STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-9/15/76

In the Matter of Environmental Protection Administration of the City of New York, Respondent, -and- Henry Dancygier and Local 375, AFSCME, AFL-CIO, Charging Parties.	BOARD DECISION & ORDER CASE NO. U-1635

This matter comes to us on the exceptions of Henry Dancygier and Local 375, AFSCME, AFL-CIO (charging parties) from a hearing officer's decision dismissing their charge. That charge alleges that the Environmental Protection Administration of the City of New York (respondent) violated Civil Service Law §209-a.1(b) and (c)[1] in that it failed to give Dancygier a permanent appointment as Senior Air Pollution Control Engineer at the end of his probationary period in that position because of Dancygier's protected activities in behalf of Local 375. The hearing officer found that Dancygier had been a probationary employee in the position of Senior Air Pollution Control Engineer and that he had been denied a permanent appointment at the end of his probationary period. He also found that Dancygier had been president of Chapter 32 of Local 375, and that this was known to his superiors, Michael Saed and Thomas Echrich, who had recommended against a permanent appointment. However, he concluded that neither Saed nor Echrich was motivated by anti-union animus in recommending against the permanent appointment of Dancygier, and he therefore determined that respondent's action was not violative of §209-a.1(b) or (c).

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1 These sections of the Act make it an improper employer practice deliberately "(b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization."

The charging parties have specified several exceptions to the hearing officer's findings of fact and conclusions of law. In essence, they argue that Saed and Echrich intentionally and unnecessarily assigned duties to Dancygier which, if performed, would have compromised him in his capacity as president of the chapter. They further argue that respondent's dissatisfaction with Dancygier's performance as a Senior Air Pollution Control Engineer was occasioned by his continued execution of union responsibilities that were in conflict with the duties assigned by Saed and Echrich. Finally, they argue that these duties were not inherent in the position of Senior Air Pollution Control Engineer.

The hearing in this proceeding was an extensive one; it lasted seven days and produced a 900-page record and many exhibits. Our review of the entire record clearly reveals the basic facts and their implications.

There are several positions in the range of engineering titles within the Bureau of Engineering of the Department of Air Resources of the Environmental Protection Administration. In ascending levels of responsibility and pay they are: Air Pollution Engineer Trainee, Assistant Air Pollution Control Engineer, Air Pollution Control Engineer, Senior Air Pollution Control Engineer, and Administrative Engineer. Higher levels differ from those below them in that the work assigned requires a relatively greater degree of independent initiative and judgment. Incumbents of the upper three levels also have supervisory responsibilities. The examination notice for Senior Air Pollution Control Engineer indicates that an incumbent "[s]upervises the activities of a section in air pollution control engineering work".

After his probationary promotion to the position of Senior Air Pollution Control Engineer, Dancygier was assigned to the Fossil Fuels Division. Echrich, a Senior Air Pollution Control Engineer, was the head of that division; he was directly responsible to Saed who was director of the Bureau of Engineering. Dancygier was designated deputy head of the Fossil Fuels

Division. Division head and deputy head are office titles. They carry with them specific duties which are consistent with the more generalized statement of duties specified in the Civil Service job description for Senior Air Pollution Control Engineer.

Among Dancygier's responsibilities was the imposition of discipline upon subordinates. He told Echrich that his position as union president would conflict with his particular duty, and Echrich responded that he would relieve Dancygier of it and perform it himself. Echrich and Saed were however dissatisfied with other aspects of Dancygier's performance.

In some instances, Echrich and Saed attributed Dancygier's shortcomings to attitudes and approaches that were conditioned by his union position. For example, Dancygier did not satisfy responsibilities for maintaining employee productivity levels. His explanation for low productivity was a criticism of employer practices that were objectionable to the union. He argued that these practices caused low morale, which in turn, had a negative effect upon productivity. This gave rise to a conclusion that Dancygier's performance was impaired by reason of Dancygier's conviction that he had to advocate the union position whenever that position had a bearing upon his work, even though his advocacy would diminish the effectiveness of his performance as a supervisor. Thus it seems clear that Saed and Echrich were not disturbed by Dancygier's union position as such, but only by the deficiency in his performance which by his own statement related to his union activity.

Charging parties concede that there was a conflict between Dancygier's union position and his assignment as deputy head of the Fossil Fuels Division. They argue, however, that the conflict was not a necessary one because the duties assigned to Dancygier as deputy head were not inherent in the title of Senior Air Pollution Control Engineer and that the duties that are in fact inherent in that title need not have conflicted with Dancygier's union

position. We disagree. Our reading of the Civil Service job description persuades us that it contemplates the work assigned to Dancygier as deputy head. Thus on the record before us we have a situation where a supervisory employee refuses to perform his normal and appropriate duties because such employee takes the position that such duties conflict with his responsibility to the employee organization. We conclude on these facts that the employer may deny this employee promotion to such supervisory position.

Once before a related question came before us. In Matter of Board of Education CSD #1 Morris, 3 PERB ¶3078 (1970) we found that a public employer had committed an improper practice when it abolished an "extra compensation" supervisory position of vice principal because the incumbent was the chief negotiator for the teachers association. Recognizing the conflict of interest between the administrative responsibilities of the vice principal and the union responsibilities of the chief negotiator, we nevertheless determined that so long as the position of vice principal remained within the negotiating unit, the incumbent had a protected right to function as union negotiator absent any evidence of the incumbent's failure to perform his assigned duties. We indicated that the remedy available to respondent in that case was to seek redetermination of the negotiating unit so as to delete the position of vice principal.

The instant situation is distinguishable from the one in the Morris case in that the record demonstrates that Dancygier was not performing the necessary and appropriate responsibilities of his job satisfactorily because of his union position. There was no similar evidence in the Morris case. So long as an employee performs satisfactorily, a public employer may not deny him a promotion within the negotiating unit merely because his union responsibilities may present an apparent conflict with responsibilities of his job. Such conflict is ordinarily a personal matter for the employee himself

to resolve. However, if the basis on which he resolves that conflict impairs his performance in the position to which he was provisionally promoted, the employer may fail him. Such was the case here.

ACCORDINGLY, we confirm the decision of the hearing officer; and

WE ORDER that the charge herein be and hereby is dismissed in its entirety.

Dated: New York, New York
September 15, 1976

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-9/15/76

In the Matter of

ELLENVILLE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, and JAMES D. EVERGETIS, SUPERINTENDENT OF SCHOOLS,

Respondents,

-and-

WILLIAM LENARD and THE ELLENVILLE TEACHERS ASSOCIATION,

Charging Parties.

BOARD DECISION AND ORDER

CASE NO. U-1682

This matter comes to us on the exceptions of Ellenville Central School District Board of Education and James D. Evergetis, respondents herein, to a decision of a hearing officer finding them in violation of Civil Service Law Sections 209-a.1(a) and (c) in that they had commenced proceedings to reprimand Mr. William Lenard, a high school mathematics teacher in the School District and president of the Ellenville Teachers Association, for the purpose of interfering with the rights guaranteed him by Civil Service Law Section 202. Respondents specify nine exceptions to the hearing officer's decision. These exceptions complain about several of the findings of fact and conclusions of law of the hearing officer and of the remedy contained in his recommended order.

On several critical issues of fact there is a direct conflict in the testimony of witnesses. In such instances, the hearing officer indicates his findings regarding the credibility of the witnesses. There is no basis in the record for not sustaining his resolution of these credibility issues. Having reviewed the record, we accept his findings of fact and conclusions of law and we confirm his recommended order.

FACTS

Much of the statement of facts is a direct quotation from the hearing officer's decision, and is so indicated.

"William Lenard, a mathematics teacher in the secondary school, has taught in the School District for 14 years. As of the time of the hearing and during the period of all relevant events, Mr. Lenard was president of the ETA."

"On April 24, 1975, while on his way to a meeting, as president of the ETA, with several teachers in the elementary school faculty room, Mr. Lenard encountered Milton Lachterman, principal of the elementary school, in a corridor of that school....[A]fter each greeted the other, he stated to Mr. Lachterman in a conversational tone: 'Tell me, Milt, is is true that you didn't recommend Sheryl Wolff for tenure?' [footnote omitted] Mr. Lachterman replied: 'Whatever you read in the paper. Whatever you read in the paper.' Mr. Lenard then stated, also in a conversational tone: 'That's a remark I'd expect from a whore and not an elementary school principal.'...[N]o children were close enough to hear their conversation."

Mr. Lachterman informed James Evergetis, the Superintendent of Schools, of the incident, and he was instructed to submit a written statement of the facts. Thereafter, Mr. Evergetis scheduled a meeting with Mr. Lachterman, Mr. Lenard and himself.

"Sometime after the meeting..., Mr. Evergetis met with the Board of Education and strongly recommended that Mr. Lenard be reprimanded and charges be instituted against him under Section 3020-a of the Education Law to accomplish such a reprimand. The Board, after discussing the matter with Mr. Evergetis, voted that the charge be issued."

That charge alleged that Mr. Lenard had engaged in conduct unbecoming a teacher and conduct displaying contempt for the elementary school principal.

"Hearings were conducted under Section 3020-a of the Education Law, after which the hearing panel recommended that the charge be dismissed. That recommendation was based on the hearing panel's finding that the evidence presented was insufficient to sustain either charge. After considering the proceedings before the hearing panel and its recommendation, the School District, by a 5 to 4 vote of its Board, reprimanded Mr. Lenard."

"Prior to the incident which is the subject of the proceeding, Mr. Lenard had numerous formal and informal meetings with principals, including Mr. Lachterman, to discuss matters of concern to the ETA. These included many meetings in the corridors of the school buildings. On several occasions in prior meetings, albeit apparently more formal ones, vulgarities were used by ETA representatives without objection by the School District. On one occasion, in response to a statement made by Mr. Lachterman in a meeting in 1974, Mr. Lenard stated to him "That's the kind of remark only a son of a bitch would make.'"

Mr. Evergetis had been upset over the fact that since he had become Superintendent, Mr. Lenard had filed about fifteen grievances, whereas in the prior year only four had been filed, and he had complained that Mr. Lenard was a "troublemaker".

THE HEARING OFFICER'S CONCLUSIONS

The hearing officer concluded that the incident in the hallway between Lenard and Lachterman was an activity protected by CSL Section 202 because Mr. Lenard, acting on behalf of a negotiating unit member, was making an inquiry that was related to the possible filing of a contract grievance. Moreover, "the meeting in the corridor was one which he had been given long-standing reason by the School District to believe he could engage in." Finally, "[h]is comment was in language of a nature never previously considered unacceptable.... It was not intended to be heard by anyone but the principal and there is no

evidence that it was."

While an employer need not be required to tolerate vulgarity or insults from employee representatives that are not ordinarily acceptable in their relationship with each other, it is apparent here that the obscenity was not so offensive to the employer as to be the real reason for bringing the disciplinary charge. Confirming the hearing officer's findings of fact and conclusions of law, we determine that the Ellenville Central School District Board of Education and its agent, James E. Evergetis, Superintendent of Schools, violated Civil Service Law Sections 209-a.1(a) and (c) by the institution of the charge and the imposition of the reprimand; and

WE ORDER respondents to rescind the reprimand and remove it from the personnel file of William Lenard and any other place that it may have been filed or recorded.

DATED: Albany, New York
September 15, 1976

Robert D. Helsby, Chairman

Joseph R. Crowley

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