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State of New York Public Employment Relations Board Decisions from March 1, 1989

New York State Public Employment Relations Board

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In the Matter of
DON A. McLAUGHLIN,
Charging Party,

-CASE NO. U-10366-

CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK
Respondent.

DON A. McLAUGHLIN, pro se

BOARD DECISION AND ORDER

Charging party Don A. McLaughlin (McLaughlin) excepts to the decision of the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, his improper practice charge against the City School District of the City of New York (District). The charge alleges that the District violated §§209-a.1(a), (d) and (e) of the Public Employees' Fair Employment Act (Act) when it terminated him in March 1988 in violation of the collective bargaining agreement between the District and McLaughlin's bargaining unit representative, refused to respond to correspondence regarding a grievance filed in connection with his termination, advised him that he was not entitled to grieve his termination because of the availability of other
administrative procedures, and failed to respond to his request for a meeting with the District's Chancellor.

The Director dismissed the aspects of the charge relating to McLaughlin's termination upon the ground that the events complained of occurred more than four months prior to the filing of the charge. The Director also dismissed the charge insofar as it alleges violations §209-a.1(a) of the Act for failure to allege facts which could establish that the District's conduct was improperly motivated.

Finally, the Director's dismissal of so much of the charge as alleges a violation of §§209-a.1(d) and (e) of the Act is based upon determinations by this Board that individual bargaining unit members lack standing to allege violations of those sections of the Act, which it is the right and responsibility of the duly certified or recognized bargaining agent to assert.

As we stated in Queens College of the City University of New York (Soffer), 21 PERB ¶3024, at 3055 (1988):

[T]he right to seek redress of [§209-a.1(d) and (e)] violations by an employer flows to the employee's bargaining agent, which has the duty and right to negotiate on behalf of its members . . . [A]n individual bargaining unit member does not have the right to act independently and in the place of the bargaining agent in the filing of charges relating to alleged violations of the employer's bargaining duties.

Accordingly, we find that the Director properly dismissed so much of the charge as alleges violations of
§§209-a.1(d) and (e) of the Act.

In his exceptions, McLaughlin asserts contractual violations by the District in his termination, performance rating, and the failure to respond to his request for a conference with the District's Chancellor. All of these matters are outside the scope of this Board's jurisdiction pursuant to §205.5(d) of the Act, because they involve nothing more than efforts to redress contractual violations which we are not empowered to address.1/

Also in his exceptions, McLaughlin asserts that the limitation period contained in §204.1(a) of PERB's Rules of Procedure (Rules), which requires the filing of a charge within four months of the allegedly improper conduct, should not apply until internal redress procedures have been exhausted. However, the Director properly found that the date from which the limitation period for the filing of improper practice charges runs is the date when the charging party knows, or should have known, that the respondent "has engaged in or is engaging in an improper practice", that is, the date when the conduct giving rise to the charge took

1/Section 205.5(d) provides, in relevant part, that: "The Board shall not have 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."
place, and the filing period is not tolled by the availability and use of other administrative procedures.

Finally, McLaughlin excepts to the Director's determination that the charge sets forth no facts which could support a finding that the District acted for the purpose of interfering with his rights under the Act. However, no allegations appear anywhere in the charge, either as originally filed or as amended, which would establish any connection between the adverse actions complained of by McLaughlin and his rights of organization under §202 of the Act, his right of representation under §203 of the Act, or any other rights conferred by the Act.

Based upon the foregoing, the Director's decision is affirmed, and IT IS ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: March 1, 1989
Albany, New York

[Signatures]


3/See County of Suffolk Department of Labor Relations, 19 PERB ¶3003 (1986); NYC Transit Authority (King), 10 PERB ¶3077 (1977).
In the Matter of
THOMAS C. BARRY,
Charging Party,

- and -

UNITED UNIVERSITY PROFESSIONS,
Respondent.

THOMAS C. BARRY, pro se

BOARD DECISION AND ORDER

Thomas C. Barry excepts to the dismissal by the Director of Public Employment Practices and Representation (Director), as deficient, of his improper practice charge which alleges that the United University Professions (UUP) violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it filed an improper practice charge against Barry's employer, the State of New York (SUNY). UUP's charge alleges that SUNY unilaterally increased the length of the workyear for bargaining unit members (including Barry) without negotiation, in violation of §209-a.1(d) of the Act.¹ He asserts that the position taken by UUP in filing its charge against SUNY does not represent his interests, is

¹That improper practice charge, Case No. U-9694, is pending before an assigned Administrative Law Judge (ALJ), and is not before us at this time.
in fact in conflict with his interests, and that UUP was not entitled to file its improper practice charge against SUNY without first ascertaining whether Barry individually supported the filing of such a charge.

The Director dismissed the improper practice charge upon the ground that it contains no factual allegations supportive of a claim of improper motivation or other breach of the duty of fair representation.

As found by the Director, no factual allegations are offered in support of Barry's claim that the improper practice charge filed by UUP against SUNY conflicts with his interests. Indeed, Barry appears to allege nothing more than his philosophical disagreement with UUP's determination to challenge an alleged unilateral change in terms and conditions of employment. However, as pointed out by the Director in his decision, the fact that an individual bargaining unit member may oppose the filing of an improper practice charge, and even may have interests which conflict with the interests of other bargaining unit members on whose behalf the charge is brought, does not give rise to an improper practice.2/ Furthermore, there is nothing inherently improper in UUP's filing of a charge seeking

2/ See Faculty Ass'n of Hudson Valley Community College (Dansereau), 15 PERB ¶3080 (1982).
enforcement of its statutory right to negotiate terms and conditions of employment.

It is beyond cavil that an employee organization is entitled to broad latitude in the negotiation of collective bargaining agreements for bargaining unit members,\textsuperscript{3} and in the determination whether to enforce its right to collectively negotiate under the Act, absent improper motivation in the making of such determinations. It is also beyond dispute that the employee organization is entitled to make its determinations on behalf of all bargaining unit members generally, whether they are union members or not, and whether they pay agency fees or not. Assuming that the employee organization otherwise comports with its duty of fair representation, the fact that some of its decisions may adversely affect some bargaining unit members does not give rise to a violation of the Act.\textsuperscript{4} Barry makes no claim, in any event, that he is adversely affected by UUP's filing of a charge.

In view of Barry's failure to establish any facts supportive of his claim that UUP violated the Act by its filing of an improper practice charge alleging a failure by

\textsuperscript{3}Civil Service Employees Ass'n, Inc. (Rooney), 20 PERB ¶3062 (1987).

\textsuperscript{4}See, e.g., Plainview-Old Bethpage CSD and Local 237, IBT, 7 PERB ¶3058 (1974).
his employer to negotiate in good faith, IT IS ORDERED that this charge be, and it hereby is, dismissed in its entirety.

DATED: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF TEACHERS,
LOCAL 2, AFT, AFL-CIO,

Charging Party,

-and-

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Respondent.

JAMES R. SANDNER, ESQ. (PAUL H. JANIS, ESQ., of
Counsel), for Charging Party

THOMAS P. RYAN, ESQ. (BARBARA A. JACCOMA, ESQ. and
SHEILA GARVEY, ESQ., of Counsel), for
Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Board
of Education of the City School District of the City of
New York (District) to an Administrative Law Judge (ALJ)
decision which upheld in part an improper practice charge
filed by the United Federation of Teachers, Local 2, AFT,
AFL-CIO (UFT). The charge alleges that the District violated
§209-a.1(d) of the Public Employees' Fair Employment Act
(Act) when it refused to negotiate upon request the salaries
to be paid to unit employees working in the District's 1987
twelve-month educational program.  

The District does not deny that wages are a mandatory subject of bargaining. Instead, its defense to the charge rests primarily upon two points. First, it denies any refusal to negotiate a wage rate for employees working during the months of July and August 1987, and affirmatively asserts that it in fact had negotiated with the UFT a rate of pay for the at-issue work, which is set forth in the parties' 1984-87 collective bargaining agreement at Article 15 (entitled "Rates of Pay and Working Conditions of Per Session Teachers"). Alternatively, the District argues that Article 20 of the agreement (entitled "Matters Not Covered") covers the issue sought to be negotiated. Second, the District contends that it did nothing more than establish an initial rate of pay for a new program without bargaining, which, it asserts, it was entitled to do pursuant to this Board's holdings in Churchville-Chili CSD, 17 PERB ¶3055 (1984) and County of Tompkins, 15 PERB ¶3092 (1982).

The circumstances giving rise to the charge are briefly set forth as follows: in February 1987, the New York State

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1/ The ALJ dismissed allegations made by the UFT that the District violated the Act by disseminating information concerning the program to some unit employees contrary to prior practice, and refusing to negotiate the impact of implementation of the new twelve-month educational program. The UFT does not except to the dismissal of these aspects of the charge, and they are not now before us.

2/ The ALJ decision, located at 21 PERB ¶4514 (1988), contains a detailed statement of facts, which will not be repeated here, except as necessary to explain our holdings.
Education Department issued guidelines for implementation of a program created by Chapter 683 of the Laws of 1986, enacted by the New York State Legislature, which required school districts to make available to students with handicapping conditions of a certain severity, a twelve-month school year. Immediately thereafter, the UFT, by its coordinator of negotiations, requested negotiations with respect to the terms and conditions of employment of persons to be utilized to carry out the program for the upcoming summer of 1987. At a meeting of the parties on March 11, 1987, representatives of the District informed the UFT that it had determined to provide the services mandated by Chapter 683 of the Laws of 1986 through a "new per session activity to begin in July 1987". Having determined that the program would be implemented as a "per session activity", the Board contended that the 1984-87 collective bargaining agreement between the parties represents the result of negotiations concerning rates of pay for per session employees and that no further bargaining was required. In essence, the District contends that it was entitled to institute a new program, that it was entitled to establish the new program as a "per session activity", and that it had already negotiated the rate of pay for per session activities, as referenced by Article 15 of the collective bargaining agreement.
Notwithstanding its position that it had no further duty to bargain the wage rate for employees working in the Chapter 683 program for the summer of 1987, the District expressed its willingness to the UFT to negotiate the wage rate for employees working in the program for subsequent years, and expressed a willingness to negotiate all terms and conditions of employment for employees working in the summer 1987 program, except the wage rate.

It is our finding that the ALJ correctly concluded, based upon the evidence before her, that the wage rate for bargaining unit members employed in the new program mandated by Chapter 683 of the Laws of 1986 and first implemented by the District in July 1987 was a new program and one not covered or contemplated by Article 15 of the parties' collective bargaining agreement. That Article defines per session activities by listing specific programs covered by

\[1\] In reaching this conclusion, the ALJ considered several arbitration awards presented by both parties which have interpreted the language of Article 15. According to the Intrator award, the District then argued that a particular at-issue assignment was not a per session activity because it did "not constitute a per session activity within the meaning of the [parties'] Agreement, nor was it the Chancellor's intent in Special Circular 5, to enlarge the coverage of the contract." The award also references several Chancellor's decisions, several of which found that new programs were not per session activities because they were not listed in the agreement. The ALJ accorded appropriate weight to this and the other awards received in concluding that the parties had not negotiated any agreement that any new program deemed by the District to be a per session activity payable at the contractual wage rate was in fact a per session activity.
the Article. No evidence was offered by the District to suggest that the Chapter 683 program falls within any of the enumerated activities of Article 15. In fact, the District's witnesses acknowledge that the Chapter 683 program is a "new" program, but contend that it has, on many previous occasions, established new programs as per session activities, without objection from the UFT. As the ALJ found, while the Act authorizes an employer to continue prior action without seeking negotiations pursuant to past practice, such practice does not negate the employer's duty to negotiate after demand is made upon it.

In its post-hearing brief to the ALJ, the District argued, for the first time, that Article 20 of its agreement

4/Article 15E of the parties' agreement provides as follows:

Definitions The following are per session activities within the meaning of this Article: vacation day camps; after school centers; evening community and youth and adult centers; evening elementary schools for adults; summer evening elementary schools for adults; fundamental adult education day classes; summer day high schools; summer evening high schools; summer junior high schools; summer special day schools, day treatment centers, institutional settings; summer day elementary schools; evening high and trade schools; the special after-school instructional help program; and extra-curricular athletic and non-athletic programs in day academic and vocational high schools, day junior high schools and special day schools, day treatment centers and institutional settings.

5/County of Tompkins, 10 PERB ¶3066 (1977); Onondaga-Madison BOCES, 13 PERB ¶3015 (1980), aff'd, 82 A.D.2d 691, 14 PERB ¶7025 (3d Dep't 1981).
with the UFT ("Matters Not Covered") should be considered as a defense to the charge. The ALJ rejected this contention upon the ground that as the District had not raised the issue of waiver or contractual coverage as an affirmative defense in its answer, it could not do so following the conclusion of the hearing in the matter, citing our decision in NYC Transit Authority, 20 PERB ¶ 3037 (1987), conf'd, ___ A.D. 2d ___, 22 PERB ¶ 7001, (2d Dep't Feb. 24, 1989). In that case, we held, at 3065, that "the defense of waiver (or negotiation to conclusion of a subject covered by a collective bargaining agreement) is an affirmative defense, which is required by our Rules to be pleaded in the answer to a charge." In reaching this holding, we found it significant that the employer had not, at any time prior to its post-hearing memorandum, either argued or presented evidence concerning the defense then raised and that the employee organization was not on notice of the defense prior to or during the hearing.

We have carefully reviewed the record in this matter, and find no evidence of reliance by the District upon Article 20 in its defense to the instant charge, whether as pleaded in its answer or raised at the hearing before the ALJ. We accordingly affirm the determination of the ALJ to exclude from consideration the District's Article 20 defense. We further note that as a factual matter the District has clearly and consistently argued, from its answer to its brief to this Board, that the wage rate for employees working in
the Chapter 683 program is a matter which is covered by the parties' collective bargaining agreement at Article 15, contrary to its post-hearing claim that this is a matter which is not covered by the agreement, and therefore subject to Article 20 thereof.

The final basis upon which the District excepts to the ALJ's decision finding it in violation of §209-a.1(d) of the Act, is that the imminence of the implementation date of the Chapter 683 program, together with the right which it has to establish initial terms and conditions for a new program, justify its refusal to engage in bargaining for the summer of 1987, while expressing a willingness to engage in bargaining concerning wage rates for subsequent years. The ALJ found, and we agree, that while the District was in fact entitled to establish an initial wage rate and other terms and conditions of employments for persons to be employed in the Chapter 683 program, the initial establishment did not confer upon the District the right to refuse to negotiate for all time the terms and conditions of employment for employees in the 1987 program. Even if bargaining had extended beyond the 1987 program, it is in fact commonplace for parties to negotiate retroactive payments to bargaining unit members. In any event, the District failed to meet its burden of proving that negotiations could not reasonably have taken place prior to implementation of the 1987 Chapter 683 program. In fact, the record supports the conclusion reached by the ALJ that the
District refused to engage in bargaining concerning the wage rate of unit members, not because it was impossible for it to do so, but because it considered that it had already done so and that Article 15 of the parties' collective bargaining agreement entitled it to determine unilaterally that its new program would be treated as a per session activity.\(^6\)

For the foregoing reasons, the decision of the ALJ finding that the District violated §209-a.1(d) of the Act by refusing,\(^7\) on March 11, 1987, UFT's demand to negotiate the rate of pay of unit employees working in the District's twelve-month educational program established pursuant to Chapter 683 of the Laws of 1986 is affirmed.

It is therefore ordered that the District cease and desist from refusing to negotiate with UFT regarding the rate of pay of unit employees working in the District's twelve-

\(^6\) The District asserts that the UFT's charge in essence seeks to compel negotiation about whether new programs will be instituted. We do not construe the charge, or the ALJ decision, as seeking or affording such a result. The decision to establish a new program is clearly a management prerogative and the wage to be paid to persons carrying out that program is just as clearly a mandatory subject of bargaining.

\(^7\) The District argues that the ALJ erred in finding a "refusal" to bargain, and excepts to the finding that the District admitted a refusal to bargain in its answer. The ALJ decision is appropriately read, however, to find that the District affirmatively alleged an absence of a duty to further negotiate because negotiations had taken place and the contract covers the issue. The ALJ found, and we agree, that the issue of wages for the Chapter 683 program was not covered by the parties' agreement and accordingly had not been negotiated, and that the denial of a duty to negotiate was therefore improper and violative of the Act.
month educational program for 1987\(^8\) established pursuant to Chapter 683 of the Laws of 1986, and that it post notice in the form attached at all locations used to post written communications to unit employees.\(^9\)

DATED: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

\(^8\)/In review of the District's clear expressions of willingness to negotiate wage rates for any Chapter 683 program implemented in 1988 and thereafter, and the absence of any claim to the contrary by UFT, the Board's order is directed specifically to the 1987 program.

\(^9\)/The District excepts to the remedial relief recommended by the ALJ, but does so upon the ground that the finding of violation is erroneous and that no remedy is accordingly required. Having affirmed the ALJ's finding of violation, we also adopt the recommended remedial relief.
NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES’ FAIR EMPLOYMENT ACT

we hereby notify all employees of the Board of Education of the City School District of the City of New York in the unit represented by the United Federation of Teachers, Local 2, AFT, AFL-CIO, that the District will not refuse to negotiate with UFT regarding the rate of pay of unit employees working in the District's twelve-month educational program for 1987 established pursuant to Chapter 683 of the Laws of 1986.

Board of Education of the City School District of the City of New York

Dated .........................................................

By ...............................................................

(Representative)                              (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
DEER PARK SCHOOL BUS DRIVERS' UNION,

Petitioner,

-and-

DEER PARK UNION FREE SCHOOL DISTRICT,

Employer,

-and-

DEER PARK UNIT, SUFFOLK EDUCATIONAL CHAPETER, LOCAL 870, CSEA, INC.,

Intervenor.

In the Matter of
WILLIAM MONAHAN and MARY WINIARSKI,

Charging Parties,

-and-

DEER PARK UNIT, SUFFOLK EDUCATIONAL CHAPTER, LOCAL 870, CSEA, INC.,

Respondent.

In the Matter of
WILLIAM MONAHAN and MARY WINIARSKI,

Charging Parties,

-and-

DEER PARK UNION FREE SCHOOL DISTRICT, and DEER PARK UNIT, SUFFOLK EDUCATIONAL CHAPTER, LOCAL 870, CSEA, INC.,

Respondents.
In the Matter of

WILLIAM MONAHAN and MARY WINIARSKI,
CHAIRPERSONS, DEER PARK SCHOOL BUS
DRIVERS' UNION,

Charging Parties,

-and-

DEER PARK UNION FREE SCHOOL DISTRICT,
and DEER PARK UNIT, SUFFOLK EDUCATIONAL
CHAPTER, LOCAL 870, CSEA, INC.,

Respondents.

In the Matter of

DEER PARK SCHOOL BUS DRIVERS' UNION,

Charging Party,

-and-

DEER PARK UNION FREE SCHOOL DISTRICT,

Respondent.

KREISBERG & MAITLAND, P.C. (JEFFREY L. KREISBERG,
ESQ., of Counsel), for Petitioner and Charging
Parties

COOPER, SAPIR & COHEN, P.C. (ROBERT E. SAPIR, ESQ.,
of Counsel), for Employer/Respondent

RICHARD M. GABA, ESQ., for Intervenor/Respondent

BOARD DECISION AND ORDER

In Case No. C-3001, the Director dismissed the petition
of the Deer Park School Bus Drivers' Union (Union), which
sought to remove those employees of the Deer Park Union Free
School District (District) employed in its Transportation
Department from an overall unit of nonprofessional employees represented by the Deer Park Unit, Suffolk Educational Chapter, Local 870, CSEA, Inc. (CSEA) and to represent them in a separate unit. The decision of the Director comes to us on the exceptions filed by the Union.

Concurrently with the Director's decision, the Administrative Law Judge (ALJ) disposed of four improper practice charges filed by the Union or by William Monahan and Mary Winiarski, which charges related to the representation dispute. After the dismissal of various allegations in the charges filed in Case Nos. U-8184 and U-8449, there remained for determination the allegations that CSEA violated its duty of fair representation by not challenging the District when it allegedly altered certain terms and conditions of employment without negotiations, when it allegedly refused to appeal several grievances to arbitration, and when it allegedly failed to notify the grievants of that decision. The ALJ dismissed all aspects of the charges in these two cases. Making a credibility determination in favor of CSEA's witnesses, the ALJ concluded that the testimony demonstrates that CSEA reviewed the matters complained about, made a good faith decision that the District acted within the confines of the collective bargaining agreement or past practices or made a good faith, responsible judgment that arbitration was not available because many of the grievances in question were
untimely. The ALJ determined that CSEA's handling of the grievances was in good faith and was not improperly motivated. The charging parties have filed exceptions to this determination.

The charge in Case No. U-8450 alleged that the District and CSEA violated the Act by continuing to negotiate for the at-issue employees during the pendency of the representation petition filed by the Union. The ALJ sustained that charge and found that the District and CSEA continued the negotiating process by presenting an agreement to their constituents for ratification after they were on notice that a bona fide question concerning representation had been raised. The District and CSEA have filed exceptions to that determination.

The charge filed by the Union in Case No. U-8687 alleges that the District violated §§209-a.1(a), (b) and (c) of the Act by implementing and enforcing a new attendance policy with the intent to interfere with and restrain employees from participating in the presentation of the Union's representation petition and prosecution of the improper practice charges filed by the Union and Monahan and Winiarski. The ALJ found that the promulgation of the attendance rules by the District was not improperly motivated and that the implementation of those rules through disciplinary proceedings against Monahan and Winiarski was
not improperly motivated. The ALJ did find, however, that the District acted with improper motivation in discharging two employees (Marie Forte and Nancy Brault) ostensibly because of their violation of the new attendance rules and insubordination. The Union and the District have filed exceptions to the ALJ's determination in this case.

DISCUSSION

The exceptions filed by the various parties raise the following questions for our consideration:

1. Does the record support the Director's decision that the existing bargaining unit should not be fragmented? Does the record establish such a degree of conflict of interest among the employees in the negotiating unit and such inadequate representation of the part-time bus drivers who seek the separate unit as to warrant granting the petition?

2. Did CSEA violate its duty of fair representation? Did it act improperly when it rejected the grievances as untimely or meritless? In this regard, should we overrule the ALJ's credibility determination in support of CSEA's witnesses?

3. Did the District and CSEA violate the Act when they sought ratification of their agreement after they
were on notice that the Union had filed its petition?

4. Were the disciplinary actions taken by the District against Monahan, Winiarski, Forte and Brault in violation of §§209-a.1(a) and (c) of the Act?

The Director concluded that the Union failed to prove the existence of a conflict of interest or inadequate representation of a degree to warrant fragmentation. The Union argues that such a conclusion is contrary to the record. Having reviewed the record, we affirm the conclusion of the Director. There is no question that there are differences in benefit levels between the full-time employees of the District and the part-time employees. Such differences alone do not warrant the conclusion that there is a conflict of interest. In the absence of evidence that their representative has failed adequately to represent their interests, such differences also do not justify fragmentation of an established unit. We agree with the Director's findings that the part-time bus drivers were represented in the development of CSEA's negotiation proposals, that they were represented in negotiations, that several proposed benefits for them were pursued to fact-finding and that some were achieved. The record does not support a conclusion that CSEA has consistently abandoned the interests of the part-timers in negotiations.
We also affirm the Director's and ALJ's findings that CSEA did not act improperly when it rejected the grievances filed by Monahan and Winiarski. There is no basis in this record for overruling the ALJ's credibility determination. The testimony of CSEA's witnesses support the conclusion that CSEA acted reasonably when it rejected the grievances as untimely or meritless. By the same token, we must conclude, as did the Director, that CSEA's handling of the grievances was not evidence of inadequate representation. Accordingly, we conclude that the Union has failed to prove the existence of a conflict of interest or inadequate representation of such a nature as would warrant fragmentation of the negotiating unit. We, therefore, affirm the dismissal of its petition in Case No. C-3001. We also affirm the dismissal of the improper practice charges filed in Case Nos. U-8184 and U-8449.

In Case No. U-8450, it was established that the Union filed a representation petition with this Board on November 1, 1985. This agency notified both CSEA and the District of the pending matter by mailing copies of the Notice of Conference and Hearing and copies of the petition to them on November 12, 1985. An agreement between the District and CSEA, covering the period July 1, 1985 through June 30, 1988, was executed on November 13, 1985. PERB's mailing was received by CSEA on November 13 and by the
District on November 15. Both the District and CSEA voted to ratify the agreement on November 20.

The ALJ concluded that, since ratification is part of the negotiating process and did not take place until after notice of the union's petition was received by the parties, the act of ratification by both sides constituted a violation of §§209-a.1(a) and 209-a.2(a) of the Act. The ALJ's determination is consistent with prior holdings of this Board.1/ We have long been of the view that an employer may not negotiate with an incumbent organization while a bona fide question concerning representation is pending.

The District and CSEA note that our earlier decisions were based, at least in part, on a similar position originally held by the National Labor Relations Board.2/ They point out, however, that the NLRB has reversed its policy.2/ The District and CSEA urge that we reconsider our policy and follow the NLRB by recognizing that the prohibition of negotiations until the representation proceeding is completed works an undue hardship on employers, unions and employees.

1/County of Rockland, 10 PERB ¶3098 (1977); Town of Brookhaven, 19 PERB ¶¶3004 and 3010 (1986).
2/Shea Chemical Corporation, 42 LRRM 1486 (1958).
We are not persuaded that our long-standing policy in this regard should be reversed. We continue to believe that the integrity of the election process and employer neutrality can better be achieved by prohibiting negotiations with the incumbent organization after a bona fide question concerning representation has been raised. On the other hand, we also recognize that our policy is appropriate only with regard to those employees who are directly affected by the representation petition. If the District and CSEA had ratified their agreement only with regard to the employees not included in the Union's petition, we would not find a violation of the Act. However, there is no evidence that the parties sought to limit their conduct in this regard. Consequently, we must affirm the ALJ's conclusion that by ratifying the agreement after they were on notice of the pendency of the petition, the District and CSEA violated §209-a.1(a) and §209-a.2(a), respectively, of the Act.

Having reviewed the record, we also affirm the ALJ's conclusions with regard to the disciplinary actions taken by the District against Monahan, Winiarski, Forte and Brault, which are the subject of the charge in Case No. U-8687. A significant dispute in the testimony relates to whether or not the District imposed its attendance policies on the supporters of the Union in a discriminatory manner. That issue is largely resolved on the basis of the ALJ's finding
that, in a memorandum issued on February 27, 1985, the District established a policy requiring all drivers to submit written leave requests for advance approval for all leaves, with or without pay. The ALJ also found that this policy was implemented prior to the events complained of herein. It follows, therefore, that the policy which the charging parties failed or refused to comply with was not promulgated for the purpose of interfering with the charging parties' rights. We affirm these findings of the ALJ.

Therefore, when Monahan and Winiarski notified the District orally, on February 11, 1986, that they would take the next day off to meet with their attorney concerning these PERB proceedings and when they notified the District orally on February 23 that they would attend a PERB conference on February 26, the District's denial of their leave requests, followed by the absence of Monahan and Winiarski from work on both days, could properly be the basis for the disciplinary reprimands issued by the District on both occasions.

The first hearing in these proceedings took place on March 20, 1986. On March 7, Monahan was asked by his supervisor to supply the District with a list of the drivers he intended to call as witnesses at the hearing. Monahan said that he would need six to eight drivers as witnesses but refused to provide the District with their names. Monahan was warned that if there was any disruption of service, he
would be penalized. On March 19, Monahan and Winiarski served subpoenas, signed by Monahan, on several District employees directing them to appear the next day at the PERB hearing. The District notified all the subpoenaed employees that the subpoenas were invalid since they were signed by Monahan and not by an attorney. The District directed all of the employees to report to work. Two of the subpoenaed employees, Forte and Brault, attended the hearing, missing their early runs. Monahan and Winiarski attended the hearing, again disregarding the District's policy requiring written request for leave.

On March 21, Forte and Brault were suspended without pay and, on March 26, the District's Board discharged them. Formal disciplinary charges pursuant to Civil Service Law §75 were preferred against Monahan, charging him with failure to follow attendance procedures and disruption of service. As a result of the §75 hearing, Monahan received a 60-day suspension (in addition to a 30-day suspension pending the hearing). Winiarski received a reprimand for not following attendance procedures.

We agree with the ALJ's conclusion that the evidence does not support a finding that the District pursued disciplinary action against Monahan and Winiarski with the intention of interfering with or restraining their Taylor Law rights. While the right of these employees to participate in
the various PERB proceedings is protected by the Act, that right must be exercised with due regard to the legitimate service needs and staff deployment concerns of the employer. While the employer may not unreasonably restrict the ability of the employees to participate in the proceedings, the employees must comply with reasonable attendance rules. Inasmuch as the District's attendance rules were established well before the filing of the representation petition, we agree with the ALJ that the promulgation of the attendance rules was not improperly motivated. We also find that the record supports the ALJ's conclusion that the decision to discipline Monahan and Winiarski was not improperly motivated.

The ALJ found, however, that the penalty assessed against Forte and Brault for their insubordination violated §§209-a.1(a) and (c) of the Act. The ALJ found that the penalty was inconsistent with the penalties assessed against other employees for not following the attendance procedures and failing to report to work as directed. Because the District offered no explanation for the severity of the penalty or the disparity of its treatment of Forte and Brault, the ALJ concluded that they were discharged by the District in retaliation for their appearance at the PERB hearing.
Undoubtedly, the District was correct in its conclusion that Monahan's subpoenas were invalid. Reliance by Forte and Brault on the subpoenas and their appearance at the hearing after being directed not to do so technically constituted insubordination. Nevertheless, they were only absent from work for two and one-half hours and actually performed their afternoon bus runs. There can be no question that the District was aware of the reason why they absented themselves from work, i.e., to appear at a PERB hearing pursuant to a subpoena. Even if the subpoenas were invalid, appearance at a PERB hearing is protected activity which can be subject to employee discipline only if the employer acts in furtherance of legitimate management interests. The District has not explained why discharge under these circumstances was the appropriate response to the misconduct of Forte and Brault, as opposed to other available disciplinary responses. In the absence of such explanation, we must agree with the ALJ that Forte and Brault were terminated in retaliation for their appearance at the PERB hearing.

Regarding the remaining allegations of the charge, we affirm the ALJ's finding that a supervisor's comments concerning authorization cards circulated on behalf of the Union cannot be attributed to the District and is not a basis for finding a violation of the Act by the District. We also agree that the District's refusal to permit Monahan on its premises during his suspension period was not improper under the Act.
CONCLUSION

We find that the District and CSEA have violated §209-a.1(a) and §209-a.2(a), respectively, of the Act by ratifying the successor agreement during the pendency of a representation petition and that the District has violated §§209-a.1(a) and (c) of the Act by terminating Forte and Brault. Further, we affirm the ALJ's dismissal of the other allegations in Case No. U-8687, her dismissal of the charges in Case Nos. U-8184 and U-8449 in their entirety, and the Director's dismissal of the petition in Case No. C-3001.

IT IS THEREFORE ORDERED that:

1. The District shall cease and desist from interfering with, restraining, coercing or discriminating against its employees and CSEA shall cease and desist from interfering with, restraining or coercing unit employees in the exercise of rights protected by the Act;

2. The District and CSEA shall cease and desist from negotiating collective bargaining agreements for employees affected by a representation petition pending before PERB;

3. The District shall offer reinstatement to Marie Forte and Nancy Brault, and make them whole for wages and benefits lost as a result of their discharge until such time as they are reinstated to employment or reject offers of reemployment, together with interest at the maximum legal rate, less interim earnings. Further, the District shall expunge from its personnel files all documents relating to their termination and, any reconsideration of disciplinary action against them shall be without regard to their protected activities; and

4. The District and CSEA shall sign and post notice in the form attached at all
locations at which unit employees work, and places ordinarily used by them to communicate with unit employees.

DATED: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Deer Park Unit, Suffolk Educational Chapter, Local 870, CSEA, Inc. that the Deer Park Union Free School District will:

1. Not interfere with, restrain, coerce or discriminate against its employees in the exercise of rights protected by the Act;

2. Not negotiate collective bargaining agreements for employees affected by a representation petition pending before PERB;

3. Offer reinstatement to Marie Forte and Nancy Brault, and make them whole for wages and benefits lost as a result of their discharge until such time as they are reinstated to employment or reject offers of reemployment, together with interest at the maximum legal rate, less interim earnings.

4. Expunge from its personnel files all documents relating to their termination and any reconsideration of disciplinary action against them shall be without regard to their protected activities.

Deer Park Union Free School District

Dated .........................

By ..................................................

(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the
NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Deer Park Unit, Suffolk Educational Chapter, Local 870, CSEA, Inc. that the CSEA will:

1. Not interfere with, restrain or coerce unit employees in the exercise of rights protected by the Act;

2. Not negotiate collective bargaining agreements for employees affected by a representation petition pending before PERB.

Deer Park Unit, Suffolk Educational Chapter, Local 870, CSEA, Inc.

Dated...........................................

By...........................................
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 852, AFSCME LOCAL 1000, AFL-CIO,
Petitioner,

- and -

CASE NO. C-3333

SAYVILLE LIBRARY,
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 Civil Service Employees Association, Inc., Local 852, AFSCME Local 1000, 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 I:

Included: All full-time librarians, clerks, clerk/typists, account clerks and custodial workers.

Excluded: Library director, senior clerk, pages and part-time employees.

Unit II:

Included: All part-time librarians, clerks, clerk/typists and custodial workers.

Excluded: Library director, senior clerk, pages and full-time employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 852, AFSCME Local 1000, 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: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
SUBSTITUTES UNITED IN BROOME, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

UNION ENDICOT CENTRAL SCHOOL DISTRICT,
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 Substitutes United in
Broome, NYSUT, AFT, 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 per diem substitute teachers who have
received a reasonable assurance of continuing
employment as referenced in §201.7(d) of the
Civil Service Law.

Excluded: All other employees.
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Substitutes United in Broome, NYSUT, AFT, 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: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
SUBSTITUTES UNITED IN BROOME, NYSUT, AFT, AFL-CIO,
Petitioner,

-and-

BINGHAMTON CITY SCHOOL DISTRICT,
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 Substitutes United In Broome, NYSUT, AFT, 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 per diem substitute teachers who have received a reasonable assurance of continuing employment as referenced in §201.7(d) of the Civil Service Law.

Excluded: All other employees.
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Substitutes United in Broome, NYSUT, AFT, 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: March 1, 1989
Albany, New York

[Signature]
Harold R. Newman, Chairman

[Signature]
Walter L. Eisenberg, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
WEST ISLIP TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

   Petitioner,

      -and-

WEST ISLIP UNION FREE SCHOOL DISTRICT,

      Employer,

      -and-

NEW YORK STATE NURSES ASSOCIATION,

      Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the West Islip Teachers Association, NYSUT, AFT, 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 registered nurses.

Excluded: Health Services Coordinator (Head Nurse) and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the West Islip Teachers Association, NYSUT, AFT, 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: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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

-AND-  
VILLAGE OF SAGUERTIES,  
Employer,  

-AND-  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
LOCAL UNION NO. 445,  
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: All police officers; sergeants and investigators.

Excluded: Chief of police; captain; school crossing guards; special patrolmen and 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: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
TRANSPORTATION AIDES OF BUFFALO, NEA/NY, NEA,

Petitioner,

-and-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO,

Employer,

-and-

LOCAL 3488, AFSCME,

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 Transportation Aides of Buffalo, NEA/NY, NEA 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 employees in the title of bus aide.
Excluded: All substitute bus aides and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Transportation Aides of Buffalo, NEA/NY, NEA. 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: March 1, 1989
Albany, New York

[Signature]
Harold R. Newman, Chairman

[Signature]
Walter L. Eisenberg, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CSEA, INC., LOCAL 834,

Petitioner,

-l-and-

LIVERPOOL CENTRAL SCHOOL DISTRICT,

Employer.

In the Matter of
OFFICE PERSONNEL ASSOCIATION OF
LIVERPOOL SCHOOLS, NEA/NY (OPALS),

Petitioner,

-l-and-

LIVERPOOL CENTRAL SCHOOL DISTRICT,

Employer,

-l-and-

CSEA, INC., LOCAL 834,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the
above matters 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 Office Personnel Association
of Liverpool Schools, NEA/NY (OPALS) 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.


Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Office Personnel Association of Liverpool Schools, NEA/NY (OPALS). 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: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 200-B,

Petitioner,

-and-

CATO-MERIDIAN CENTRAL SCHOOL DISTRICT,

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 Service Employees International Union, Local 200-B 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 full- and part-time teacher aides, teaching assistants and library assistants.
Excluded: Per diem substitutes, casual and temporary employees and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Service Employees International Union, Local 200-B. 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: March 1, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member
February 7, 1989

Joseph M. Bress, Esq.
Executive Director
N.Y.S. Ethics Commission
Suite 1211
11 North Pearl Street
Albany, NY 12207

Dear Mr. Bress:

In accordance with Advisory Opinion 88-2, please find enclosed for filing a Code of Conduct applicable to per-diem members of the New York State Public Employment Relations Board. As you know, this agency has one Board only, which consists of a full-time Chairman and two per-diem members. One of the per-diem Board seats is currently vacant.

If any further steps are needed to assure the compliance of this agency with the Advisory Opinion, please advise.

Very truly yours,

[Signature]

Pauline R. Kinsella
Special Counsel to the Board

cc: Harold R. Newman
    Walter L. Eisenberg
STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD  

CODE OF CONDUCT FOR PER DIEM BOARD MEMBERS  

I. Restrictions covering business and professional activities by such members while serving on the Public Employment Relations Board  

Outside activities of the two part-time members of PERB may include the practice of law and arbitration. However, such members of PERB may not represent clients in public sector labor-related matters under the jurisdiction of the Taylor Law and they may not accept arbitration assignments involving parties subject to the Taylor Law. They may accept arbitration assignments involving unions that are affiliated with other unions that represent public employees; for example, it would not be a violation of this policy for one of such Board members to accept a labor arbitration assignment involving a local of the Teamsters or the SEIU by reason of the fact that both organizations have Locals that represent, or are seeking to represent, employees subject to the Taylor Law, so long as the Local involved in the arbitration does not. ¹/  

II. Restrictions on post-service appearances before the Public Employment Relations Board  

a. No person who has been [a member] of the Board shall engage in practice before the Board or its agents in any respect in connection with any case or proceeding which was pending during the time of his employment with the Board.  

b. No person who has been [a member] of the Board shall engage in practice before the Board or its agents in any respect in connection with any case or proceeding not pending during his employment, for a period of six months after his employment with the Board has terminated. ²/  

¹/This policy was enacted by resolution of the Board on June 24, 1976.  

²/This policy is codified at §215.2 of the Rules of Procedure of the Public Employment Relations Board.
III. **Enforcement procedures**

Any complaint of violation of this code of conduct shall be submitted in writing to the Chairman. The Chairman shall refer any such complaints to the New York State Ethics Commission for its investigation and recommendation to the Chairman concerning the action to be taken, if any, in connection with such complaint.