STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-5/5/77

In the Matter of COUNTY EMPLOYEES UNIT, ORANGE COUNTY CHAPTER OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., the ORANGE COUNTY CHAPTER OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. and THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Upon the Charge of Violation of Section 210.1 of the Civil Service Law.	BOARD DECISION AND ORDER CASE NO. D-0131

This matter comes to us on the exceptions of the County Employees Unit of the Orange County Chapter of the Civil Service Employees Association, Inc. (unit) and the Civil Service Employees Association, Inc. (CSEA), from a hearing officer's decision which found that they had violated CSL §210 by causing, instigating, encouraging, condoning and engaging in a fourteen day strike against Orange County from March 17 through March 30, 1976.[1]

Several different exceptions were filed. Some go to statements in the hearing officer's decision that are only incidental to his determination that both CSEA and the unit are responsible for the strike. For example, they object to the hearing officer's statement that Mr. Vitale, a member of CSEA's staff, urged the unit employees to strike. They interpret the evidence as establishing only that Mr. Vitale was merely explaining the alternatives available to the employees. In our judgment, the record supports the hearing officer's interpretation of the facts on this point. Moreover, even if it did not, there is other evidence in the record which was cited by the hearing

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1 The charge had alleged that the Orange County Chapter of the Civil Service Employees Association, Inc. had also been involved in the strike, but the hearing officer dismissed this part of the charge for lack of supporting evidence.

officer and not covered by the exceptions that makes clear that CSEA must share in the responsibility for the strike. The other exceptions are directed to the hearing officer's ultimate conclusions, especially his rejection of the defense of "extreme provocation".

Having reviewed the record and the parties' oral arguments, we determine that the evidence supports his findings of fact and that his conclusions of law are correct.

FACTS

A dispute arose in the course of negotiations over a wage reopener clause in a multi-year agreement. After rejecting the recommendation of a factfinder, the County Executive submitted the dispute to the Orange County Legislature in accordance with CSL §209.3(d) on December 16, 1975. Thereafter, the county made no effort to resume negotiations.

Two separate actions were taken by the Legislature of Orange County following the submission to it of the dispute at impasse. First, it passed a resolution on December 29, 1975, effective January 1, 1976, freezing salaries at the 1975 level and eliminating all increments. Its second action was to hold a legislative hearing on January 23, 1976 and then to issue, on March 12, three categories of salary schedules for 1976. It was later that day that the members of the unit voted to strike.

CSEA and the unit contend that these facts constitute extreme provocation of the strike action.

DISCUSSION

The only issue for decision is whether the actions of the County and the Legislature can be found to have constituted extreme provocation for

the strike.[2]

The hearing officer, relying upon Matter of Bethlehem, 5 PERB ¶3010, rejected the contention that the county was under an obligation to negotiate after submission of the dispute to the Legislature. CSEA and the unit argue in their brief that Bethlehem is inapplicable here because the unilateral action of the Legislature on December 29, 1975 was contrary to Taylor Law requirements. They state:

> "Bethlehem stands for the proposition that an employer that holds a legislative hearing in compliance with the Taylor Law, need not negotiate after the hearing is held. The present case, however, involves a refusal of the employer to negotiate after illegal legislative action was taken." (emphasis in original)

We agree with the hearing officer that the principle enunciated in Bethlehem, which dealt with the public employer's obligations following submission of the dispute to the legislative body, governs the instant situation. The county, as the employer, having properly participated in all the negotiations procedures set forth in CSL §209 and having submitted the dispute for disposition by its legislative body pursuant to subdivision 3(d) of that section, while not precluded from doing so, was under no legal obligation to negotiate while awaiting a legislative determination. We also agree with the hearing officer that the action of the County Legislature on December 29, 1975 did not constitute extreme provocation. He found that this action was not the real cause of the strike. The record supports this finding. He also found that the striking organizations had available to them grievance procedure

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2 The unit had also filed a charge against Orange County alleging that the County had violated CSL §209-a.1(d) by failing to negotiate in good faith with it. A consolidated hearing was held on both the improper practice charge and the charge herein. In a single opinion covering both cases, the hearing officer dismissed the improper practice charge. No exceptions were filed regarding that part of his decision. Under our Rules, that part of his decision is now final, with no further consideration of it by us. We do consider, however, whether the conduct charged nevertheless constituted extreme provocation.

recourse for alleged breach of the agreement to pay increments which they sought initially, but then declined to pursue diligently. They cannot persuasively claim extreme provocation when they did not fully assert their grievance through available legal channels, but resorted to the strike instead.

The record establishes that this fourteen-day strike had a substantial, through not crippling, impact on public health and welfare. In view of the responsibility of both CSEA and the unit for the strike, and in the absence of extreme provocation, we determine, on the basis of the length and impact of the strike, that the dues deduction privileges of both parties, for members employed by Orange County, should be suspended for a period of one year.

ACCORDINGLY, WE ORDER that Orange County withhold the dues deduction privileges of the County Employees Unit of the Orange County Chapter of the Civil Service Employees Association, Inc., and the Civil Service Employees Association, Inc. for a period of twelve months, commencing on the first practicable date. Thereafter, Orange County shall deduct no dues on behalf of either until each affirms "that it does not assert the right to strike against any government, or to assist or participate in such strike, or to impose an obligation to conduct, assist or participate in such a strike", as is required by

the provisions of CSL §§210.3(g) and 207.3(b).

DATED: Albany, New York
May 5, 1977

Robert D. Helsby, Chairman

Joseph R. Crowley

Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-5/5/77

In the Matter of	
CITY OF BINGHAMTON	BOARD DECISION AND ORDER
upon the Application for Designation of Persons as Managerial or Confidential	CASE NO. E-0336

The City of Binghamton (employer) filed an application on May 3, 1976 seeking the designation of the chief and assistant chiefs of police and the chief and assistant chiefs of fire as managerial in accordance with the criteria set forth in CSL §201.7.[1] After a hearing, the Director of Public Employment Practices and Representation (Director) granted the application with respect to the chief of police, the assistant chief of police-staff section, the chief of fire and the four assistant chiefs of fire. He denied the application with respect to the assistant chief of police-operations section, a position that had been vacant for several years.

The employer, the Binghamton Firefighters, Local 729, AFL-CIO, I.A.F.F. (IAFF) which represents the fire chief and assistant fire chiefs, and the Binghamton Police Benevolent Association, Inc. (PBA) which represents the police chief and the assistant police chiefs, all filed exceptions. Each submitted a brief in support of its exceptions.

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1 Section 201.7 defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, persons...who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board....Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment."

The employer's exceptions urge a determination that the position of assistant police chief-operations section, is a managerial position and should be so designated even though it is currently vacant. In support of this it argues that it may wish to appoint someone to that position in the future and, if it does so, the job specifications require that the person so appointed be designated managerial.

The IAFF's exceptions urge reversal of the hearing officer's determination that the fire chief and the assistant fire chiefs are managerial. IAFF argues that none of them has any role in the formulation of policy in that all policy is formulated by the Mayor in his capacity as Commissioner of Public Safety. In this connection, it contends that the Second Class Cities Law, Sections 131, 135 and 137, compel such a conclusion. It further argues that all are supervisors and have no role in collective negotiations and that their role in contract or personnel administration is of a routine nature. Moreover, it argues that the hearing officer should not have permitted evidence regarding any of the standards contained in §201.7 other than the formulation of policy, because that was the sole basis stated in the application.

The PBA's exceptions urge reversal of the hearing officer's determination that the police chief and the assistant police chief-staff section are managerial. PBA, too, argues that neither has any role in the formulation of policy in that all policy is formulated by the Mayor in his capacity as Commissioner of Public Safety. It, too, further argues that both are supervisors who have no role in collective negotiations and whose role in contract or personnel administration is of a routine nature.

We reject the employer's exceptions. A position that has been vacant for an extended period of time cannot be designated "managerial" under the Taylor Law. When a vacant position is filled, the assigned job duties might or might not be as specified in the job description. In determining that an

employee is "managerial", this Board must consider what the actual responsibilities of an actual employee in the job are, and not what they might be.[2] We also determine that the hearing officer was correct in admitting evidence concerning standards contained in §201.7 other than the formulation of policy, and that the Director was correct in considering that evidence. It is the statute, and not the allegations in the application, that sets the standards. Moreover, neither IAFF nor PBA has been prejudiced by the admission of evidence relating to the other statutory standards.

Having reviewed the evidence, we affirm so much of the Director's decision as finds the police chief and fire chief to be managerial employees. The PBA would have us apply the wrong test in determining that the Mayor, acting in his capacity of Commissioner of Public Safety, has exclusive authority to formulate policy for the Police Department. It would have us reason that, because the Mayor sometimes does not accept the chief's recommendations, the chief has no role in policy formulation. The evidence, however, establishes that the chief does make significant day-to-day decisions in the operation of the Police Department. It also establishes that he has been consulted on negotiations and that he makes meaningful recommendations regarding employee discipline, a significant aspect of contract and personnel administration. The fire chief, too, is the operating head of his department and is responsible for its day-to-day affairs. For example, in answer to a question about when the Mayor intervenes in personnel decisions involving the transfer of employees, the fire chief answered, "Only when he gets word of it and it is something he does not approve of".

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2 Assignment of out-of-title work may give rise to a proceeding under other parts of the Civil Service Law, but has no relevance here.

We reject the Director's determination insofar as it finds the assistant police chief and the assistant fire chiefs to be managerial. The evidence does not support the conclusion that any of them formulates policy or that any of them has a substantial role in collective negotiations, contract, or personnel administration. The four assistant fire chiefs are staff supervisors. The duties of the assistant police chief are also supervisory. For example, while the chief has been consulted on negotiations, the assistant chief has merely been informed of what agreements were reached.

In Matter of Board of Education, School District No. 1 (Hempstead), 6 PERB 3001 (1973), affirmed Board of Education, School District No. 1 (Hempstead) v. Helsby, 42 AD 2d 1056 (1973), 35 N.Y. 2d 877 (1974), we determined that school principals were not managerial employees. At the time of the Hempstead decision, there was in effect a legislative enactment, L. 71, c. 503 §5, expressing a public policy that administrative employees on the same level as principals who were already in a negotiating unit should not be declared managerial unless the evidence was strongly persuasive that the statutory standards were met. This would apply to the assistant chiefs. The statement of public policy was amended in 1975 (L. 75, c. 854) to extend the strict test regarding the evidence to administrative employees on the same level as principals even if they had not been in negotiating units in the past. The evidence in the record establishes that the assistant chiefs here exercise a lower level of authority and have lesser supervisory responsibilities than did the school principals in Hempstead.

ACCORDINGLY, we designate the chief of fire and the chief of police as managerial, and we deny the application with respect to

the assistant chiefs of fire and the assistant chiefs of police.

DATED: Albany, New York
May 5, 1977

Robert D. Helsby, Chairman

Joseph R. Crowley

Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :

WAPPINGERS CENTRAL SCHOOL DISTRICT, :

Employer, :

- and - :

WAPPINGERS FEDERATION OF TRANSIT, CUSTODIAL AND MAINTENANCE WORKERS, :

Petitioner, :

- and - :

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

Intervenor. :

#2C-5/5/77

CASE NO. C-1454

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 Wappingers Federation of Transit, Custodial and Maintenance Workers

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

Unit: INCLUDED: Custodians, groundsmen, driver-cleaner, custodian-nights, head custodian-elementary and head groundsmen, elementary-nights, secondary, secondary-nights, maintenance man, bus driver-full time, driver cleaner (38 weeks), part-time bus driver (5 hour day) automechanic I and head maintenance man, automechanic II, couriers and audio-visual technicians.

EXCLUDED: All others.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with Wappingers Federation of Transit, Custodial and Maintenance Workers

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 5th day of May, 1977.

Robert D. Helsby, Chairman

Joseph R. Crowley

Ida Klaus

4715

PERB 58
(10-75)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
POTSDAM CENTRAL SCHOOL DISTRICT,	:	#2D-5/5/77
Employer,		
- and -	:	
POTSDAM CENTRAL SCHOOL SERVICE EMPLOYEES UNIT, NYSUT,	:	CASE NO. C-1444
Petitioner,	:	
- and -		
POTSDAM CENTRAL SCHOOL UNIT OF THE ST. LAWRENCE COUNTY CHAPTER OF THE CIVIL SERVICE EMPLOYEES 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 Potsdam Central School Unit of the St. Lawrence County Chapter of the Civil Service Employees Association
has been designated and selected by a majority of the employees of the above-named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: INCLUDED: All non-teaching personnel employed by the District.

EXCLUDED: Food Service Manager, Supervisor of Buildings and Grounds, Supervisor of Transportation.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Potsdam Central School Unit of the St. Lawrence County Chapter of the Civil Service Employees Association
and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 5th day of May , 1977 .

Robert D. Helsby, Chairman

Joseph R. Crowley

Ida Klaus

471

PERB 58
(10-75)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :

HICKSVILLE UNION FREE SCHOOL DISTRICT, :

Employer, :

- and - :

HICKSVILLE CONGRESS OF TEACHERS, NYSUT, AFT, AFL-CIO, NYEA, NEA, :

Petitioner, :

- and - :

NASSAU EDUCATIONAL CHAPTER, CIVIL SERVICE EMPLOYEES' ASSOCIATION, INC., :

Intervenor. :

#2E-5/5/77

CASE NO. C-1477

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 HICKSVILLE CONGRESS OF TEACHERS, NYSUT, AFT, AFL-CIO, NYEA, NEA

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

Unit: INCLUDED: All Clerical Personnel

EXCLUDED: All Other Employees

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with Hicksville Congress of Teachers, NYSUT, AFT, AFL-CIO, NYEA, NEA

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 5th day of May , 1977 .

Robert D. Helsby, Chairman

Joseph Crowley

4717

Ida Klaus

PERB 58
(10-75)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
PEEKSKILL ASSOCIATION OF EDUCATIONAL SECRETARIES, PEEKSKILL FACULTY ASSOCIATION/NYSUT, Petitioner,	:	#2F-5/5/77
- and -	:	
PEEKSKILL CITY SCHOOL DISTRICT, Employer,	:	CASE NO. C-1434
- and -	:	
PEEKSKILL ASSOCIATION OF EDUCATION SECRETARIES, WESTCHESTER COUNTY CHAPTER, CIVIL SERVICE EMPLOYEES 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 Peekskill Association of Educational Secretaries, Peekskill Faculty Association/NYSUT

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

Unit: INCLUDED: Full-time typists, clerk-typists, stenographers, senior stenographers, account clerks and account clerk-typists.

EXCLUDED: Secretary to Superintendent of Schools, administrative assistant, senior stenographer to chief negotiator and account clerk/payroll.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Peekskill Association of Educational Secretaries, Peekskill Faculty Association/NYSUT

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 5th day of May, 1977.

Robert D. Helsby, Chairman

Joseph R. Crowley

Joseph R. Crowley

4718

Ida Klaus

Ida Klaus

PERB 58
(10-75)