a) of the Taylor Law.

Having considered the Association's argument, we affirm the decision of the hearing officer. Neither the announced intention of a party to declare impasse nor an actual declaration of impasse terminates negotiations in the sense that it precludes a party from making new demands. "The term 'negotiations' under the Taylor Law contemplates not only face-to-face bargaining, but the full range of conciliation procedures under CSL §209 . . . ." PBA of the City of New York, Inc., 9 PERB ¶3013 (1976).[1/]

Viewed in a light most favorable to the Association, the statement of the District's negotiator might be seen as a withdrawal of an earlier partial agreement to make any salary increase retroactive to July 1, 1982. While a party's withdrawal of a prior partial agreement might be indicative of an intention to frustrate the reaching of an agreement, there are circumstances where a party's withdrawal of a partial agreement may be justified. Peekskill City School District, 16 PERB ¶3075 (1983).

[1/]See also UFFA, Mount Vernon, 11 PERB ¶3095 (1978).

On the record before us, there is a reasonable basis for us to conclude that the District was prepared to grant some salary increases in return for some productivity concessions by the Association and its willingness to make the salary increases retroactive to July 1, 1982 was a tradeoff for the productivity improvements it expected to realize during the school year. Thus, as the time consumed by the negotiation reduced the current benefit that the District could realize from attainment of its productivity demands, it was not inconsistent with its duty to negotiate in good faith for it to question the retroactivity of the salary increases being negotiated. Accordingly, we find no violation of §209-a.1(d) of the Taylor Law.

We also reject the Association's argument that the District's action was inherently destructive of the right of unit employees to organize, and therefore a per se violation of §209-a.1(a) of the Taylor Law. Finding neither a per se violation nor evidence that the District's conduct was designed to deprive unit employees of such rights, we dismiss the allegation of a violation of §209-a.1(a) of the Taylor Law.

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

DATED: January 24, 1984
New York, 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

#3A - 1/24/84

TOWN OF ULSTER,

Employer,

-and-

CASE NO. C-2666

DONALD SHORT, et al.,

Petitioner,

-and-

LOCAL UNION NO. 445, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding[1/] having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that Local Union No. 445, 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

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1/ The proceeding was instituted by a petition seeking decertification of the intervenor as negotiating agent.

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 full-time and regular part-time patrolmen, sergeants and dispatchers.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local Union No. 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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: January 24, 1984
New York, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

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