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State of New York Public Employment Relations Board Decisions from August 16, 1990

New York State Public Employment Relations Board

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
NIAGARA FALLS POLICE CLUB,
Charging Party,

-and-

CITY OF NIAGARA FALLS,
Respondent.

DIXON, DeMARIE and SCHOENBORN, P.C. (ANTHONY J. DeMARIE, ESQ., of Counsel), for Charging Party

DOUGLAS J. CROWLEY, ESQ., for Respondent

BOARD DECISION AND ORDER

By decision dated April 20, 1990, an Administrative Law Judge (ALJ) found the City of Niagara Falls (City) to have violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused to execute an agreement, or otherwise respond to a request to do so, proffered by the Niagara Falls Police Club (Club) for the years 1987, 1988 and 1989.

In 1987, following issuance of an interest arbitration award for that year, the parties agreed that they would:

execute a completely revised collective bargaining agreement to include terms and conditions of employment contained in the interest arbitration panel award and all previously existing terms and conditions of employment, in a revised form, which would simplify the agreement and provide an easier understanding for the employees covered by the contract.
Shortly thereafter, on December 1, 1987, the Club submitted to the City a proposed agreement for its review and possible execution. Apparently on its own initiative, the Club submitted revised proposed agreements on January 22, 1988 and February 18, 1988, which made corrections to the original draft.

Having received no proposals from the City for amendment, correction, or change in the proposed agreement, nor an executed copy of the proposed agreement, the Club made written inquiries on March 30, 1988, September 1, 1988, December 5, 1988 and April 7, 1989, about the status of the proposed agreement, whether any changes were sought, and, if not, when the agreement would be executed.

On April 20, 1989, representatives of the Club were informed that the proposed agreement was rejected because it contained "substantial changes", which, however, were unspecified. The instant improper practice charge ensued.

During the course of proceedings before the ALJ, the City asserted that the proposed agreement presented to it some 16 months earlier contained substantive changes not contemplated or agreed upon by the parties. However, it failed to specify the respects in which it contended that the proposed agreement differed substantively from the expired 1986 agreement and interest arbitration panel awards intended to be incorporated together into a single document.
Based upon the City's failure to identify the substantive changes upon which it relied to support its refusal to execute the proffered agreement in either its answer or at the pre-hearing conference held in this matter, the ALJ directed the City to submit an offer of proof identifying the relied upon changes following the pre-hearing conference. Upon the failure of the City to do so, the ALJ closed the record and issued the decision which is now before us on review.

At the outset, we note that the City does not deny that it agreed to enter into and execute an agreement incorporating the terms of the parties' expired 1986 agreement and the terms of the interest arbitration panel awards into a single, revised, simplified agreement. We concur with the ALJ's finding that at the point when the City agreed to develop a unified agreement the duty to negotiate in good faith required by §209-a.1(d) of the Act attached, with its attendant responsibilities to communicate, meet at reasonable times and places, and attempt in good faith to reach an agreement, to be executed on demand. In the instant case, the City failed, for a period of some 16 months, to respond in any fashion to the agreement proffered by the Club, which purported to reflect the parties' agreement to prepare and execute a unified agreement. The City also failed to identify its objections, if any, to the proposed agreement, even in the face of the instant charge and in the
instant proceedings. This failure to communicate or to submit counter-proposals or objections to the Association's proposal without any reasonable explanation, or, indeed, any explanation at all, constitutes a failure to negotiate in good faith.

In its exceptions before this Board, the City identifies, for the first time, by way of example, in what manner it contends that the proffered agreement differs from the terms of the 1986 agreement and/or interest arbitration panel awards. It also asserts that it was the responsibility of the ALJ to review the documentary evidence before her, without need for specification of differences by the City, to determine whether in fact differences exist between the two sets of documents before reaching a determination on the merits of the charge. We disagree. In view of the City's agreement to the preparation and ultimate execution of a revised unified agreement, there is no reason to assume

1/The Club alleges in its charge that the City's Director of Labor Relations orally informed the Club's representative in April, 1988 that the agreement proffered in December, 1987 was satisfactory, an allegation denied by the City in its answer. In view of the City's denial of the allegation, we exclude it from our consideration and deem the record to contain no response at all to the request for consideration and execution of the December, 1987 agreement.

2/In its exceptions, the City denies having made such a commitment, although it failed to make such denial in its answer to the charge. The ALJ accordingly deemed the allegation admitted, and relied upon it as fact in issuing her decision and recommended order. Based upon our review of the charge and answer, we affirm the ALJ's finding in this regard.
that the language of the proffered agreement should or would be identical in language to the expired agreement or the interest arbitration awards, but would incorporate the substantive content of each. Accordingly, comparison of the documents by the ALJ as a mechanical procedure to identify differences in language would be meaningless, even if the burden rested upon the ALJ to find such differences. Under these circumstances, however, the City certainly had the burden of coming forward in its answer or at least, after being directed to do so by the ALJ, to identify those differences between the documents which it contended were substantive rather than merely cosmetic. The burden rests not upon the ALJ but upon the City to establish the existence of a defense of substantive change in the agreement previously reached to the charge of refusal to execute the agreement. That defense is established by presentation of evidence that specific language differences, if any, result in substantive changes and not unification and clarification of the previous agreements. The City is not, furthermore, privileged to await the filing of exceptions to this Board to present its defense to the charge by identifying, for the first time, its objections to execution of the agreement. Such defense was not before the ALJ and is therefore not properly before us. The City's exception in this regard is accordingly denied.
Based upon the foregoing, the ALJ decision is affirmed, and IT IS ORDERED that the City:

1. Negotiate in good faith by executing the agreement submitted by the Club on February 18, 1988, and

2. Sign and post the attached notice at all locations customarily used to post communications to unit employees.

DATED: August 16, 1990
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 Niagara Falls Police Club that the City of Niagara Falls:

1. Will negotiate in good faith by executing the agreement submitted by the Niagara Falls Police Club on February 18, 1988.

City of Niagara Falls

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.
This matter comes to us on the exceptions of the Watkins Glen Faculty Association, NYSUT, AFT, AFL-CIO, Local #3094 (Association) to the dismissal of its improper practice charge against the Watkins Glen Central School District (District), which alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, on April 19, 1988, the Superintendent of Schools refused to execute an agreement presented to him following negotiation of an Excellence in Teaching (EIT) Fund distribution agreement. Thereafter, at its meeting of April 26, 1988, the District's Board of Education (Board) rejected the agreement presented by the Superintendent and Association representatives.
The Administrative Law Judge (ALJ) determined that the foregoing action by the Board constituted a denial of legislative approval pursuant to the Act, which privileged the Superintendent's earlier refusal to sign. For the reasons which follow, we reverse the ALJ's decision.

Legislative approval is material only to the binding effect of certain agreements reached by the chief executive officer (Act §§201.12 and 204-a.1). Agreements needing legislative action for implementation by amendment of law or the provision of funding require the legislative body's approval before they become binding. The chief executive officer's duty to sign documents accurately embodying agreements reached in negotiations, however, extends to all agreements, whether or not they are subject to legislative approval (Act, §204.3). Legislative approval or disapproval is not material to a refusal to execute charge because the legislative body's actions in that respect bear only upon the ultimate enforceability of the document as signed, not the chief executive officer's duties, which are independent of the legislative body's. Material inaccuracy in the document tendered for signature or unsatisfied condition are viable defenses to a refusal to execute charge, but there is no claim or evidence of either on this record. Whether the agreements the Superintendent reached in negotiations with the Association are now subject to legislative approval in
whole or in part or whether, as claimed by the Association, the Board has already preapproved the Superintendent's agreements by its application for the EIT funds, are issues which are not properly before us under this charge.

Based upon the foregoing, we reverse the decision of the ALJ to dismiss the charge and find that the District violated §209-a.1(d) of the Act when its Superintendent refused, upon demand, to execute the agreement previously reached by the parties.

IT IS THEREFORE ORDERED that the District:

1. Execute the agreement entered into with the Association on March 30, 1988;

2. Post notice in the form attached at all locations customarily used for communications to bargaining unit employees.

DATED: August 16, 1990
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 of the Watkins Glen Central School District (District) in the unit represented by the Watkins Glen Faculty Association, NYSUT, AFT, AFL-CIO, Local #3094 (Association) that the District will execute the agreement entered into with the Association on March 30, 1988.

WATKINS GLEN CENTRAL 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.
In the Matter of

ONEIDA COUNTY DEPUTY SHERIFF'S BENEVOLENT ASSOCIATION,

Charging Party,

-and-

SHERIFF and COUNTY OF ONEIDA,

Respondents.

THOMAS J. KRAJCI, for Charging Party

SCOLARO, SHULMAN, COHEN, LAWLER & BURSTEIN, P.C.
(BENJAMIN J. FERRARA, ESQ., of Counsel), for Respondents

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Oneida County Deputy Sheriff's Benevolent Association (Association) to the dismissal of its improper practice charge against the Sheriff and County of Oneida (together the Employer). The charge, as amended, alleges that the Employer violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by failing to commence negotiations, requested by the Association, within a reasonable period of time following a February 22, 1989 demand.

The facts giving rise to the instant charge are not in dispute. What is at issue before us is whether the facts, taken together, establish that the Employer failed or refused to accede to the Association's demand to commence contract negotiations for an unreasonable period of time. The
assigned Administrative Law Judge (ALJ) concluded, based upon the totality of circumstances, that a violation of a duty to negotiate in good faith had not been established. For the reasons which follow, we reverse the ALJ's decision and find that the Employer violated §209-a.1(d) of the Act when it failed to commence negotiations within a reasonable period of time after demand therefor.

FACTS

In March 1988, the Employer and Association executed a memorandum of understanding for a collective bargaining agreement for the period January 1, 1987 to December 31, 1988. As a result of disagreement concerning the language of one provision of the memorandum, an agreement was not finally executed by the parties until January 30, 1989. In the interim, on June 9, 1988, the Association's representative made written demand upon the Employer to commence negotiations for a successor agreement for the period following December 31, 1988, when the agreement then in dispute was in any event to expire.

The Association received no response to its June 9, 1988 demand. However, following execution of the by-that-time expired 1987-88 agreement on January 30, 1989, the Association again made written demand, by letter dated February 22, 1989, for the commencement of negotiations. A subsequent written demand, dated March 17, 1989, was also
made by the Association. No written response was ever issued. Moreover, in addition to the written requests, the Association's president made a number of oral inquiries to Thomas Graziano, the Employer's Director of Labor Relations, concerning when negotiations would commence, to which three responses were given: "The County had not picked a chief negotiator;" "The negotiations team had not been approved by the Board of Legislators;" [and] "They weren't ready".

According to Graziano, the Employer sought to retain the services of an outside negotiator, but those efforts proved unsuccessful in March or April 1989. In mid-May 1989, Graziano himself was selected chief negotiator, after the Employer's previous chief negotiator made the decision to retire from his employment. The first negotiating meeting took place on May 26, 1989, at which time Graziano informed the Association representatives that he had been selected as the Employer's chief negotiator.

**DISCUSSION**

The ALJ found that because the Association filed and later withdrew an improper practice charge alleging that the Employer failed to commence negotiations following its June 9, 1988 demand therefor, the propriety of the Employer's failure to engage in negotiations from June 1988 until February 22, 1989, when a second written demand was made, was not properly before her. The ALJ, accordingly, only
considered the delay from February 22, 1989 until May 26, 1989 in reaching her decision to dismiss the charge. Although the failure to respond to the June 9, 1988 demand may not violate the Act, the fact that a demand was made at that time is part of the record before us. For the purpose of establishing a background and context within which to consider the reasonableness of the delay from February 22, 1989 to May 26, 1989, we are permitted, if not required, to consider that fact.

Section 204.3 of the Act requires parties to meet at reasonable times to negotiate successor collective bargaining agreements. That mandate furthers the Act's policy to eliminate or minimize, to the extent possible, the hiatus periods between agreements. The reasonableness of the time frame between demand and commencement of negotiations is judged against the totality of circumstances. For example, a delay in negotiations occurring well before the expiration of a current agreement may be reasonable, while the same length of delay after the expiration of an agreement may be unreasonable.

It is our determination that the Employer unreasonably delayed the start of negotiations for a successor to the

1/See Act §209.1 which provides that an impasse may be deemed to exist if the parties have failed to reach an agreement at least 120 days before the expiration of the Employer's fiscal year even if the parties have not exhausted their efforts to negotiate an agreement without third party assistance.
1987-88 agreement when measured from February 22, 1989. The last agreement had expired five and one half months before negotiations began. The Employer was clearly on notice as of June 9, 1988 that the Association was prepared to and sought to engage in negotiations for an agreement to take effect on and after January 1, 1989. The record does not disclose when the Employer began preparations for negotiations or, indeed, when it began the selection process to retain a chief negotiator, although it is clear that by April 1989, those efforts had proven unsuccessful. The Employer explains its failure to make any appointment until mid-May by indicating that its previous chief negotiator had not yet decided whether to retire and that it was not until after that decision was made that it determined to appoint Graziano as its chief negotiator, yet these reasons were never stated to the Association. The Employer failed to respond to the Association's written demands and gave only vague oral explanations to the several Association inquiries. As this Board held in Harrison CSD, 7 PERB ¶3041, aff'g 7 PERB ¶4523 (1974), a two-month delay in responding to a demand to negotiate, without adequate explanation, may constitute a violation of the duty to negotiate in good faith even when made many months before the expiration of an extant collective bargaining agreement. In the instant case, more than three months elapsed, at a minimum, from the date of
demand to the date of commencement of the negotiations and at a point when the parties' last agreement had already expired following protracted negotiations which did not result in a final agreement until one month after the agreement's expiration. These facts, combined with the Employer's failure to respond in writing or to give a reasonable oral explanation for the delay, establish even more compelling circumstances for the finding of a violation than those presented in Harrison CSD.2/

We further reverse the ALJ to the extent that her decision suggests that the Association was required to establish a deliberate attempt to frustrate the negotiations process in order to prove a violation of §209-a.1(d) of the Act. A failure to respond in an expeditious fashion to a demand to negotiate, to provide some reasonable explanation for a delay in response or commencement of negotiations, and to select a chief negotiator within a reasonable period of time so that negotiations may commence, whether intended to frustrate the negotiation process

2/ Compare Faculty Association of the Community College of the Finger Lakes, 8 PERB ¶4510, aff'd, 8 PERB ¶3044 (1975), in which a two and one-half month delay immediately prior to the expiration of a one-year legislative determination period was found not to be unreasonable, given all other circumstances. See also, however, New York City Board of Education, 7 PERB ¶4507, aff'd, 7 PERB ¶3022, motion to reconsider denied, 7 PERB ¶3039 (1974), wherein the Board found unreasonable a two-month delay in the commencement of negotiations for a first collective bargaining agreement.
or not, has the effect of doing so and constitutes a violation of
the duty to negotiate in good faith.

IT IS THEREFORE ORDERED that the Employer:

1. Will negotiate in good faith with the Association by
meeting at reasonable times and places for the purpose of
negotiating an agreement with the Association;

2. Post notice in the form attached at all locations
customarily used to distribute information to members of the
Association's bargaining unit.

DATED: August 16, 1990
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 Oneida County Deputy Sheriff's Benevolent Association that the Sheriff and County of Oneida:

1. Will negotiate in good faith the Association by meeting at reasonable times and places for the purpose of negotiating an agreement with the Association.

SHERIFF AND COUNTY OF ONEIDA

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.
In the Matter of

LAVERNE PAUL,  
Charging Party,  

-and-  

UNITED FEDERATION OF TEACHERS,  
Respondent.  

LAVERNE PAUL, pro se  

BOARD DECISION AND ORDER  

By decision dated April 24, 1990, the Director of Public Employment Practices and Representation (Director) dismissed, as deficient, an improper practice charge filed by Laverne Paul against the United Federation of Teachers (UFT) which alleges that the UFT violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) by refusing to appeal a 1987 arbitration award which denied a grievance filed by her in October 1985.

The Director dismissed the charge upon the grounds that it was untimely filed, and, even if timely filed, fails to allege facts which, if proven, would set forth a violation of the Act.

In her exceptions to the Director's dismissal of the charge, Paul alleges, for the first time, that "the UFT's decision not to appeal the award in my case was arbitrary,
discriminatory and in bad faith" because during the course of the arbitration hearing held in Paul's case, the representatives of the Board of Education of the City School District of the City of New York (Paul's employer) "were allowed 15-20 times to be excused in order to prepare their case with my UFT advocate's permission each time." Paul also alleges that the UFT failed to advise her to seek outside legal help, but does not indicate whether the help was to have been for her representation at the arbitration or for the filing of an appeal from the arbitration award.

In view of the allegations made by Paul in her charge that an arbitration award was issued in her grievance on July 30, 1987, and that she immediately thereafter requested that the UFT appeal the decision, a request which was denied, and that Paul repeated her request for appeal of the arbitration award in September 1987, October 1988, February 1988 and December 1989, and was each time given the same negative response, we affirm the Director's decision dismissing the charge as untimely. Section 204.1(a)(1) of PERB's Rules of Procedure requires that improper practice charges be filed within four months of the act or omission complained of. The filing of a charge in April 1990, at least two and one half years following the first request and refusal of an appeal, is not made timely by subsequent
repeated requests and denials.\(^1\) Paul's allegations in her exceptions to the Director's decision, even if originally made before the ALJ, that numerous recesses were taken during the course of the arbitration hearing held in June 1987 and that she was not advised to seek "outside legal help" are similarly untimely, and her exceptions with regard to these allegations are dismissed accordingly.

We also concur with the Director's determination that the charge fails to allege facts which, if proven, would establish a violation of the UFT's duty of fair representation under §209-a.2(a) of the Act. As we have previously held,\(^2\) an employee organization has no obligation under the Act to institute litigation on behalf of unit members in the absence of evidence that it has done so for others, and has refused to do so in a particular instance for arbitrary, bad faith, or discriminatory reasons. Because no such allegations are made here, the charge, even if it were timely, would appropriately be dismissed as failing to

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\(^1\)See, e.g., UFT (Dessler), 16 PERB ¶3082 (1983); West Park UFSD, 11 PERB ¶3016 (1978).

\(^2\)See PEF (Hartner), 15 PERB ¶3066 (1982); UFT, Local 2 (Greenberg), 15 PERB ¶4591 (1982), aff'd, 16 PERB ¶3004 (1983).
establish any basis upon which a finding of violation of §209-a.2(a)\textsuperscript{2/} of the Act could be made.

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

DATED: August 16, 1990
Albany, New York

\begin{center}
\textbf{Harold R. Newman, Chairman}
\end{center}

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\textbf{Walter L. Eisenberg, Member}
\end{center}

\textsuperscript{2/}By virtue of L. 1990, ch. 467, effective July 11, 1990, a breach of the duty of fair representation constitutes a violation of a new §209-a.2(c) of the Act.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CITY OF BUFFALO,
- and -
BUFFALO POLICE BENEVOLENT ASSOCIATION,
INC.,

Charging Party,

Respondent.

CASE NO. U-10519

SAMUEL HOUSTON, Corporation Counsel (STANLEY J. SLIWA, ESQ., of Counsel), for Charging Party
WYSSLING, SCHWAN and MONTGOMERY (W. JAMES SCHWAN, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Buffalo (City) to the dismissal of its improper practice charge against the Buffalo Police Benevolent Association, Inc. (Association), which alleges that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting to compulsory interest arbitration eight proposals which are nonmandatory subjects of negotiation.

During the course of proceedings before the assigned Administrative Law Judge (ALJ) in this matter, the Association withdrew two proposals, identified in the charge as No. 1 and No. 3, from its petition for interest arbitration, and the City accordingly withdrew its charge with respect to those two items. The Association also withdrew from its petition for interest
arbitration the proposal identified as No. 2 in the charge. However, the City declined to withdraw its charge with regard to that proposal.

Notwithstanding the City's refusal to withdraw its charge as to proposal No. 2, the ALJ determined that it was neither necessary nor appropriate to issue a determination concerning a proposal which had been withdrawn from the petition for interest arbitration. In so doing, she distinguished this Board's decision in Village of Mamaroneck, 22 PERB ¶3029 (1989). There, during the pendency of proceedings before the ALJ, the respondent expressed its intention to withdraw certain proposals from interest arbitration, but had not actually done so, and the charging party had refused to withdraw its charge. Although the ALJ determined that findings on the purportedly withdrawn proposals were unnecessary, he nevertheless made dicta determinations concerning the duty to negotiate the at-issue proposals. Upon review, this Board held that in view of the dicta determinations made below, the parties were entitled to Board review of those determinations on their merits, notwithstanding the charging party's decision to withdraw the proposals.

The City argues that the ALJ erred in failing to decide whether proposal No. 2 constitutes a mandatory or nonmandatory subject of negotiation and whether the Association's inclusion of the proposal in its petition for interest arbitration constitutes
a violation of §209-a.2(b) of the Act. However, we concur with the ALJ's determination that our decision in Village of Mamaroneck, supra, is appropriately distinguished on its facts from the case before us.

The circumstances of this case are also distinguishable from the facts in City of Schenectady, 21 PERB ¶3022 (1988), wherein, during the course of proceedings before the ALJ, the employee organization sought to modify the language of the proposals which it had submitted to interest arbitration and which were the subject of the employer's improper practice charge. We there held that the employer was entitled to a determination as to whether the proposals originally submitted by the employee organization constituted mandatory or nonmandatory subjects of negotiation because these demands were never in fact removed from the table and the modifications offered by the employee organization constituted, in essence, offers in settlement of the charge which were rejected by the employer. In contrast, the Association in the instant case has withdrawn proposal No. 2 from interest arbitration in its entirety and no purpose is served by our making a scope determination at this time. Because the Association has withdrawn Proposal No. 2 from its petition for interest

1/Proposal No. 2, according to the charge, consists of the following:

Amend Article X, Section 10.1 to provide that the Commissioner of Police shall announce all assignments to be filled via the police teletype. Positions shall be filled on the basis of seniority provided the senior applicant had the ability and qualifications to perform the work involved.
arbitration and because there are no special circumstances present in this case which would warrant our making a scope determination, the City's exception to the ALJ's refusal to issue such a determination is denied.

Proposals 4 through 8, as referenced in the charge, reproduce language contained in the parties' expired collective bargaining agreement, without change. However, as the ALJ found, the Association's petition for interest arbitration does not contain any demands that the articles in the expired agreement referenced by the City in its charge be continued. The City's charge, with respect to these proposals, alleges, in essence, that the Association has committed an improper practice by implicitly seeking to continue allegedly nonmandatory terms of the expired agreement, even though no demand for their continuation is contained in the petition for interest arbitration. 2/

Because there is no evidence whatsoever that the Association has included in its petition for interest arbitration nonmandatory

2/ Although framed in these terms, the City's charge, as litigated and argued, goes not to whether the Association's petition for interest arbitration affirmatively includes proposals which are nonmandatory subjects of negotiation, but whether items in the expired agreement which are not part of the petition for interest arbitration automatically continue in effect or are automatically eliminated by operation of §209-a.1(e) of the Act. As we have done in other cases, we decline to rule, in the context of a charge by an employer against an employee organization, whether the employer would be committing a violation of §209-a.1(e) of the Act if it failed to continue the terms of the parties' expired agreement following issuance of an interest arbitration award because the issue was not properly before us in those cases, nor is it properly before us in the instant case. See, e.g., Village of Mamaroneck, supra.
subjects of negotiation over the objection of the City, the instant charge must be dismissed. This is so even though the petition contains some demands, not at issue before us, which purport to "amend" articles of the parties' expired agreement in specified respects. The fact that the Association contends that items in the expired agreement continue in effect following issuance of the interest arbitration award unless modified by the award has no bearing upon our disposition of a charge by the City alleging that nonmandatory subjects have been submitted, over its objection, to interest arbitration, because our review is limited to those matters actually placed before the arbitration panel.3/

Based upon the foregoing, IT IS ORDERED that the charge be, and it hereby is, dismissed.

DATED: August 16, 1989
Albany, New York

[Signatures]