

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JANE E. BERMANN,

Charging Party,

-and-

CASE NO. U-10699

DISTRICT COUNCIL 37, LOCAL 284,
AFSCME, AFL-CIO,

Respondent.

JANE E. BERMANN, pro se

ROBERT PEREZ-WILSON, ESQ. (VIRGINIA HARDY, ESQ.,
of Counsel), for Respondent

BOARD DECISION AND ORDER

Jane E. Bermann (charging party) excepts to the dismissal, as deficient, of her improper practice charge against District Council 37, Local 284, AFSCME, AFL-CIO (DC 37), which alleges that DC 37 violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it advised her that, as a provisional employee, no contractual remedy was available to her to protest her termination by her employer.^{1/} The Director of Public Employment Practices and Representation (Director) dismissed the charge upon the ground that it failed to set forth any

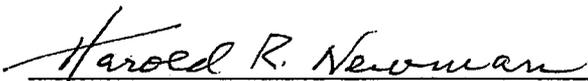
^{1/}The charge makes reference to certain conduct by the charging party's employer. However, the employer was not named as a respondent, nor is there any claim that DC 37 had any knowledge of the employer's alleged conduct when it gave charging party the advice giving rise to this charge.

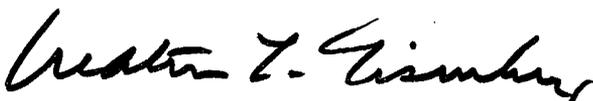
allegations which, if proven, would constitute a violation of §209-a.2(a) of the Act, finding that the mere giving of advice that contractual remedies were unavailable to the charging party because of her provisional status in no way constitutes a violation of the Act.

We affirm the Director's dismissal of the charge, which fails to allege facts which would establish that DC 37 engaged in conduct which was arbitrary, discriminatory or in bad faith.^{2/} Indeed, there is no claim that the advice given to the charging party was not accurate. Under these circumstances, no cognizable claim of violation of §209-a.2(a) of the Act is made.

IT IS ACCORDINGLY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: August 2, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

^{2/}See Local 342, Long Island Public Service Employees (MacLean), 20 PERB ¶3045 (1987), conf'd 146 A.D.2d 775, (2d Dep't), 22 PERB ¶7005 (January 30, 1989), mot. for leave to appeal den., ___ A.D.2d ___ (June 1989).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED UNIVERSITY PROFESSIONS, LOCAL 2190,
NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-10086

STATE OF NEW YORK (STATE UNIVERSITY OF
NEW YORK - COLLEGE AT POTSDAM),

Respondent.

PAUL MANKE, for Charging Party

WALTER J. PELLEGRINI, ESQ., GENERAL COUNSEL
(RICHARD J. DAUTNER, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

United University Professions, Local 2190, NYSUT, AFT, AFL-CIO (UUP) excepts to the denial of its motion to reopen an improper practice charge filed by it against the State of New York (State University of New York - College at Potsdam) (SUNY), which had been withdrawn pursuant to an agreement between the parties. The charge alleged a violation of §§209-a.1(a), (b) and (d) of the Public Employees' Fair Employment Act (Act) by SUNY when it required that an agreement reached by the parties at a labor-management committee meeting concerning a student grade appeal procedure be reviewed by the Faculty Assembly, the campus faculty governance body.

In the course of the processing of the charge, the

parties entered into an agreement as follows:

1. UUP and the State agree that UUP will be notified when appeals are brought at the Dean's step of the final grade appeal procedure.
2. UUP and the State will use their best efforts ~~to meet as soon as possible in the labor-management committee context~~ to ascertain whether any difference of opinion exists as to the policy that the Committee worked on for approximately one and a half years.
3. UUP and the State will utilize their best efforts to implement as soon as possible a uniform, campus-wide policy regarding student final grade appeal process.
4. In light of the above, charge U-10086 is hereby withdrawn. The parties agree that the above settlement in no way constitutes a precedent or an admission in any other actions.

Approximately four months following settlement of the charge, UUP made a motion to the Director of Public Employment Practices and Representation (Director) to reopen and litigate the original charge upon the ground that SUNY had not met its commitments under paragraphs 2 and 3 of the settlement agreement. SUNY denies lack of compliance and asserts that the intervening summer break between execution of the settlement agreement and the motion to reopen accounts, in part, for the failure to finalize and implement a policy concerning student final grade appeals.

The Director denied the motion to reopen the charge upon the ground that it fails to meet the criteria set forth in this Board's decision in New York State Public Employees

Federation (Farkas), 15 PERB ¶3020 (1982). In that case, we allowed the reopening of an improper practice charge upon the ground of failure by the respondent to meet the terms of the agreement, a failure ascertained on clear, narrow and concrete grounds. ~~Finding that SUNY's alleged failure to~~ comply with the settlement agreement was less than clear, and finding that the agreement was subject to a range of interpretation by the parties, the Director declined to reopen the charge.

For the reasons which follow, we affirm the Director's determination. Although this Board has the authority to permit rescission of the withdrawal of an improper practice charge, such discretion should be exercised only in extremely rare and limited circumstances, in keeping with the interest in finality of settlement agreements. Furthermore, §205.5(d) of the Act instructs us that we are without authority "to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice." In construing this statutory limitation, we have repeatedly held that an improper practice charge seeking merely to enforce an agreement between the parties is beyond our jurisdiction, whereas an alleged repudiation of an agreement does fall within our improper

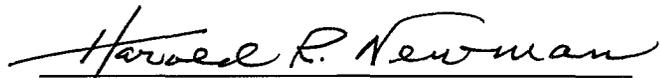
practice jurisdiction.^{1/} Thus, the Board has held it has jurisdiction over a charge alleging repudiation of an agreement where the respondent denies the existence of an agreement or its contractual obligation under circumstances demonstrating no colorable claim of contractual entitlement.

In our view, settlement agreements reached between the parties in resolution of improper practice charges should not be set aside and the charges reopened except in the same extraordinary circumstances which would establish a repudiation of the settlement agreement, as we have defined repudiation in our review of our analysis of our jurisdiction under §205.5(d) of the Act. As we suggested in Farkas, a mere difference between the parties in interpretation of a settlement agreement or a difference of opinion concerning the extent to which compliance has been achieved is insufficient to warrant the reopening of a settled improper practice charge. It is only under circumstances in which there is no colorable claim of compliance with the settlement agreement or in which it can be shown that the noncomplying party has otherwise repudiated the agreement that a charge will be reopened. A difference of opinion concerning whether, and the extent to which, compliance with a settlement agreement has taken place is a matter for enforcement procedures in another forum.

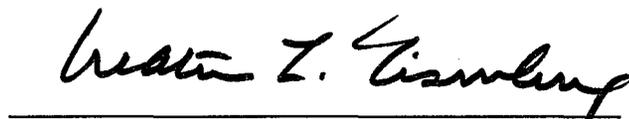
^{1/}See Connetquot Central School District, 21 PERB ¶3049 (1988); City of Buffalo, 19 PERB ¶3023 (1986); Honeoye CSD, 18 PERB ¶3085 (1985).

Based upon the foregoing, the Director's denial of UUP's application to reopen Case No. U-10086 is affirmed, and the application is hereby denied in its entirety.

DATED: August 2, 1989
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
VILLAGE OF KENMORE,

CASE NO. E-1462

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

FLAHERTY, COHEN, GRANDE, RANDAZZO & DOREN, P.C.
(DENNIS J. CAMPAGNA, ESQ., of Counsel), for
Village of Kenmore

WYSSLING, SCHWAN & MONTGOMERY, ESQS. (W. JAMES
SCHWAN, ESQ., of Counsel), for Kenmore Club, Police
Benevolent Association, Inc.

BOARD DECISION AND ORDER

The Village of Kenmore (Village) excepts to the dismissal by the Director of Public Employment Practices and Representation (Director) of its application for the designation of three Captains in its Police Department as managerial. The Captains are currently represented by the Kenmore Club, Police Benevolent Association, Inc. (Association) in a unit consisting of the uniformed personnel of the Department, excluding the Chief, Deputy Chiefs and civilians. Ultimate responsibility for the operation of the Police Department rests with the Village's Board of Trustees and Mayor. The Chief is the Village's designee for the operation of the Police Department. Below him in the chain of command are two Deputy Chiefs, who are responsible,

respectively, for supervision of the Department's patrol duties and for administration. The three Captains who are the subject of this application report to the Deputy Chief in charge of patrol duties, and each is responsible for supervision of one of the three shifts operated by the Department. Four Lieutenants report to the Captains, who, in turn, supervise a total of 14 Patrol Officers.

The Director found that although the record abundantly establishes that the Captains perform a supervisory function within the Village's Police Department, the discretion afforded to the Captains in the exercise of their supervisory roles is sufficiently circumscribed by contract and Department policy to warrant denial of the application to designate the Captains as managerial.

Section 201.7(a) of the Public Employees' Fair Employment Act (Act) authorizes this Board to designate persons 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.

Notwithstanding the Village's exceptions, we affirm the Director's finding that the involvement of the Captains in

personnel administration does not warrant a managerial designation. The facts that the Captains have some responsibility for contract and disciplinary matters at the lower levels of the procedures, and that Captains may, on occasion, recommend disciplinary action, fail to meet the requisite criteria of establishing the existence of a "major" role in personnel administration or administration of agreements, or that such role requires the exercise of independent judgment not circumscribed by Village policy and contract.^{1/} The Director's decision is accordingly affirmed in this regard.

We also affirm the Director's determination that the Captains do not presently "formulate policy". While the Captains may, on occasion, make recommendations concerning policy based upon their supervisory responsibilities, the record fails to establish that the Captains have any authority to determine what policies will be followed within the Department.^{2/}

Finally, we turn to the portion of the Village's exceptions which relate to its claim that "The future plans of the Police Department include meaningful participation in

^{1/}Hempstead Public Schools, 6 PERB ¶3001 (1973), conf'd sub nom. Board of Education v. Helsby, 42 A.D. 2d 1056, 6 PERB ¶7012 (2d Dep't 1973), aff'd, 35 N.Y. 2d 877, 7 PERB ¶7024 (1974).

^{2/}Cf. McGraw CSD, 21 PERB ¶3001 (1988).

policy development and reformulation and meaningful participation in future negotiations." In this regard, the Village points to testimony by the Chief that he has assigned to the Captains some of the responsibility for the redrafting of the Department's policy manual. Even assuming that this assignment constitutes a current and not a future activity (as required by the Act), this testimony does not establish that the Captains have or will have a significant role in the formulation of new policy or that they do or will formulate new policy themselves. Rather, the evidence indicates that the policy manual requires updating simply because it no longer conforms to actual practice within the Department, and that corrections are needed to properly identify the persons and/or ranks of persons having various responsibilities within the Department. There is no indication that the Captains have been given, or will be given, responsibility for preparation or issuance of a policy manual which departs in any material fashion from current practice, nor is there any indication in the record that any rewrite of the policy manual in which they will participate will constitute anything other than recommendations or suggestions for change. Indeed, the Chief testified that, following certain staffing and structural changes within the Department, the Department's rules and regulations were made "archaic" and

"not appropriate in all situations". Accordingly, the Chief testified:

It has been my intention for some time to revise it, to modernize it, to update it, etc. but I don't have the time to do it all by myself, nor do I have the staff . . . and I think that it requires updating by the people who are working in the Department as primary enforcement officers; namely, Police Officers, Lieutenants and Captains.

While the Chief indicated his intention to rely primarily upon the Captains for this task, he also made it clear that input at all levels will be sought. Under these circumstances, the Chief's intention to primarily utilize Captains for the rewrite of the Department's policy manual does not rise to the level of policy formulation necessary to obtain a managerial designation under the Act.

Similarly, we reject the Village's contention that the future use of the Captains in collective negotiations warrants their designation as managerial. The record does not disclose anything more than an intention by the Village to solicit suggestions and recommendations from the Captains, among others, concerning additions to or deletions from the collective bargaining agreement with the Association. There is no indication in the record that Captains will either participate directly in collective negotiations or that they will have any significant behind-the-scenes involvement in

the negotiation process such as to warrant a managerial designation.^{3/}

Based upon the foregoing, the Director's dismissal of the instant application is affirmed, and IT IS ORDERED that ~~the application be, and it hereby is, dismissed in its~~ entirety.

DATED: August 2, 1989
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

^{3/}See, Newburgh Enlarged CSD, 21 PERB ¶13047 (1988) and cases cited therein.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK COUNTY AND MUNICIPAL EMPLOYEES,
DISTRICT COUNCIL 66, AFSCME, AFL-CIO,

Petitioner,

- and -

CASE NO. C-3275

STATE OF NEW YORK (LONG ISLAND PARK,
RECREATION, AND HISTORICAL PRESERVATION
COMMISSION),

Employer,

- and -

NEW YORK STATE INSPECTION, SECURITY AND
LAW ENFORCEMENT EMPLOYEES, DISTRICT
COUNCIL 82, AFSCME, AFL-CIO,

Intervenor.

FREDERICK J. PFEIFER, ESQ., for Petitioner

WALTER J. PELLEGRINI, ESQ., GENERAL COUNSEL (RICHARD J.
DAUTNER, ESQ., of Counsel), for Employer

ROWLEY, FORREST, O'DONNELL & HITE, P.C. (BRIAN O'DONNELL,
ESQ., of Counsel), for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the New York County and Municipal Employees, District Council 66, AFSCME, AFL-CIO (Council 66) to the dismissal by the Director of Public Employment Practices and Representation (Director) of its petition seeking to represent lifeguard titles of the State of New York (State) Long Island State Park, Recreation,

and Historical Preservation Commission (Commission). The petition seeks fragmentation of the Commission's lifeguard titles from the Security Services Unit (Unit), which is represented by the New York State Inspection, Security and ~~Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO~~ (Council 82). While the State opposes fragmentation of these titles, Council 82 supports the petition.

The Commission's lifeguards constitute approximately 57% of all lifeguards in the existing unit, approximately 25% of all seasonals in the unit and less than 2% of all employees in the unit. They are employed at the State's beaches located on Long Island, and thus perform lifeguard duty at ocean sites rather than at the lake sites where all other unit lifeguard personnel are employed.

The Director dismissed the petition upon the ground that Council 66 failed to establish the existence of the compelling evidence required by our decisions to warrant fragmentation of a long-standing bargaining unit. In its exceptions, Council 66 argues, in the alternative, that the Board's standard for fragmentation of long-standing units should be reconsidered and lowered, or that the standard has in any event been met in the instant case.

This Board has long adhered to two ruling principles in deciding uniting questions. First, we have held that "[i]t is the policy of the Act to find appropriate the largest unit

permitting for effective negotiations".^{1/} The second long-standing principle to which we have adhered is that fragmentation of existing bargaining units will not be granted in the absence of compelling evidence of the need to do so.^{2/} We have held that compelling need is generally established by proving the existence of a conflict of interest or inadequate representation.^{3/} When these principles have been applied in the creation and continuation of appropriate units, they have, at the very least, contributed to stability in public sector labor relations and have focused the parties' attention on substantive negotiations rather than on the process of adding to or subtracting from units. Notwithstanding the arguments of Council 66, we shall adhere to our standards for review of fragmentation petitions.

Having so concluded, we now turn to the question whether the Director properly applied these principles to the facts of the instant case. It is our determination that he did and that the Director's decision should be affirmed.

^{1/}See County of Ulster, 22 PERB ¶3030, at 3073 (1989), quoting from Town of North Castle, 19 PERB ¶4049, at 4071 (1986).

^{2/}See, e.g., Deer Park UFSD, 22 PERB ¶3014 (1989); State of New York, 21 PERB ¶3050 (1988); Chautauqua County BOCES, 15 PERB ¶3126 (1982).

^{3/}Id.

Council 66 argues, first, that Commission lifeguards are subject to significantly more hazardous working conditions than unit lifeguards who are employed at lake sites. While there is no dispute that ocean lifeguards are subjected to greater risks in the course of their duties, it cannot be said that the difference in risk level is any greater than the difference in risk level among other groups within the unit. For example, correction officers having direct contact with inmates (working in population) in maximum security inmate facilities may be subjected to a considerably greater risk than correction officers performing administrative duties. This does not, however, warrant fragmentation of the occupational category of correction officer any more than fragmentation of the occupational category of lifeguard. Notwithstanding the increase in risk, the Commission lifeguards continue to share a community of interest at least with other lifeguards in the unit, as well as with other seasonal employees within the unit, which is not outweighed by the increased hazard of ocean duty.

Council 66 argues, next, that the longevity, degree of interest in bargaining, and esprit de corps of the Commission lifeguards sufficiently distinguish them from other lifeguards, other seasonals, and other employees in the Security Services Unit to warrant their fragmentation. As pointed out by the Director, however, the existence of a

sense of cohesiveness among unit members, or the absence of such a sense, does not constitute a proper basis upon which uniting decisions should be made. To do so would result in the proliferation of units by title, by work site, possibly by shift, and even within specific work sites, and would be contrary to the principles by which we have been guided in carrying out our uniting responsibilities under the Act. Based upon the detailed factual findings and analysis set forth in the Director's decision, therefore, we deny the exceptions of Council 66 in this regard.

The primary assertion made by Council 66 in support of fragmentation of the Commission lifeguards from the Security Services Unit is that they have been largely ignored as a constituency in the collective negotiating process. In this regard, it must be noted that, while the Commission lifeguards are clearly in the forefront among seasonals and lifeguards generally in formulating and pursuing negotiating demands, the demands which have been pursued are not of unique interest to Commission lifeguards. Indeed, the two primary negotiating goals expressed by the Commission lifeguards relate to the establishment of third-party disciplinary procedures and seniority, subjects which are, although less consistently expressed, certainly of interest to other lifeguards and seasonals throughout the unit. The nature of these demands does not, therefore, establish the

existence of any conflict of interest with other seasonals or lifeguards within the unit. Council 66 further asserts, however, that the fact that full-time employees in the unit already have the benefit of third-party disciplinary procedures and seniority rights gives rise to a conflict of interest with those in the unit who do not now possess those benefits. We disagree. There can be no claim that Council 82, which represents both full-time and seasonal employees in the Security Services Unit, does not share the view that these benefits are of significant value. The only issue which exists is whether these benefits are or have been realistically achievable for seasonal employees, lifeguards generally, or Commission lifeguards in particular. We, thus, reach the final question before us in our consideration of this case, which is whether the disparity in level of benefits of the petitioned-for employees, compared to full-time unit employees evidences either a conflict of interest between the groups, or establishes a history of inadequate representation arising to a level warranting fragmentation.

It is our determination that the testimony of Council 82's chief negotiator establishes neither the type of systematic and intentional disregard of the interests of the petitioned-for group, nor the neglect or indifference to the interests of the group which would warrant the fragmentation sought. Instead, we find that the negotiating history

described by Council 82's chief negotiator establishes that efforts have been made to accommodate the interests and negotiating needs of seasonal employees generally and the Commission lifeguards in particular and that, to the extent that those needs may remain to some extent unsatisfied, Council 82's failure to achieve the goals sought by the Commission lifeguards reflects the realities of the collective negotiation process. Council 82's chief negotiator testified that the interests of a minority of the bargaining unit must sometimes be subordinated to the interests of the majority and the need to come to closure in the negotiating process. We construe this testimony as an expression of nothing more than an acknowledgement of the reality that, in the bargaining process, it is simply not possible to satisfy all subgroups all of the time. We need not decide, therefore, whether the unit would be fragmented if the record evidenced a policy or intention of routinely disregarding the interests of this particular subgroup out of hand.

Based upon the foregoing, and upon the findings and analysis contained in the Director's decision, we find that Council 66 has failed to meet its burden of establishing the existence of a conflict of interest or inadequate representation sufficient to warrant fragmentation of Commission lifeguards from the existing unit represented by

Council 82. IT IS THEREFORE ORDERED that the petition be,
and it hereby is, dismissed in its entirety.

DATED: August 2, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Impasse Between
NEW YORK CITY TRANSIT AUTHORITY,

CERTIFICATION

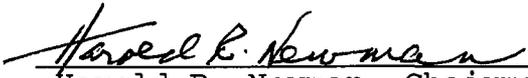
CASE NO. TIA89-19;
M88-238

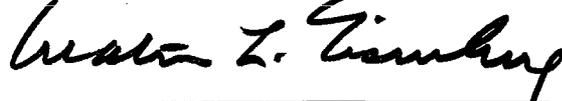
-and-

AMALGAMATED TRANSIT UNION, DIVISION 726.

In accordance with the provisions of §209.5(a) of the Public Employees' Fair Employment Act (Act) and based upon an investigation conducted under §205.15 of the Board's Rules of Procedure into the status of the above entitled impasse, it is hereby certified that a voluntary resolution of the contract negotiations between the New York City Transit Authority and the Amalgamated Transit Union, Division 726 cannot be effected. The dispute between the parties is accordingly referred to the Public Arbitration Panel designated in accordance with the provisions of §209.5(a) of the Act and §205.18 of this Board's Rules of Procedure.

Dated: August 2, 1989
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
TRANSIT SUPERVISORS ORGANIZATION,
Petitioner,

-and-

CASE NO. C-3490

MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY,

Employer.

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,

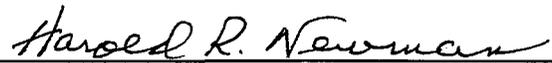
IT IS HEREBY CERTIFIED that the Transit Supervisors Organization has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All those in the position of Assistant Field Manager and Assistant Field Supervisor.

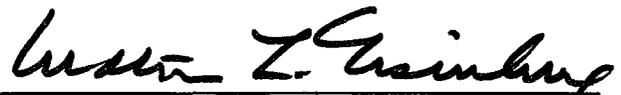
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Transit Supervisors Organization. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 2, 1989
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WEBSTER CENTRAL SCHOOL BUS DRIVERS
COALITION,

Petitioner,

-and-

CASE NO. C-3505

WEBSTER CENTRAL SCHOOL DISTRICT,

Employer,

-and-

AFSCME, NEW YORK COUNCIL 66, LOCAL 1635-D,
AFL-CIO,

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 AFSCME, New York Council 66, Local 1635-D, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit 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 those in the position of Head Mechanic, Mechanic I, Mechanic II, Bus Driver and Courier.

~~Excluded: All seasonal employees and all other employees of the District.~~

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with AFSCME, New York Council 66, Local 1635-D, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 2, 1989
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
UNITED FEDERATION OF POLICE OFFICERS, INC.,
Petitioner,

-and-

CASE NO. C-3519

ROOSEVELT ISLAND OPERATING CORP.,
Employer,

-and-

ALLIED INTERNATIONAL UNION,
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,

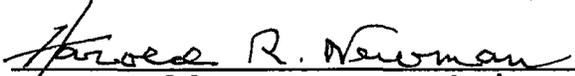
IT IS HEREBY CERTIFIED that the United Federation of Police Officers, Inc. has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Uniformed Security Officers, Sergeants and Dispatchers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Police Officers, Inc. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 2, 1989
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member



#4A-8/2/89

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
50 WOLF ROAD
ALBANY, NEW YORK 12205-2670

(518) 457-2614
August 2, 1989

Miguel Ortiz, Esq.
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Christopher H. Gardner, Esq.
Council 82, AFSCME
61 Colvin Avenue
Albany, NY 12206

Earle E. Thurston, Esq.
Corporation Counsel
City of Auburn
One Lincoln Street
Auburn, NY 13021

Re: Case Nos. U-10232, U-10251 & U-10295

Dear Counsel:

As you know, the Administrative Law Judge (ALJ) decision in the above referenced matters, issued on April 3, 1989, relied heavily upon the Board Decision in Board of Education of the City School District of the City of New York, 19 PERB ¶3015 (1986), aff'd. sub nom. Board of Education of the City School District of the City of New York v. PERB, 21 PERB ¶7001 (Sup. Ct. Alb. Co. 1988) in reaching the conclusion that §209-a.1(d) of the Public Employees' Fair Employment Act had been violated. Subsequent to issuance of the ALJ decision and to the filing of briefs and exceptions in this matter, the Appellate Division, Third Department, in a decision dated June 1, 1989, unanimously reversed the Supreme Court and PERB. A copy of that decision is attached for your information.

There is now pending before the New York State Court of Appeals a motion for leave to appeal the Appellate Division decision and order.

I am writing to you for the purpose of informing you that the Board has decided to await the outcome at least of the motion for leave to appeal before issuing a decision in the above referenced matter. We will inform you of the outcome of the motion as soon as we have received it, and, at that time, the Board would be prepared to entertain a request for supplemental argument, taking into account the outcome of

the New York City Board of Education case.

In the event that any party has any objection to the foregoing procedure, please advise immediately.

Very truly yours,

Pauline R. Kinsella
Deputy Chairman & Counsel

PRK/mn
Enclosure

cc: Harold R. Newman
Walter L. Eisenberg

BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF
NEW YORK; and NATHAN QUINONES,
Chancellor of the City School District
of the City of New York,

Petitioners-Appellants,

-against-

THE NEW YORK STATE PUBLIC EMPLOYMENT
RELATIONS BOARD; HAROLD R. NEWMAN,
Chairman; WALTER L. EISENBERG, Member;
UNITED FEDERATION OF TEACHERS, Local 2,
AFT, AFL-CIO; COUNCIL OF SUPERVISORS
AND ADMINISTRATORS, Local 1, AFSA,
AFL-CIO; INTERNATIONAL UNION OF
OPERATING ENGINEERS, Local 891;
DISTRICT COUNCIL 37, AFSCME; and
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Respondents-Respondents.

Case Nos. U-7776, U-7864, U-7868, U-7943, U-7937

Before: New York State Supreme Court, Appellate Division,
Third Department; June 1, 1989

Back references: 21 PERB 7001; 19 PERB 3026, 3015, 4532,
4503; 18 PERB 4625, 4624, 4621

Peter L. Zimroth, Corporation Counsel, City of New York
(David D. Karnovsky of counsel), for petitioners-appellants.

Martin L. Barr (Jerome Thier of counsel), for respondent
Public Employment Relations Board.

James R. Sandner (J. Christopher Meagher of counsel), for
respondent United Federation of Teachers.

Bruce K. Bryant, for respondent Council of Supervisors and
Administrators.

Cohn, Glickstein & Lurie and Spivak, Lipton, Watanabe &
Spivak (Stephen L. Fine of counsel), for respondents
International Union of Operating Engineers and Communications
Workers of America.

Robert Perez-Wilson (Rosaria R. Esperon of counsel), for
respondent District Council 37.

HARVEY, J.:

In the wake of a 1984 scandal concerning alleged financial improprieties and breaches of public trust involving a former Chancellor of the City School District of the City of New York, petitioner Board of Education of the City School District of the City of New York (hereinafter the Board) took steps to ensure that no similar incidents would occur in the future by undertaking to investigate its nontenured employees. Invoking its authority under Education Law § 2590-g (13) and (14), the Board adopted Chancellor's Regulations C-115 and C-120, as amended, which basically required designated Board employees earning certain wages to undergo background investigations and submit detailed annual financial disclosure statements as a condition of their continued employment. Four of the respondents in this proceeding, employee organizations representing various units of the Board's employees, filed improper employer practice charges with respondent Public Employment Relations Board (hereinafter PERB) claiming that the Board's unilateral adoption of regulations C-115 and C-120 and its refusal to negotiate the matter violated Civil Service Law § 209-a (1) (d) and (e). The matters were heard separately and the Administrative Law Judges found for said respondents. In all the matters, the Board was ordered to rescind and cease enforcement of the disputed regulations.

Thereafter, the Board filed exceptions to the administrative decisions with PERB. In a consolidated decision, PERB determined that the Board's actions violated the Taylor Law and ordered the Board to rescind and cease enforcement of the regulations. The Board and its Chancellor then commenced this CPLR article 78 proceeding seeking to set aside and annul PERB's determination. Supreme Court dismissed the petition on the merits and this appeal by petitioners ensued.

As the agency charged with implementing the Taylor Law (Civil Service Law §§ 200-214), PERB "is presumed to have developed an expertise which requires [courts] to accept its construction of [the Taylor Law]" unless the determination is arbitrary and capricious or an abuse of discretion (Matter of Town of Mamaroneck PBA v New York State Pub. Employment Relations Bd., 66 NY2d 722, 724; see, Matter of West Irondequoit Teachers Assn. v Helsby, 35 NY2d 46, 51). In the present case, petitioners argue that the pivotal issue raised herein requires an interpretation of the Education Law, not the Taylor Law, and therefore PERB's determination that the imposition of financial disclosure and background investigation requirements are mandatory subjects of collective bargaining is not entitled to the deference accorded such decisions (see, Matter of Town of Mamaroneck PBA v New York State Pub. Employment Relations Bd.,

supra, at 724). The principal statute at issue is Education Law § 2590-g, which provides in pertinent part that:

[T]he city board shall have power and duty to:

* * *

14. a. Prescribe regulations and bylaws requiring members of the city board, the chancellor and, for good cause shown, any other officer or employee in schools and programs under the jurisdiction of the city board and the chancellor, to submit to the city board, in the discretion of the city board, financial reports for themselves and their spouses.

b. The frequency and period of coverage, the designation of persons to submit such reports by name, title or income level or by a combination thereof, and the content of such reports, including minimum dollar amounts, shall be determined by the city board and such reports may include but not necessarily be limited to the following * * * (emphasis supplied).

However, despite petitioners' contentions otherwise, this case does turn on PERB's interpretation of the Taylor Law and not on any interpretation by PERB of the Education Law. As revealed by the record, both PERB and petitioners are in agreement that the financial disclosure requirements of Education Law § 2590-g (14) are discretionary since petitioners have apparently abandoned any argument that financial disclosure requirements were mandated by the Education Law. Such an argument could not be persuasive since Education Law § 2590-g (14) was added to the statute in 1975 and petitioners' regulations were not adopted until 1984. Accordingly, this case turns on whether the imposition of financial disclosure requirements are terms and conditions of employment which are mandatory subjects for collective bargaining (see, Civil Service Law § 204 [2]; § 209-a [1] [d]) and whether PERB's determination that they were should be accorded deference.

In our view, PERB's determination should be annulled. While PERB is usually given discretion in determining what issues constitute mandatory subjects for collective bargaining, there are exceptions where certain matters otherwise deemed terms and conditions of employment are prohibited from collective bargaining. This is where there is "plain and clear" language against it in a statute (Syracuse Teachers Assn. v Board of Educ., Syracuse City School Dist., 35 NY2d 743, 744) or where there is a public policy explicitly or implicitly prohibiting collective bargaining derived from a statute or statutory scheme (Matter of Susquehanna Val. Cent.

School Dist. at Conklin [Susquehanna Val. Teachers' Assn.], 37 NY2d 614, 616-617).

Here, we find an example of the latter exception (see, Matter of Cohoes City School Dist. v Cohoes Teachers Assn., 40 NY2d 774, 778). While Education Law § 2590-g (14) and the various other provisions in the Education Law permitting the imposition of financial disclosure requirements of certain employees (see, e.g., Education Law § 2590-e [20]; § 2590-g [13]) do not explicitly forbid collective bargaining as to this subject, it is our view that this prohibition is implicit in such provisions (see, id.; see also, Board of Educ., Great Neck Union Free School Dist. v Areman, 41 NY2d 527, 534). Undeniably, there is a strong public policy to detect and deter corruption and conflict of interest. The Second Circuit Court of Appeals has held such policy to be a substantial, possibly even a compelling, state interest (see, Barry v City of New York, 712 F2d 1554, 1560, cert denied 464 US 1017; see also, Kaplan v Board of Educ. of City School Dist. of City of N.Y., 759 F2d 256, 261-262; Matter of Levitt v Board of Collective Bargaining of City of N.Y., 140 Misc 2d 727).

In reaching its determination that financial disclosure requirements are mandated subjects of collective bargaining, PERB applied a balancing test in which it weighed the State's interest in deterring and detecting corruption against the privacy interests of the employees. Factoring in also the public policy of encouraging collective bargaining, PERB concluded that the privacy rights of the affected employees outweighed the public interest in avoiding corruption. We find this oversimplified analysis inadequate as it appears to pay insufficient attention "to the fact that the public interest in avoiding corruption * * * is of enormous importance to government in carrying out its core concerns" (Matter of Levitt v Board of Collective Bargaining of City of N.Y., supra, at 738). PERB apparently disregarded numerous decisions in this area which have held that whatever constitutionally protected privacy interests may be affected by the disclosure requirements are outweighed by the governmental interest in avoiding corruption and conflicts of interest (see, Kaplan v Board of Educ. of City School Dist. of City of N.Y., supra; Barry v City of New York, supra; Evans v Carey, 40 NY2d 1008; Hunter v City of New York, 58 AD2d 136, affd 44 NY2d 708). The case of Rapp v Carey (44 NY2d 157), relied on by respondents, is inapposite since it holds that employees' privacy rights are not overborne by unlawfully passed executive orders. Here, the Board's regulations are derived from implicit and explicit statutory direction.

In sum, we find that, in light of the strong public interest in detecting and deterring corruption, the imposition of financial disclosure requirements is a prohibited subject of collective

bargaining. It would be absurd to require the Board here to negotiate over anticorruption measures with the very employees whose honesty and integrity are at issue. In light of our finding that PERE's determination should be annulled, we find it unnecessary to address the remaining issues raised by petitioners.

Opinion by HARVEY, J., in which CASEY, J.P., WIKOLL, YESAWICH, JR., and MERCURE, JJ., concur.

Judgment reversed, on the law, with costs, determination annulled and petition granted.

