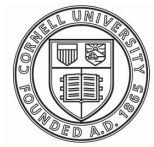

10-24-2000

State of New York Public Employment Relations Board Decisions from October 24, 2000

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from October 24, 2000

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, HOLBROOK FIRE DISTRICT UNIT,

Charging Party,

- and -

CASE NO. U-18646

HOLBROOK FIRE DISTRICT,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Charging Party

INGERMAN, SMITH, L.L.P. (CHRISTOPHER VENATOR of counsel), for Respondent

BOARD DECISION AND ORDER

This case has been remitted to us by the Appellate Division, Third Department[1] for an independent review of a decision of an Administrative Law Judge (ALJ) finding that the Holbrook Fire District (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it brought disciplinary charges against one of its employees, Jason Feinberg, in retaliation for his efforts in attempting to organize District employees for

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[1] *CSEA, Inc. v. PERB*, 267 AD2d 935, 32 PERB ¶7027 (3d Dep't 1999).

representation by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Holbrook Fire District Unit (CSEA).[2]

The ALJ found that Feinberg had been charged with eight counts of misconduct from March 1996 through September 1996, the time during which he was actively organizing support among his fellow employees for an employee organization, that the District Manager, Deborah Knopfke, knew he was engaged in organizational activity and that the business reasons given by the District for preferring charges against Feinberg were pretextual. Determining that Feinberg had been subjected to disparate and retaliatory treatment by the District in that others who had committed the same or similar offenses as Feinberg had not been disciplined and that some of the offenses attributed to Feinberg involved duties that were ancillary to his job of fire dispatcher and did not warrant the penalty of discharge, the ALJ found that the District had violated §§209-a.1(a) and (c) of the Act.

The parties submitted the case to the ALJ for decision based upon a stipulated record, consisting of the appellate return in a proceeding brought pursuant to Civil Practice Law and Rules (CPLR) Article 78 to review the decision of the Civil Service Law (CSL) §75 hearing officer on the disciplinary charges that were brought against Feinberg by the District. The hearing officer sustained six of eight charges against Feinberg and recommended his discharge. The return includes the disciplinary charges against

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[2]On March 11, 1996, the Holbrook Fire District Association filed a petition seeking to represent a unit of employees of the District. On June 17, 1996, the Association withdrew its petition. On September 3, 1996, CSEA filed a petition seeking to represent a unit of firehouse attendant, custodian, watchman, mechanic, district secretary and HVAC mechanic. That petition was dismissed pursuant to the employees' vote against representation. *Holbrook Fire Dist.*, 30 PERB ¶3035 (1997).

Feinberg, the CSL §75 hearing transcript, the exhibits and the hearing officer's report and recommendations. Both parties also submitted briefs to the ALJ.

In deciding the exceptions filed by the District and the cross-exceptions filed by CSEA, we determined that the ALJ had erred by failing to defer to the findings of the §75 hearing officer that the charges against Feinberg were brought by the District for appropriate business reasons and not to retaliate against him for his organizing activities. We, therefore, reversed the decision of the ALJ and dismissed the improper practice charge against the District.

Pursuant to Article 78 of the CPLR, CSEA sought review of our determination. The matter was transferred from Supreme Court, Albany County to the Appellate Division, Third Department. The court found:

> [T]he relevant inquiry in a proceeding pursuant to Civil Service Law §75 is very different than that in an improper practice proceeding under Civil Service Law §209-a. In the former, the focus is upon whether there was cause for the employee's dismissal. (citation omitted) In the latter, it is whether the employer' action was motivated by anti-union animus and "it is irrelevant...whether or not cause for the employer's action in terminating [the employee] actually existed." (citation omitted)[3]

The court further found that the §75 hearing officer had not fully considered the dispositive issue in the improper practice proceeding and remitted the matter to us for further proceedings consistent with its decision.

Based upon our review of the entire record and our consideration of the parties' arguments, we reverse the decision of the ALJ.

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[3]*CSEA v. PERB*, *supra* note 1 at 7045-46.

FACTS

The underlying facts in this case are set forth more fully in our earlier decision[4] and in the ALJ's decision,[5] which adopted the factual findings of the §75 hearing officer.[6]

Feinberg was actively attempting to organize District employees on behalf of CSEA at all times relevant to the charge. His supervisor, Knopfke, was aware of his organizing efforts at least by February 1996.[7] The District filed the CSL §75 charges on October 10, 1996. The charges alleged that on March 18,1996, Feinberg had allowed unauthorized personnel in the radio room and that he engaged in a prank in the radio room; that he failed to timely complete an assignment given to him on May 13, 1996; that he failed to follow proper procedures for requesting time off on three occasions in June 1996; that he failed to complete the printing and filing of eight monthly reports for the State of New York; and that he failed to maintain a New York State Commodities Contract book. The §75

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[4]31 PERB ¶3084 (1998).

[5]31 PERB ¶4589 (1998).

[6]The ALJ rejected the District's claim, raised for the first time in its brief, that the hearing officer's decision be given *collateral estoppel* effect. However, the ALJ properly adopted the factual findings of the CSL §75 hearing officer, submitted by the parties as part of their stipulated record. In *State of New York (ben Aaman)* 11 PERB ¶3084, at 3138 (1978), the Board found that an ALJ properly relied upon the determination of the facts found by an arbitrator in a related grievance arbitration, thereby precluding relitigation of the issue in the improper practice charge. The basis of this conclusion was that the criteria in *New York City Transit Auth.*, 4 PERB ¶3031, at 3670 (1971), were satisfied. Those criteria are that "the issues raised by the improper practice charge were fully litigated in the arbitration proceeding, that arbitral proceedings were not tainted by unfairness or serious procedural irregularities and that the determination of the arbitrator was not clearly repugnant to the purposes and policies of the . . . Act."

[7]*See Holbrook Fire District*, 30 PERB ¶3062 (1997), where it was determined that the District, and Knopfke in particular, were aware of Feinberg's organizing activities by February 1996.

hearing officer sustained all of these charges and recommended that Feinberg be discharged.[8]

DISCUSSION

> To establish the improper motivation necessary for a finding that §209-a.1(a) and (c) of the Act have been violated, the charging party has the burden of proving engagement in protected activities, that the employer had knowledge of the activities and that it acted because of those activities. If a *prima facie* violation has been established by direct evidence or by circumstantial evidence, the burden shifts to the respondent to rebut that violation by proof that legitimate business reasons prompted the action. (footnotes omitted)[9]

Here, the record establishes that Feinberg was engaged in protected activity and that his supervisor was aware of his activities. Beyond that, no facts are present in the stipulated record that would prove that Feinberg would not have been disciplined for his wrong-doing *but for* his protected activities.[10] A charging party's mere contact with protected activity does not shield him from otherwise lawful action.[11]

CSEA relied on the timing of the disciplinary action, which occurred during Feinberg's organizational activities, alleged disparate treatment of Feinberg in response to the March 1996 incidents and the argued de minimis nature of the other charged offenses to establish the third prong of the test.

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[8]Two other charges of misconduct were dismissed by the hearing officer.

[9]*Convention Ctr. Operating Corp.*, 29 PERB ¶3022, at 3051-52 (1996).

[10]*See CSEA v. PERB*, 32 PERB ¶7010 (Sup. Ct. Albany County 1999).

[11]*State of New York (OMRDD)*, 24 PERB ¶3036 (1991); *Brunswick Cent. Sch. Dist.*, 19 PERB ¶3063 (1986).

As to timing, while a close proximity in time between a protected activity and an adverse action may be sufficient to raise a suspicion of a causal relationship, a coincidence of events alone is insufficient to justify such an inference.[12] While characterized by CSEA as proof of disparate treatment in support of the charge, that the other employees who were present in the radio room and who engaged in the prank with Feinberg on March 18, 1996 and the later, similar, prank that day were not disciplined[13], does not establish animus.[14] We do not agree that because the other employees were also involved in some way with pranks in the radio room, that Feinberg was treated disparately by the District. Feinberg was reprimanded at the time for his conduct and admitted that he had acted inappropriately. The District was free to deal with the other employees as it saw fit based upon their employment records at the time and their further conduct. Feinberg's "conduct and attitudes took a further precipitous decline" after the March 1996 incidents so the District included the incidents in the disciplinary charges that were filed in October 1996. The record does not show that any of the other employees involved in the pranks engaged in any subsequent misconduct.

Finally, the ALJ dismissed the other acts of misconduct on Feinberg's part as not serious enough to warrant the discharge of an otherwise "very good" employee and thereby attributed animus to the District because of the "implausibility of [its] proffered

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[12]*Board of Educ. of the City Sch. Dist. of the City of New York*, 13 PERB ¶4592 (1980), *aff'd*, 14 PERB ¶3005 (1981).

[13]The other employee, who acted in concert with Feinberg, received a counseling memorandum.

[14]*Rockville Ctr. Union Free Sch. Dist.*, 32 PERB ¶3050 (1999).(appeal pending)

business justifications." We are not willing to draw the same conclusions from our reading of the stipulated record.[15] Feinberg engaged in various acts of commission and omission, he admitted that he had done so, and he was found by the §75 hearing officer to be guilty of six of the eight charges brought against him. As we noted in *Rockville Centre Union Free School District*, "insubordination and failure to comply with mandatory [requirements for use of leave time] are not trivial matters."[16]

CSEA must satisfy its burden of proof by a preponderance of the credible evidence.[17] No connection was established in this case between Feinberg's union activity and the disciplinary charges. Thus, CSEA has failed to establish the third necessary element of proof to sustain the charge. It is only when the charging party meets its burden on each of the three elements of proof that the respondent must then rebut that proof and demonstrate that its conduct was for proper business reasons.[18]

Based on the foregoing, we grant the District's exceptions and reverse the decision of the ALJ.

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[15]*Supra* note 12.

[16]*Supra* note 14, at 3116.

[17]That is the standard we have held charging parties must satisfy. *See, e.g., State of New York (Division of Human Rights)*, 22 PERB ¶3036 (1989).

[18]*Town of Independence*, 23 PERB ¶3020 (1990).

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: October 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF WHITE PLAINS,

Charging Party,

CASE NO. U-21488

- and -

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF WHITE PLAINS, INC.,

Respondent.

In the Matter of

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF WHITE PLAINS, INC.,

Charging Party,

CASE NO. U-21525

- and -

CITY OF WHITE PLAINS,

Respondent.

RAINS & POGREBIN, P.C. (RICHARD K. ZUCKERMAN and JESSICA S. WEINSTEIN of counsel), for City of White Plains

SOLOMON, RICHMAN, GREENBERG, P.C. (HARRY GREENBERG and LORI B. SKLAR of counsel), for Police Benevolent Association of the City of White Plains, inc.

BOARD DECISION AND ORDER

These matters come to us on exceptions filed by both the City of White Plains (City) in Case No. U-21525 and by the Police Benevolent Association of the City of White Plains, Inc. (PBA) in Case No. U-21488, to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) which found that both parties had violated §209-a of the Public Employees' Fair Employment Act (Act) by submitting certain demands to interest arbitration which constituted nonmandatory subjects of negotiation. The Assistant Director ordered the PBA to withdraw its proposals numbered 8, 12 and 13 and the City to withdraw its proposed numbered 13 from consideration at compulsory interest arbitration.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the Assistant Director.

FACTS

On February 2, 2000, the PBA filed a petition for compulsory interest arbitration. On February 14, 2000, the City filed its improper practice charge alleging that the PBA violated §209-a.2(b) of the Act by submitting certain nonmandatory subjects of bargaining to interest arbitration. (Case No. U-21488) On March 2, 2000, the PBA filed its improper practice charge against the City alleging that it violated §209-a.1(d) of the Act when it submitted a nonmandatory subject of bargaining to the interest arbitration panel in response to the PBA's demands. (Case No. U-21525)

The parties stipulated to the facts and exhibits in lieu of a hearing. The Assistant Director consolidated the cases for decision based upon the stipulated facts.

ASSISTANT DIRECTOR DECISION

The Assistant Director determined that the proposals in dispute submitted by both parties constituted nonmandatory subjects of bargaining and ordered them withdrawn from compulsory interest arbitration.

EXCEPTIONS

The PBA, in Case No. U-21488, excepted to the Assistant Director's decision on the law and the facts. The City, in Case No. U-21525, excepted to the Assistant Director's decision on the law.

DISCUSSION

Case No. U-21488

PBA Proposal #8

This proposal adds new language to section 24 entitled Grievance Procedure of the parties' collective bargaining agreement. The City objects specifically to subsections (C), (D) and (F) of proposal #8. The City correctly argues that subsections (C) and (F) are nonmandatory subjects because they involve procedures to be followed in the event of an internal criminal or administrative investigation. Subsection (D) is nonmandatory because it is too vague and, thus, ambiguous.

We concur with the Assistant Director's analysis of those proposals in light of our prior holdings on these issues.

We turn to the exceptions raised by both parties to the specific findings made by the Assistant Director upon the Stipulation and Facts before him.

1. The PBA excepts to the Assistant Director's finding that the Grievance Proposal must be considered as a single package and, therefore, he found it to be nonmandatory in its entirety based on the nonmandatory aspect of some of its parts.

The PBA excepts to the Assistant Director's decision that proposal #8 is a unitary demand and, as such, nonmandatory because it contains a mixture of both mandatory and nonmandatory subjects. We have held that where a bargaining proposal contains two or more inseparable elements , i.e., a unitary demand, at least one of which is nonmandatory, the entire proposal is deemed nonmandatory.[1] The Assistant Director correctly notes that we previously held, in *Schenectady Patrolmen's Benevolent Association,*[2] that a proposal for a

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[1]*See Poughkeepsie Prof'l Fire Fighters' Ass'n, Local 596, IAFF, AFL-CIO*, 33 PERB ¶3029 (2000), citing *City of Oneida*, 15 PERB ¶3096 (1982); *CSEA, Inc., Niagara Chapter*, 14 PERB ¶3049 (1981); *Amherst Police Club, Inc.,* 12 PERB ¶3071 (1979); *City of Rochester*, 12 PERB ¶3010 (1979); *Town of Haverstraw*, 11 PERB ¶3109 (1978), *confirmed in relevant part sub. nom. Town of Haverstraw v. PERB*, 12 PERB ¶7007 (Rockland County Sup. Ct. 1979), *aff'd* 75 AD2d 874, 13 PERB ¶7006 (2d Dep't 1980); *Pearl River Union Free Sch. Dist.*, 11 PERB ¶3085 (1978).

[2]21 PERB ¶3022 (1988).

procedure which "is applicable to criminal investigations as well as to internal disciplinary investigations" is a nonmandatory subject of negotiations.[3]

We also agree with the Assistant Director that proposal #8 is not somehow rendered mandatory under the Board's conversion theory adopted in *City of Cohoes (*hereafter *Cohoes)*.[4] While situated in Article 24, Grievance Procedure, of the parties' collective bargaining agreement, a mandatory subject of negotiations, proposal #8 adds new language to this article which is not related to the parties' grievance mechanism. Consequently, we cannot agree that proposal #8 is subject to the conversion theory of negotiations and, thus, PBA's exception is denied.

2. The PBA's demand regarding overtime would take away management's rights to unilaterally change staffing levels.

The PBA has submitted a proposal that is not a demand for compensation to be paid at an overtime rate but rather a demand that would give the employees the unfettered right to work overtime without regard for existing staffing needs. The Assistant Director correctly points to our decision in *Town of Carmel,*[5] where we held, and the Appellate Division confirmed, that it is a

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[3]*Supra* note 2 at 3049; *see also Patrolmen's Benevolent Ass'n of Newburgh, New York, Inc.*, 18 PERB ¶3065 (1985).

[4]31 PERB ¶3020 (1998), *confirmed*, 32 PERB ¶7026 (Sup. Ct. Albany County, 1999) (appeal pending).

[5]31 PERB ¶3006, at 3009 (1996), *confirmed*, 267 AD2d 858, 32 PERB ¶7028 (3d Dep't 1999).

managerial prerogative to set and change minimum staffing levels. Consequently, the creation and filling of positions is a nonmandatory subject.[6] The PBA's exception is denied.

3. The PBA excepts to the Assistant Director's finding that the conversion theory does not convert nonmandatory matters already in a contract and it does not convert nonmandatory topics into mandatory topics merely because they are to be added to mandatory subject matter in a contract.

The PBA's proposal #13 sought to grant employees on maternity leave of over sixty calendar days duration the right to accrue vacation time.

The parties' collective bargaining agreement addresses the accrual of vacation time and expressly disqualifies any employee who is on leave of absence, paid or unpaid, exceeding sixty calendar days, from accruing vacation time. The Assistant Director noted our decision in *City of Rochester*[7] where we held that a demand that would have treated pregnancy and childbirth leave differently from other types of leave to be nonmandatory. In addition, the Court of Appeals has held that such a demand is discriminatory.[8]

The PBA misapprehends the rationale of *Cohoes*.[9] We held in *Cohoes* that the conversion theory was limited to nonmandatory subjects of

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[6]*See Erie County Water Authority*, 27 PERB ¶3010 (1994); *Town of Henrietta*, 25 PERB ¶6501 (1992); *Churchville-Chili Cent. Sch. Dist.*, 17 PERB ¶3055 (1984).

[7]12 PERB ¶3010 (1979).

[8]*See Union Free Sch. Dist. No. 6 v. New York State Human Rights Appeal Bd.*, 35 NY2d 371, 378 (1974).

[9]*Supra* note 4.

negotiation and had no application to prohibited subjects. Since the PBA's proposal #13 is discriminatory in nature, it is a prohibited subject and outside the scope of negotiations. The PBA's exception is denied.

Case No. U-21525

The City's proposal #13 sought to add language to the General Provisions section of the parties' collective bargaining agreement which waives the protection afforded employees under §58(4)(c) of the Civil Service Law, to wit:

> Notwithstanding the provisions of Civil Service Law Section 58 (4)(c), any employee who has received permanent appointment as a police officer and is temporarily assigned to perform the duties of a detective shall not, whenever the assignment exceeds 18 months in duration, be appointed as a detective and shall not receive the compensation ordinarily paid to a detective performing those duties.

The PBA objected to such proposal as a nonmandatory subject. The Assistant Director agreed and found the proposal to be nonmandatory. The City excepted to the decision on the ground that the Assistant Director determined the City's reliance on *Steinman v. Village of Spring Valley* (hereafter *Steinman*)[10] was misplaced. We agree with the Assistant Director's analysis.

Civil Service Law §58(4)(a) expressly declares the legislature's intent by stating that :

> it is frequently impracticable to ascertain fitness for the positions of detective and investigator . . . by means of competitive examination . . . . The Legislature further finds that competitive examination has never been employed in many police . . . departments, to ascertain

[10]261 AD2d 548 (2d Dep't 1999).

> fitness for the positions of detective and investigator . . . ; such fitness has always been determined by evaluation of capabilities of an individual (who has . . . received permanent appointment to the position of police officer . . .) by supervisory personnel. The Legislature further finds that an individual who performs in an investigatory position . . . for a period of eighteen months, has demonstrated fitness for the position of detective or investigator within such police . . . department at least as sufficiently as could be ascertained by means of a competitive examination.

In *Steinman*, the Appellate Division affirmed the lower court's denial of a police officer's Article 78 petition. The lower court found that the police officer was not entitled to continue as a detective even though he performed those duties more than eighteen months. The court found that he acted as a detective in a *supervisory capacity* which took him out of the protection afforded by §58(4)(c). Furthermore, §16 of the Rockland County Police Act, a special act, took precedence over the inconsistent provision of the Civil Service Law. This Act gave the police chiefs authority to assign officers to detective duty and to revoke such assignments "at will".

We determined in *Cohoes*[11] that an employer's demand to alter a statutory right that may affect a term and condition of employment is mandatorily negotiable, unless such a demand is against public policy or has otherwise been prohibited by a plain and clear expression of legislative intent.

The legislative intent expressly stated in §58(4)(c) of the Civil Service Law could not be any clearer and since the City's proposal mirrors the statutory

[11] *Supra* note 4 at 3043.

language contained in §58(4)(c), the City's proposal #13 is foreclosed by the statute and is, therefore, not a mandatory subject of negotiation. The City's exceptions are denied.

For the reasons set forth above, the Assistant Director's decision is affirmed and the PBA's exceptions and the City's exceptions are dismissed.

IT IS HEREBY ORDERED that the PBA withdraw its proposals #8, #12, and #13 and that the City withdraw its proposal #13 from consideration at compulsory interest arbitration.

DATED: October 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROSEANNE LEGRAND,

Charging Party,

CASE NO. U-21730

- and -

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFL-CIO,

Respondent.

In the Matter of

JEANNETTA WALSH,

Charging Party,

CASE NO. U-21732

- and -

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFL-CIO,

Respondent.

In the Matter of

CYNTHIA DICKSTEIN,

Charging Party,

CASE NO. U-21733

- and -

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFL-CIO,

Respondent.

ROSEANNE LEGRAND, JEANNETTA WALSH AND CYNTHIA DICKSTEIN, ***pro se***

BOARD DECISION AND ORDER

These matters come to us on exceptions filed by Roseanne Legrand, Jeannetta Walsh and Cynthia Dickstein (charging parties), *pro se*, to a decision of the Director of Public Employment Practices and Representation (Director) dismissing their improper practice charges. The charging parties filed separate charges, each alleging that the Council of Supervisors and Administrators of the City of New York, Local 1, AFL-CIO (CSA), violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) when it failed to implement a side-letter agreement reached during collective bargaining for its current contract with the Board of Education of the City School District of the City of New York (District).

FACTS

On May 30, 2000, the charging parties filed their identical charges with PERB. They alleged that the CSA and the District entered into a new agreement on January 31, 2000. As a result of those negotiations, a side-letter agreement was also made which stated that the District's "Division of Human Resources will audit and re-evaluate positions identified by the Superintendent/Executive Director where newly assigned Educational Administrators Level II (EA II's) are making higher salaries than EA II's serving in comparable positions in the same district/office. Where warranted, reclassification of positions to set salary rates will be implemented."[1]

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[1]See Improper Practice Charges.

The charging parties alleged that guidelines on the actual implementation have not as yet been issued. They contacted CSA and were advised by CSA that "things are in the works," however, they allege, nothing has materialized.

On June 1, 2000, the Assistant Director of Public Employment Practices and Representation (Assistant Director) sent a notice of deficiency to the charging parties advising them that their charges were deficient and the reasons therefor. On June 19, 2000, the charging parties submitted their first amendment. On June 19, 2000, the Assistant Director sent a second deficiency letter to them. On July 6, 2000, an extension to file an amendment was granted to July 21, 2000. On July 20, 2000, the second amendment was received from the charging parties.

The charging parties failed to respond to the second deficiency notice and accordingly their charges were dismissed. They except to the Director's decision on factual grounds, which includes facts which were not contained in the original charges or the amendment to their charges.

DISCUSSION

We have consistently held that the duty of fair representation is breached upon a showing of conduct which is arbitrary, discriminatory or in bad faith.[2] Since we are loath to substitute our judgment for that of CSA, we have established a limited basis upon which a breach of duty of fair representation may be shown. Absent evidence that an

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[2]*See CSEA, Local 1000 (Heffelfinger)*, 32 PERB ¶3044 (1999); *CSEA v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

action taken is arbitrary, discriminatory or in bad faith, a violation of the representation duty will not be found.[3]

The Assistant Director advised the charging parties of the deficiencies contained within their respective charges. The amendments which followed did not address those deficiencies. Instead, the charging parties submitted documents which failed to specify how CSA's conduct as it relates to the side-letter agreement was arbitrary, discriminatory or in bad faith. It is not our role to search through documents in an effort to discern and articulate the existence of a charge.[4]

Upon our review of the pleadings, we find that the charging parties have failed to make a *prima facie* showing of arbitrary, discriminatory or bad faith conduct on the part of CSA. While charging parties allege that CSA was careless, inept and ineffective in the manner in which it handled their complaints, we, as well as the courts, have held that such allegations do not evidence a breach of the duty of fair representation.[5]

Based on the foregoing, the charging parties' exceptions are denied and the decision of the Director is affirmed.

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[3]*Public Employee's Fed'n AFL-CIO and State of New York (Dep't of Health)*, 29 PERB ¶3027 (1996).

[4]*See State of New York (Workers' Compensation Bd.) and CSEA, Inc.*, 29 PERB ¶3054 (1996); *State of New York (Div. of Parole) and Security and Law Enforcement, Council 82, AFSCME,* 27 PERB ¶3016 (1994).

[5]*Supra note 2.*

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: October 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 342, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

- and -

CASE NO. CP-639

TOWN OF HUNTINGTON,

Employer,

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

WILLIAM M. HENNESSEY, for Petitioner

JOHN J. LEO, ESQ., for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Local 342, United Marine Division, International Longshoremen's Association, AFL-CIO (Local 342) to an Administrative Law Judge's (ALJ) decision which dismissed Local 342's petition for unit clarification and placement of the newly created position of Town Park Supervisor I (Town Park Supervisor).

The Town of Huntington (Town), at the time this position was created, placed it in the "white collar" unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). On February 4, 2000, CSEA was granted leave to intervene and a hearing was held upon the issues on February 17, 2000.

ALJ Decision

The ALJ decided that the recognition clause of the Town-Local 342 collective bargaining agreement did not specifically include the title of Town Park Supervisor and the broadly worded reference in the contract to "all supervisory employees" was not conclusive. Thus, the unit clarification aspect of the petition was dismissed.

As to the unit placement aspect of the petition, the ALJ inquired into the most appropriate unit for this title. She found no community of interest between the new title of Town Park Supervisor and the existing supervisory titles represented by Local 342 and, therefore, also dismissed the unit placement aspect of the decision.

Exceptions

Local 342 excepts to the ALJ decision as to unit clarification on the grounds that the ALJ failed to acknowledge the plain language of the recognition clause of the Town-Local 342 collective bargaining agreement. In addition, with respect to unit placement, Local 342 argues that the background of the incumbent (Todd McGowan) is consistent with that of other supervisors represented by Local 342. Furthermore, his job description is similar to other supervisors of Local 342. Lastly, Local 342 argues that the Town ignored public policy by unilaterally determining the unit in which McGowan's title was placed.

Facts

The facts are fully set forth in the ALJ's decision. We shall, therefore, confine our review to the salient facts relevant to the exceptions filed by Local 342.

The recognition clause of the collective bargaining agreement between Local 342 and the Town covers "all supervisory employees", including but not limited to several other titles specifically listed. However, Town Park Supervisor was not among the titles specifically listed. Local 342's supervisory unit generally consists of labor supervisors.

The title "Town Park Supervisor" resulted from consultations by the Town with the County civil service commission. The Town originally used another title for the position but the commission rejected that title because it was already in use. The purpose of creating the position was to hire an employee who could oversee Heckscher Park, regarded by many to be the Town's "crown jewel". Heckscher Park had been neglected for many years and had been the subject of community complaints.

The primary role of the Town Park Supervisor is to manage Heckscher Park and not supervise Town employees. McGowan was hired from a civil service list, possesses a master gardener license and, most recently, supervised a park in Albany, New York. In addition to managing the park, he is responsible for interacting with civic groups, elected officials, Town maintenance employees, Town highway department employees and the Director of Parks and Recreation.

CSEA represents a unit of "white collar" supervisors, including, among others, Inventory Control Supervisor, Print Shop Supervisor, Parking Meter Supervisor,

Recreational Supervisor, Senior Citizens Program Supervisor, Town Maintenance Supervisor, and Waterways Management Supervisor. The incumbents in these titles are responsible for programs or projects. Some supervise personnel, directly, as a part of their job duties, and some of the employees supervised are in Local 342's unit.

By comparison, Local 342's supervisors are a "blue collar" unit, such as Labor Crew Leader IV, Park Maintenance Supervisor IV and Labor Crew Leader III. The blue collar supervisors are typically maintenance crew leaders who are trained in the trades and have supervision over subordinates as their primary role.

McGowan was placed in the CSEA unit by the Town because neither of the collective bargaining agreements between the Town and Local 342 nor the Town and CSEA contained the title of Town Park Supervisor in its recognition clause. The Town believed that based on the duties the title had a greater community of interest with the "white collar" supervisors in the CSEA unit.

Discussion

Local 342 argues that the ALJ failed to acknowledge the plain language of its recognition clause. The phrase "all supervisory employees" contained in its recognition clause should, therefore, include the title of Town Park Supervisor. This argument is rejected.

We have previously held that "[a] unit clarification petition seeks only a factual determination as to whether a job title is actually encompassed within the scope of the petitioner's unit. We have held a unit clarification petitioner to a burden of proof on its petition because that particular type of petition necessarily seeks only a determination

of fact."[1] A unit clarification petition raises only a fact question as to whether the at-issue personnel are included in the existing unit.[2] Where the language in the recognition clause is general and is not title specific, the inquiry goes beyond the language of the recognition clause to determine whether any other contractual language either covers or specifically excludes the at-issue title.[3] Where there is no relevant contractual language, the parties' practice with respect to the at-issue title or similar titles is reviewed to ascertain the parties' intent.[4]

The recognition clause in the Town-Local 342 collective bargaining agreement includes "all supervisory employees", including, but not limited to, several specific titles. The at-issue title is not among those listed. The Town-CSEA collective bargaining agreement includes several "supervisor" titles also. We affirm the ALJ's finding that the recognition clause in question is overly broad and that the unit clarification aspect of the petition should be dismissed.

We also reject Local 342's exceptions regarding the ALJ's dismissal of the unit placement petition. A unit placement petition puts the appropriateness of the unit under

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[1]*Monroe-Woodbury Cent. Sch. Dist.*, 33 PERB ¶3007, at 3021 (2000), citing *State of New York (Dep't of Audit and Control)*, 24 PERB ¶3019 (1991).

[2]*County of Orange and Sheriff of Orange County*, 25 PERB ¶3049 (1992), *confirmed sub nom. Orange County Deputy Sheriff's Ass'n v. PERB*, 26 PERB ¶7004 (Sup. Ct. Rockland County 1993).

[3]*General Brown Cent. Sch. Dist.*, 28 PERB ¶3065 (1995); *County of Niagara*, 21 PERB ¶3030 (1988).

[4]*County of Niagara*, *supra*. *See also Clinton Community Coll.*, 31 PERB ¶3070 (1998).

§207 of the Public Employees' Fair Employment Act (Act) in issue. "Moreover, the unit placement petition proceeds from the *finding* or *admission* that the position in issue is not in the petitioner's unit, but should be most appropriately placed there."[5] (emphasis added)

Since the title of Town Park Supervisor was in neither of the bargaining units, the Town placed McGowan in the CSEA unit because it believed it was the most appropriate given the nature of his work. This determination should not be disturbed especially in light of the community of interest factors discussed by the ALJ in her decision.

The ALJ's decision accurately reflects in material respects a record which distinguishes the work performed by the Town Park Supervisor from the blue collar supervisors represented by Local 342. She noted the differences in the factors which make up community of interest such as work rules, personnel policies, contractual benefits and civil service status.

Furthermore, as we have held, "Any questions under a community of interest criterion as to the appropriateness of continuing the placement of the [affected employee] in the [CSEA] unit are removed upon application of the 'administrative convenience' uniting criteria in §207.1(c) of the Act. That criterion requires weight be given to an employer's uniting preference."[6]

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[5]*State of New York (Dep't of Audit and Control), supra* note 1 at 3038.

[6]*Malone Cent. Sch. Dist.*, 31 PERB ¶3050 at 3105 (1998); Transcript pp. 39-40, 100-02.

Local 342's policy exception is also rejected based upon our application of the employer's administrative convenience uniting criteria as set forth in *Malone Central School District, supra*.

Based upon the record before us and our consideration of the parties' arguments, we affirm the decision of the ALJ and deny Local 342's exceptions.

IT IS, THEREFORE, ORDERED that the petition must be, and it hereby is, dismissed.

DATED: October 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SENECA FALLS SUPPORT STAFF ASSOCIATION,

Petitioner,

-and- **CASE NO. C-4954**

SENECA FALLS CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CIVIIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, 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 the Seneca Falls Support Staff Association 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.

Included: All support staff personnel hereafter listed: Assistant Cook, Cook Manager, Food Service Helper, Senior Food Service Helper, Baker, School Lunch Cashier, Cafeteria Monitors, Audio Visual Aide, Typist, Head Building Maintenance Mechanic, Senior Stenographer (12 mos.) at Bldg. Level, Mechanic, Bus Dispatcher, Stenographer (11 mos.), Stenographer (12 mos.), Building Maintenance Mechanic, Senior Custodian, Custodian, Head Automotive Mechanic, Automotive Mechanic, Bus Driver, Cafeteria Aide, Teacher Aide, Bus Monitor, Mechanic-Bus Driver, Senior Typist, Library Aide, Groundskeeper, Food Transporter, Child Associate, Data Entry Machine Operator, General Mechanic/Automotive.

Excluded: Head Custodian, Business Manager, Superintendent of Buildings and Grounds, Building Maintenance Supervisor, Cafeteria Supervisor, Transportation Supervisor, and District Office Personnel. District Office Personnel to include Secretary to Superintendent, District Treasurer, and no more than two (2) other full-time equivalent positions.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Seneca Falls Support Staff Association. 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: October 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member