

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-4/15/74

In the Matter of	:	
MASSAPEQUA UNION FREE SCHOOL DISTRICT	:	<u>BOARD DECISION</u>
NO. 23,	:	
	:	<u>AND ORDER</u>
Respondent,	:	
-and-	:	
CIVIL SERVICE EMPLOYEES ASSOCIATION,	:	<u>CASE NO. U-0935</u>
INC., NASSAU CHAPTER,	:	
Charging Party.	:	

The Civil Service Employees Association, Inc., Nassau Chapter (CSEA) filed, on July 16, 1973, an improper practice charge against the Massapequa Union Free School District No. 23 (employer) alleging a violation of Sec. 209-a.1(d) of the Public Employees' Fair Employment Act (Act).¹ The gravamen of the charge is that the employer has "refused to pay increments and longevity payments due its employees July 1, 1973."²

The hearing officer found that "in withholding all annual increments" the employer made a unilateral change in terms and conditions of employment and thus violated Sec. 209-a.1(d).

The employer filed the following exceptions to the hearing officer's decision:

- (1) Under the expired contract between the parties, the employees were not entitled to an incremental advance and that the cost of such incremental advances was a cost factor to be considered in negotiations for a successor contract;

¹ This section makes it an improper employer practice to deliberately "...refuse to negotiate in good faith with the duly recognized or certified representative of its public employees."

² It was stated at the close of the hearing that the charge as to the longevity payments would be withdrawn if the payments were made. The attorney for the employer has stated in his brief that such payments were made and this statement has not been challenged. We will deal, therefore, only with the charge as to the failure to pay increments.

(2) The employer acted under a substantial claim of contractual privilege and this Board should defer to the grievance procedures of the contract;

(3) The charge should be dismissed for failure of the charging party to serve a copy thereof upon the employer in accordance with Sec. 204.1(c) of the Rules of the Board.

We shall consider these exceptions in inverse order.

The record supports the contention of the employer that CSEA did not serve a copy of the subject charge upon the employer as required by Sec. 204.1(c) of the Rules of this Board.³ A witness for the employer testified a copy was not delivered to the office of the employer by CSEA. CSEA offered no evidence to contravene such testimony. The employer urges on this record that the charge herein should be dismissed. We do not agree; rather, we adopt the reasoning and conclusion of the hearing officer on this issue. The charge was filed on July 16, 1973 and the employer did receive a copy of the charge on July 21, 1973 in a communication from this Board. There is no showing in this record, nor is it claimed by the employer, that it was in any way prejudiced in not receiving a copy of the charge prior to July 21st. Thus, we do not sustain this exception.

The second exception is that the employer acted under a substantial claim of contractual privilege and this Board should, therefore, defer to the grievance procedure provided in the agreement between the parties.

This Board has stated that not every violation of a contract is per se an improper practice and that it is not the function of this Board to police and enforce contracts between

³ This section of the Rules has since been repealed. Rule 204.2(a) now provides that a copy of the charge will be sent to the respondent with the notice of hearing, the procedure followed in this case.

public employers and employee organizations. Further, this Board has indicated that where the conduct complained of might constitute an improper practice as well as a contract violation, it will defer to the grievance-arbitration procedures agreed upon by the parties where the charged party asserts, with a basis therefor, that its action was predicated on a substantial claim of contractual privilege. The basis for this deferral policy is that the basic issue ~~is one of contract interpretation and that the parties had bargained~~ for the arbitrator's interpretation.

Thus, assuming arguendo that the employer predicated its conduct on its interpretation of the contract (this will be discussed later), this exception is without merit. It has been our practice not to defer to a grievance procedure unless it terminates in binding arbitration, Matter of Board of Education of the City of New York, 6 PERB 3006 (1973). The contract herein does not so provide; rather, it provides only for a procedure in the nature of advisory arbitration.

The final exception deals with the application of the Board's "Triborough" doctrine, Matter of Triborough Bridge and Tunnel Authority, 5 PERB 3037 (1972). The facts of the Triborough case are not too dissimilar to the facts here. There, the parties in 1969 agreed to an incremental system based on length of service which was incorporated into the written agreement. There was no express provision in the Triborough contract as to whether the incremental system would survive the expiration of that contract. The contract expired on June 30, 1971 while the parties were negotiating a successor agreement. After expiration of the agreement, the employer maintained the salary and fringe benefit provisions of the contract, but refused to pay increments to those employees whose anniversaries of employment occurred subsequent to the expiration of the contract. This Board held that this withholding of the increment constituted a unilateral change in a term and condition of employment and thus was a violation of the Act. We reasoned that the statutory prohibition against an employee organization

resorting to self-help by striking imposed a correlative duty upon a public employer to refrain from altering terms and conditions of employment unilaterally during the course of negotiations.

The employer in the instant case does not appear to challenge the basic concept of the Triborough decision that after expiration of a contract and during the course of negotiations the employee organization is entitled to a maintenance of the status

~~quo as to terms and conditions of employment provided in the~~ expired contract. During the course of negotiations for a successor contract, the employer adopted the following resolution:

"RESOLVED, that the status quo continue and that all of the terms and conditions of employment contained in the aforesaid described expired agreement be continued in effect, specifically including salaries, retirement and longevity increases after ten (10) and fifteen (15) years of consecutive service, sick leave, fully paid hospitalization, personal days, and grievance procedure until a new agreement has been concluded."

However, the employer contends that the Triborough doctrine should not apply to incremental advances. In this connection it further resolved:

"that the maintenance of the status quo as aforesaid, expressly shall not include advancement of employees to the next step on the salary schedule, inasmuch as the expired agreement specifically provides that 'steps on the salary scale do not reflect years of service', and further that the cost of such advancement is estimated at \$11,169.00, and such factor has been and should accordingly continue to be the subject of negotiations and a factor to be considered by the parties therein."

Moreover, the employer alleges that it was authorized by contract to withhold increments.

The record reveals that in 1958 there was a twelve-step salary schedule and that on July 1st of each year each employee received a step or incremental increase. This practice continued until 1969 when, in the course of negotiations, the twelve steps were reduced to nine.

The employer produced documentary evidence that in the 1969 negotiations for the 1969-70 contract it proposed the following

language to be included in the contract concomitant with the reduction of steps from twelve to nine that "Steps appearing on the salary schedule do not refer to years of service...." The employer's business manager, Stayne, testified that he proposed the language to CSEA saying that the employer wished to be in a position to withhold the increment of an employee and that the increments should not be automatic. In essence, it was the employer's position that all increases for an ensuing year should be the subject of negotiations. CSEA rejected the proposed language and the employer proposed it again in 1970.

CSEA disputes that the employer proposed such language. Rather, it contends that it suggested this language in 1970 for the 1970-71 contract. Its stated purpose in making this proposal was to ensure that an employee's eligibility for a longevity increase after ten years of service would not be clouded by the reduction in salary steps from twelve to nine.⁴ The employer agreed to the inclusion of this language in the agreement and it has remained in successor one-year agreements to date.

It does not appear necessary to resolve the question as to who first proposed this language for it may be that each accepted the language for its own purpose as set forth above. Whatever else each of the parties may have intended to accomplish by the language in question, it is clear that CSEA did not intend to waive increments. As we have noted in Matter of Mount Vernon, 5 PERB 3100 (1972), a waiver by an employee organization must be explicit.

It is significant to note that, although since 1969 the employees did not receive the increments on July 1st and the increments were not paid until an over-all agreement had been negotiated, the increments were always paid retroactively to July 1st.

⁴ CSEA's concern in this regard is somewhat difficult to understand since it is clearly provided in Article VI.4 of the agreement and again on the salary schedule that longevity payments are due after ten consecutive years of service. There is no reference to or incorporation of salary steps in longevity eligibility.

In the negotiations subsequent to 1969 it appears to have been the practice of the employer to attempt to negotiate an across-the-board increase which would absorb the increment, but CSEA consistently rejected such proposals and the settlements always included the increments plus a percentage increase.

Finding no waiver of increments by CSEA, we now consider the principles underlying our Triborough decision in order to ascertain its applicability to increments. The answer is that the Triborough case involved increments and, as such, is directly in point.

Although our Triborough decision was pronounced solely in terms of reference to the public sector in general and the New York Act in particular, it is a policy long recognized in the private sector. It would seem to be well settled under the National Labor Relations Act that an employer may not cancel insurance plans, eliminate holidays, vacations, sick leave or cut wages in order to bring economic pressure on employees to accept the employer's offer or to abandon the employees' demands, Borden, Inc., 196 NLRB No. 172 (1972), 80 LRRM 1240. Further, as pointed out by the Supreme Court of the United States, the rights of employees to such benefits as severance pay, vacation pay, and pension benefits do not automatically terminate upon the expiration of the agreement establishing them and the employer is bound to honor them beyond the term of the contract, Wiley v. Livingstone, 376 U.S. 543; Steelworkers v. Porter, 64 LRRM 2201 (D.C., W.Pa.1966). This is the thrust of the Triborough decision and, as the Board has indicated, the reasons therefor are far more compelling in the public sector of this State because of the strike prohibition.

In the instant case, the incremental system was a well established term and condition of employment. The employer may not unilaterally change such term and condition. The employer's contention, based on the contract language and practice that it had the right to withhold the increment, would have validity only if there had been a waiver by CSEA of its right to bargain on this

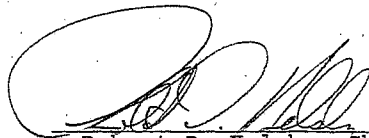
issue. As we have pointed out, CSEA never agreed to waive its rights to negotiate on the issue of annual increments.

The final contention of the employer that increments are a cost factor which should be the subject of negotiations is not without merit, but the fact that they are a cost factor provides no basis for the unilateral abolition as a negotiating tactic.

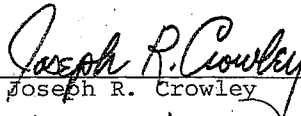
NOW, THEREFORE, IT IS ORDERED that Massapequa Union Free

~~School District No. 23~~ cease and desist from refusing to grant increments in accordance with the contract that expired on July 1, 1973, retroactive payment of such increments to include interest thereon at the rate of three percent per annum.

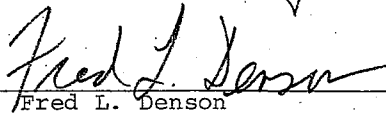
Dated: Albany, New York
April 15, 1974



Robert D. Helsby, Chairman



Joseph R. Crowley



Fred L. Denson

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
VILLAGE OF ELMSFORD,	:	<u>BOARD DECISION</u>
Respondent,	:	
-and-	:	<u>AND ORDER</u>
ELMSFORD POLICE DEPARTMENT,	:	
Charging Party.	:	<u>CASE NO. U-0795</u>

This matter comes to us on the exceptions filed by the Elmsford Police Department (charging party) to the hearing officer's decision dismissing a charge that the Village of Elmsford refused to negotiate in good faith, thus violating CSL §209-a.1(d). The alleged violation was a payment by the Village of a salary increase to three patrolmen in violation of its contract with the charging party and without the consent of the charging party. In its defense, the Village has alleged that the salary increases had been granted pursuant to its contract with the charging party.

The hearing officer concluded that the issue between the parties involved the interpretation of their contract and that no question involving a duty to negotiate in good faith had been raised. Accordingly, he dismissed the charge. In its exceptions, the charging party argues that the hearing officer's decision is contrary to the evidence which indicates that neither explicitly nor implicitly did the contract provide salary increases for the three policemen; hence, what the Village did amounts to a unilateral change of terms and conditions of employment.

Having reviewed the evidence and considered the arguments of the parties, we ascertain that the hearing officer's findings of fact and conclusions of law are correct. The contract between the parties covering the period from June 1, 1971 to May 31, 1972 had eliminated the entrance grade for policemen, but was silent about the implications of this circumstance upon the salaries

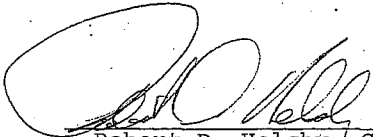
of policemen in higher grades. When a new policeman was employed under the agreement at a salary higher than the former entrance level, three other policemen whose salaries were at lower grades grieved that their salaries, too, should be raised because, in effect, the change in the entrance level bumped their salary levels upward. This proposal was viewed with disfavor by other policemen whose salaries were at the top of the scale, unless their salaries, too, would be raised. The charging party supported this latter

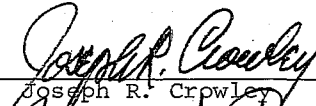
position. Although the contract did not provide for the arbitration of grievances, the Village gave it conscientious attention and decided in favor of the three grieving policemen.

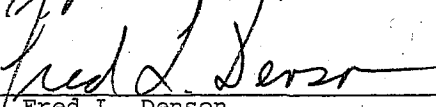
We agree with our hearing officer that the sole question was one of contract interpretation, and we adopt his rationale:

Accordingly, the charge should be, and hereby is,
dismissed in its entirety.

Dated: Albany, New York
April 15, 1974


Robert D. Helsby, Chairman


Joseph R. Crowley


Fred L. Denson

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#20-4/15/74

In the Matter of :

YONKERS HOUSING AUTHORITY, :

Respondent, :

BOARD DECISION

AND ORDER

-and-

WESTCHESTER CHAPTER, CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC., :

Charging Party. :

CASE NO. U-0840

After reviewing the record, the exceptions filed and hearing oral argument, we adopt the finding of the hearing officer that respondent violated §209-a.1(a) and (d) of the Act in failing to pay the increments due on January 1, 1973. In reaching this conclusion we are not unmindful that respondent's salary schedule must be approved by federal and state agencies. However, respondent has not demonstrated on this record that the requirements of such agencies precluded the payment of the incremental advances due on January 1, 1973. The hearing officer found, and we agree, that no further approval by such agencies was "required to pay the increments in January 1973...."

The hearing officer's recommended order provided in part that the respondent make restitution to those employees who were entitled to the increments on January 1, 1973. However, the hearing officer further recommended that the payment of \$250 made in June 1973 retroactive to January 1, 1973 be treated as a set-off against the amount due for the increment.

The hearing officer apparently concluded that this payment of \$250 was in lieu of the increment. We are not persuaded that the record establishes that the payment of \$250 was in lieu of the increment. The chief accountant of respondent was a witness, but his testimony was silent on this point. O'Connor, a field representative of CSEA was called as a witness by respondent. He was questioned as to the \$250: Q. Was it ever characterized as in lieu

of anything?

A. No sir.

In argument before the hearing officer, counsel for respondent did state the payment was in lieu of the increment, but there is no evidence in this record to support counsel's contention.

Further, there are 63 employees in the negotiating unit, 27 of whom were in the maximum salary step and thus not entitled to an incremental advance. The record is barren of any evidence that they did not receive the \$250 payment, which would have been the case if the payment of \$250 were in lieu of the increment.

Under the issue entitled "Amount of Salary Increase for Years 1972 and 1973", the factfinder adopted respondent's position which was:

1972	4%
January 1, 1973	\$250
July 1, 1973	5.5%

The effective date of the increment was separately treated by the factfinder, who recommended that the effective date remain at January 1st. Obviously, there was no tie-in between the \$250 and the increment.

Respondent accepted the factfinder's recommendation as to the above salary increases, but rejected his recommendation as to the effective date for increment, and adopted a July 1st date.

This record warrants the conclusion that the payment of \$250 was not in lieu of an increment, but was a general salary increase paid to all employees whether or not they were entitled to an incremental advance.

Therefore, the payment of \$250 may not be considered as a set-off and the respondent must make restitution for incremental advances due eligible employees for the period, January 1, 1973 to July 1, 1973.

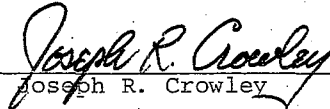
NOW, THEREFORE, IT IS ORDERED that:

1. The respondent cease and desist from refusing to pay increments when due to those of its employees entitled to such increments under the now expired contract, and
2. The respondent make restitution to those of its employees who were entitled to increments between January 1, 1973 and July 1, 1973 by paying them the amount due them, together with 3 percent interest thereon.

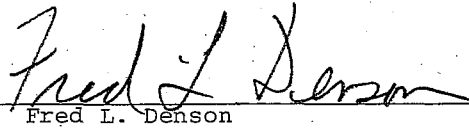
Dated: Albany, New York
April 15, 1974



Robert D. Helsby, Chairman



Joseph R. Crowley



Fred L. Denson

STATE OF NEW YORK #2D-4/15/74
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :
NEW YORK CITY BOARD OF EDUCATION, : BOARD DECISION
Respondent, : AND ORDER
-and- :

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, : CASE NO. U-0829
Charging Party. :
_____ :

This case comes to us on exceptions filed by the New York City Board of Education (respondent) and cross-exceptions filed by District Council 37, AFSCME, AFL-CIO (AFSCME) to a decision of a hearing officer finding that respondent had failed to negotiate in good faith in violation of CSL §209-a.1(d). The issue is whether an employer that has recognized an employee organization to represent a negotiating unit and then engages in dilatory negotiating tactics can then refuse to negotiate with the employee organization if it alleges that the negotiating unit has become inappropriate.

The charge originally filed by AFSCME on April 9, 1973 and amended on August 1, 1973, alleges that respondent delayed in the scheduling of negotiating sessions, failed to make responses or counterproposals to AFSCME's demands and eventually refused to negotiate with AFSCME at all pending determination of the appropriateness of the negotiating unit and AFSCME's representation status. Respondent's answer asserts that the schedule of meetings had been acceptable to AFSCME; the failure to make responses and counterproposals was necessarily occasioned by the requirements of Education Law §2590(g)(6), which requires it to consult with community boards of education; and that it had a good faith doubt as to the appropriateness of the negotiating unit and of AFSCME's majority status.

The sequence of events is significant; the relevant events and circumstances and their dates are as follows:

1. AFSCME was recognized to represent a unit comprising all employees in the title of community center attendant on June 9, 1972.
2. Respondent's fiscal year runs from July 1 through June 30.
3. On January 31, 1973 AFSCME submitted a list of contract demands.
4. Respondent agreed to meet with AFSCME on March 19, 1973. The meeting was held on that date, at which time AFSCME explained its demands. Respondent explained that it was required to consult with the thirty-two community school boards before it could formulate a response.
5. Respondent refused to meet again until April 4, 1973. At the meeting held on that day it advised AFSCME that it had been unable to review the demands with the community school boards and therefore could not respond.
6. The original charge herein was filed on April 9, 1973.
7. A pre-hearing conference on this charge was held on April 27, 1973, at which time the parties agreed to resume negotiations.
8. After additional negotiations which did not yield an agreement, respondent notified AFSCME on July 26, 1973 that, on the basis of information obtained in the course of preparation for that negotiations session indicating that the negotiating unit was no longer appropriate and AFSCME no longer represented a majority of the employees then in the unit, it was terminating negotiations.
9. On August 1, 1973, the charge was amended to include respondent's termination of negotiations.

The hearing officer determined that respondent's conduct in January and February following receipt of demands from AFSCME was dilatory and that its negotiating posture during May and June was evasive. He then rejected respondent's argument that twelve months having elapsed since the date of recognition, it was free

on July 26, 1973 to terminate negotiations with AFSCME because it had a good faith doubt that the negotiating unit was appropriate and that AFSCME represented a majority of the employees within the unit. In its exceptions, respondent alleges that the circumstances prior to July 26 are irrelevant because if a unit becomes inappropriate, the employer has no further obligation to negotiate with the representative of that unit. It does not contest findings that its prior negotiating posture was dilatory, rather it characterizes the hearing officer's recommended order directing it to negotiate as being "a determination that 'two wrongs will make a right'." AFSCME filed cross-exceptions alleging that several of the hearing officer's findings of fact are contrary to the evidence and that his proposed remedy is inadequate.

Having reviewed the record and considered the arguments of the parties, we affirm the hearing officer's findings of fact and conclusions of law.

Respondent was duty-bound to negotiate with AFSCME upon receipt of AFSCME's demands. Consistent with the statutory negotiating schedule set forth in CSL §209, the parties should have attempted to reach agreement before July 1, 1973, the beginning of respondent's new fiscal year. Having precluded a timely agreement by its own dilatory negotiating tactics, respondent cannot thereafter be permitted to abandon negotiations because of a right that it claims accrued and information it alleges it obtained subsequently. Moreover, neither the claimed right nor the alleged information is compelling. The nature of the information is that

- (1) there had been a high turnover among the employees in the negotiating unit and only a few of the employees who had originally signed AFSCME designation cards were still employed by respondent, and
- (2) many of the new employees were students.

Whether or not AFSCME had lost the support of the majority of the employees and whether or not the students who worked for respondent

were employees within the comprehension of the Taylor Law is not established by respondent's new information. The decisions cited by respondent for the proposition that a year having elapsed since recognition, it had become free to abandon that recognition, are not applicable to the instant set of facts under the Taylor Law. CSL §208.2 relates an employee organization's period of unchallenged representation status to the fiscal year of the employer.

The language of this section, taken together with §201.3(d) of our Rules, provide that the status of AFSCME as representative of the negotiating unit in question could be challenged during the month of November. We have ruled in Matter of the County of Jefferson, 4 PERB 3702 (1971) that an employer need not file a decertification petition; it may unilaterally alter a negotiating unit but, as indicated in that decision, this may only be done during the time when a petition for decertification would be timely.

In support of its exceptions, respondent argues that if a unit for which an employee organization is recognized is inappropriate, there is never any obligation on the part of the employer to negotiate with that organization because there had been "no statutory obligation to recognize the Union in the first instance." Inherent in respondent's argument is the theory that a contract with AFSCME would be null because many of the persons now within the negotiating unit are students and thus are not covered by the Taylor Law. We do not reach the question of whether such students are covered by the Taylor Law or whether, if not, they would be covered by the terms of an agreement. This question may or may not be resolved by this Board or perhaps by an arbitrator in some other more appropriate proceeding in which all the relevant facts are presented. We note, however, that it is not inconsistent with the terms of the Taylor Law for a determination to be made that persons currently in a negotiating unit are not employees within the meaning of the Taylor Law and yet for them to remain in that negotiating unit and continue to enjoy the protections of the Taylor Law


until the expiration of the period of unchallenged representation of their negotiation representative (CSL §201.7(a)). For the purposes of this case it is sufficient to determine that respondent cannot question its own action in recognizing AFSCME nor avoid the statutory consequences of that action except at the time permitted by the Taylor Law and our Rules.

NOW, THEREFORE, IT IS ORDERED that the New York City

Board of Education, with regard to the unit of community center attendants,

1. Cease and desist from refusing to continue good faith negotiations with AFSCME;
2. Cease and desist from refusing to schedule negotiating sessions within a reasonable time span;
3. Cease and desist from failing to be adequately prepared during negotiations to discuss relevant matters;
4. Upon request, to resume good faith negotiations with AFSCME forthwith, such negotiations to include, if AFSCME so demands, the time span in which it was in violation of its obligation to negotiate in good faith.

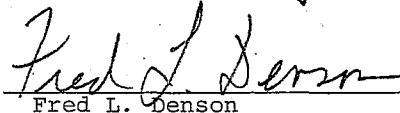
Dated: Albany, New York
April 15, 1974



Robert D. Helsby, Chairman



Joseph R. Crowley



Fred L. Denson

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2E-4/15/74

In the Matter of
CITY OF NEW ROCHELLE,
Respondent,

BOARD DECISION

-and-

AND ORDER

LOCAL 663, COUNCIL 66,
AFSCME, AFL-CIO,
Charging Party.

CASE NO. U-0810

BACKGROUND

The City of New Rochelle unilaterally reallocated the job of a maintenance welder from Labor Grade VI to Labor Grade VII. This reallocation was accompanied by a concomitant increase in pay from \$9,890 to \$10,580 for the individual involved. The City's action carried an effective date of January 1, 1973.

Officials of Local 663, Council 66, AFSCME, AFL-CIO commenced a series of inquiries and meetings with City representatives relative to the reallocation. The initial inquiries took place prior to the implementation of the reallocation, in response to which the City denied that any job reallocations had taken place. Subsequently, after repeated inquiries by the union and after several additional meetings between City and union officials, the City admitted that the reallocation had taken place as of January 1, 1973.

AFSCME filed an improper practice charge under Part 204 of the Rules of Procedure of the New York State Public Employment Relations Board charging a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act)¹. The charge alleged that during the term of a collective agreement, the City unilaterally

¹ This Section of the Act makes it an improper employer practice to "(d)...refuse to negotiate in good faith with the duly recognized or certified representative of its public employees."

reallocated the job of maintenance welder from Labor Grade VI to Labor Grade VII in violation of the agreement, and subsequently failed to live up to an agreement between the parties to withdraw the reallocation and to negotiate whether or not the job should be reallocated.

The hearing officer determined that there was merit to the charge and fashioned a recommended order which would require the District to cease and desist from classifying the job of

maintenance welder in Labor Grade VII, and to preserve the status quo ante by reclassifying the job to Labor Grade VI.

The matter comes before us on respondent employer's exceptions alleging errors in the hearing officer's decision and recommended order rendered January 18, 1974.

EMPLOYER'S EXCEPTIONS

The City excepts to the hearing officer's failure to find that the contractual grievance procedure was the exclusive means for resolving the matter in issue. The employer points out that since the grievance machinery was not utilized by the union, that it (the union) has failed to exhaust its remedies provided by the contract. Reference is made to the fact that binding arbitration is available under the contract and further that, should the matter not have been resolved to the satisfaction of the union through the lower steps of the grievance procedure, the issue could have been submitted to an arbitrator for decision.

The employer's second exception relates to the alleged failure of the hearing officer to find that the employer had observed and kept the terms of the agreement and had not committed any improper practices. In support of this exception, the employer contends that in the past, it has freely exercised the right of making job reallocations, and by virtue of this established past practice, it now retains this prerogative as one of its management rights. Additionally, the City points out various sections of the contract with which it has complied in regard to the instant matter. Specific reference is made to the following:

a) Article II, Section 3² which requires the employer to notify the union of all new hires, terminations and any changes affecting the job or pay status of employees. The employer stresses that there is no requirement in this section for the union to be notified before action is taken and further, that there is no time limit specified for such notification.

b) Article IV, Section 1³ which specifically excludes from the grievance machinery disputes involving personnel authorizations. The employer interprets this provision to mean that personnel authorizations as well as job allocations are to be excluded from the negotiating process.

c) Article VII, Section 7⁴ which, according to the City's interpretation, sets forth only the minimum increase to be accorded an employee upon labor grade reallocation. The City urges that this section does not prohibit the employer from granting an increase to an employee which exceeds the minimum.

² "3. Notification of Personnel Changes. The EMPLOYER agrees to notify the UNION of all new hires or terminations occurring within the bargaining unit, as well as of changes affecting the job or pay status of employees in the bargaining unit. This notification shall be in the form of a copy of the official personnel action authorization by means of which such changes are effected."

³ "This procedure shall be used in seeking the settlement of any grievance or dispute which may arise between the parties, including the application, interpretation or enforcement of this AGREEMENT. However, matters shall not be handled under this procedure involving alteration of wage rate schedules, retirement benefits established elsewhere in this AGREEMENT, or of established budget appropriations or personnel authorization."

⁴ "7. Wage Increase Upon Labor Grade Reallocation. When a position class is reallocated from a lower to a higher grade in the labor grade schedule, all incumbents for positions in that class shall have their wages increased by an amount which is equal to one-half of the value of the normal service increment applicable to the higher grade. However, no employee whose class has been reallocated from a lower to a higher labor grade shall be paid a wage which is less than the minimum for the higher grade."

d) Article VII, Section 13(a)⁵ which provides for the scope of review granted to the City's Director of Personnel. The employer submits that this section does not mandate the City to negotiate reallocations with the union, but instead merely affords the union the opportunity to submit requests for reallocation to the Director of Personnel.

Finally, the City asserts in support of its exception, that in accordance with its interpretation of a local ordinance, job reallocations are not terms and conditions of employment and thus are not mandatory subjects of collective negotiation.

The employer's final exception urges that the hearing officer's proposed order is beyond the limits imposed by §205-5(d) of the Act. According to the employer, PERB is authorized only to issue an order to a violating party requiring it to "negotiate in good faith".

DISCUSSION

We concur with the hearing officer's sustentation of the charge.

In previous decisions, the Board has held that where the action complained of presents both a question of violation of the statute and a breach of contract, deference will not be made to the contractual grievance machinery unless conclusive disposition of the matter can be consummated by binding arbitration.⁶ While binding arbitration is available under the contract as argued in the employer's first exception, it is not available for the purpose of resolving the matter at issue. It is noted that Article IV,

⁵ "13. Requests for Reallocation or Reclassification. (a) The Director of Personnel shall hear, consider and make recommendations to the City Manager on all questions pertaining to the allocation of positions to labor grades, or for the occupational reclassification of positions as may be referred to him by the UNION."

⁶ In the Matter of Board of Education of the City of New York,
6 PERB 3022, 3024 (January 24, 1973).

