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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of  
LOCAL 456, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,  
Respondent,  
CASE NO. D-0252

upon a Charge of Violation of §210.1 of  
the Civil Service Law

BOARD DECISION AND ORDER

On June 8, 1992, the City of Yonkers filed a charge alleging  
that Local 456, International Brotherhood of Teamsters violated  
§210.1 of the Civil Service Law (CSL) in that it caused,  
instigated, encouraged or condoned a strike against the City of  
Yonkers on May 14, 15 and 18, 1992.

The parties requested PERB’s Counsel (Counsel) to recommend  
to this Board a proposed penalty under which the Respondent’s  
dues and agency fee deduction rights would be suspended for a  
period of three months.

Upon the understanding that Counsel would recommend, and  
this Board would accept that penalty, the Respondent withdrew its  
answer to the charge. Counsel has so recommended. We determine  
that the recommended penalty is a reasonable one and is  
consistent with the policies of the Act.

WE ORDER that the dues and agency shop fee deduction rights  
of Local 456, International Brotherhood of Teamsters, be  
suspended, commencing at the first practicable date, and
continuing for a period of three months. Thereafter, no dues or agency shop fees shall be deducted on its behalf by the City of Yonkers until the Respondent affirms that it no longer asserts the right to strike against any government as required by the provisions of CSL §210.3(g).

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
COUNTY OF DELAWARE

for a determination pursuant to
Section 212 of the Civil Service Law.

BOARD DECISION AND ORDER

Pursuant to §212 of the Civil Service Law (CSL), the County of Delaware (County) has submitted an application by which it seeks a determination that the Delaware County Public Employees' Fair Employment Act, as amended on April 14, 1993, by Local Law No. 94-1993, is substantially equivalent to the provisions and procedures set forth in CSL Article 14 with respect to the State. The amendment brings the County's local law into conformity with Chapter 723 of the Laws of 1991, which extended the CSL §209.4 interest arbitration provisions to Criminal Investigators employed in the office of the district attorney.

Having reviewed the application, and having determined that the subject local law, as amended, is substantially equivalent to the provisions and procedures set forth in CSL Article 14 with respect to the State,

IT IS ORDERED that the application of the County of Delaware be, and it hereby is, approved.

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson
Walter L. Eisenberg, Member
Eric J. Schmertz, Member
This case comes to us on exceptions filed by the Schenectady Police Benevolent Association (PBA) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). After a hearing, the Assistant Director dismissed the PBA's charge against the City of Schenectady (City) which alleges that the City violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) by dealing directly with a member of its unit, Lieutenant Michael Moffett, regarding a flexible work schedule.

The Assistant Director found that Captain Patrick Smith, the supervisor of the investigations services bureau, permitted Moffett to work a schedule other than the one posted when he bid
for a job\(^1\) in the investigations bureau. Despite Smith's supervisory position,\(^2\) the Assistant Director held that Smith's dealings and agreement with Moffett could not be attributed to the City because Smith's dealings were unknown to others and contrary to instructions given Smith by the Police Commissioner that the posted shift could not be changed.

The PBA argues that the Assistant Director erred on the facts and law in failing to hold the City responsible for Smith's dealings with Moffett. It also excepts to a ruling made by the Assistant Director during the hearing which limited the scope of its cross-examination of Smith.

The City argues in its response that the Assistant Director's dismissal of the charge was correct on the facts and the law, as was his ruling during the hearing which merely excluded irrelevant and immaterial evidence.

For the reasons set forth below, we affirm the Assistant Director's decision.

Section 209-a.1 of the Act defines the improper practices of a "public employer or its agents". It is plain, therefore, that actions by persons who are not deemed agents of the public employer cannot violate any of the improper practice provisions of the Act. The issue before us then is whether Smith's

\(^1\)The shift was scheduled from 3:00 p.m. to 11:00 p.m. Smith permitted Moffett to work 7:00 a.m. to 3:00 p.m. on the days he attended night school.

\(^2\)Captains, in order of seniority, are third in command after the Police Commissioner and the Police Chief.
discussions and agreement with Moffett regarding Moffett's work schedule may be attributed to the City under agency theories. In applying those agency principles in the labor relations context, we have taken a liberal approach, not limiting ourselves in assessing an employer's responsibility for the conduct of others to a strict application of the rules of agency or respondeat superior. 3/ It is equally true, however, that an employer is not always strictly responsible for the conduct of its supervisors. 4/ The ultimate focus must always be on the agency relationship, not supervisory status itself. Therefore, we reject the PBA's argument for attribution of Smith's conduct to the City as a matter of law simply because Smith is a supervisor, high-level or otherwise. 5/ The pertinent inquiry is simply whether, in the totality of circumstances, the employer may fairly be said to be responsible for a given individual's actions. In the context of this case, we find that the answer to that inquiry must be no.

Smith's testimony that he was told by the Police Commissioner that he could not change the posted hours of the shift is competent, admissible and unrebutted. In that

3/ Our approach parallels that under the National Labor Relations Act. See IAM v. NLRB, 311 U.S. 72, 7 LRRM 282 (1940).


5/ As the Assistant Director observed, however, Smith is also in the PBA's unit.
circumstance, Smith's dealings with Moffett, of which no other person in the City or PBA was aware, can only be seen as wholly unauthorized. However liberal our application of agency theories has been and remains, it does not extend to hold the City responsible for clandestine discussions conducted by a supervisor who has disobeyed the specific instructions of a superior officer. In the totality of circumstances, the record most reasonably read shows that two unit employees entered into an arrangement for their mutual benefit unbeknownst to either the City or the PBA. There can be no attribution of misconduct to the City in such circumstances.

The PBA argues alternatively that the City should be held responsible for Smith's actions because it subsequently ratified or condoned his conduct. We have examined the record in this respect and find no basis in Smith's testimony or otherwise to find that the City authorized, encouraged or ratified Smith's direct dealing with Moffett.

Near the end of the PBA's cross-examination of Smith, the Assistant Director sustained the City's objection to a question as to whether there was any issue pending regarding Assistant Chief positions. As explained by the PBA, the question was designed to elicit information as to whether captains had been "cutting their own deals" with the City. The Assistant Director concluded that the information sought was irrelevant to the pending charge. We agree. Evidence of the existence of any agreements between Smith or others and the City apart from the
PBA contract has no probative value in determining whether the City violated the Act based on Smith's dealing with Moffett.

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

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

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson
Walter L. Eisenberg, Member
Eric J. Schmertz, Member
In the Matter of
PAUL M. CROSS,

-Charging Party,-

STATE OF NEW YORK (INSURANCE FUND) and
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,

Respondents.

PAUL M. CROSS, pro se

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Respondent Civil Service Employees
Association, Inc., Local 1000, AFSCME, AFL-CIO

WALTER J. PELLEGRINI, GENERAL COUNSEL (REBECCA L.
CAUDLE of counsel), for Respondent State of New York

BOARD DECISION AND ORDER

Paul M. Cross excepts to the dismissal, as deficient, of an
improper practice charge filed on October 1, 1992 against the
State of New York (Insurance Fund) (State) and the Civil Service
Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

Having reviewed the original charge, its amendment and
subsequent clarification, the exceptions and responses thereto,
we find that the Director properly dismissed the charge as
untimely because it was not filed within four months of any
actions complained of as required by §204.1(a)(1) of our Rules of
Procedure.
IT IS, THEREFORE, ORDERED that the charge be, and it hereby is, dismissed.

DATED: June 29, 1993
Albany, New York

[Signatures]
Pauline R. Kinsella, Chairperson
Walter J. Eisenberg, Member
Eric J. Schmertz, Member
Hugo Gregory excepts to the dismissal, after hearing, of his improper practice charge against AFSCME, Council 66 and Local 2055 (AFSCME) and the Capital District Off-Track Betting Corporation (OTB). The assigned Administrative Law Judge (ALJ) found that Gregory had not met his burden of proving that AFSCME and OTB violated, respectively, §209-a.2(a) and §209-a.1(c) of the Public Employees' Fair Employment Act (Act). Gregory's charge alleges that AFSCME breached its duty of fair representation when it resolved certain of his grievances in a manner unsatisfactory to him and that it failed to properly respond to his claim, which is the basis for his charge against
OTB, that OTB retaliated against him by issuing certain letters of reprimand in 1991 because he obtained a grievance award in November 1989 which reduced the penalty proposed by OTB for certain acts of alleged misconduct.

In his exceptions, Gregory appears to assert that the ALJ did not ask sufficient questions of the witnesses who appeared to testify. It is not, however, the role of the ALJ to prosecute a charge on behalf of a charging party, even one who appears pro se, and the burden of proving a charge rests upon the charging party, not the ALJ. The exceptions in this regard are, accordingly, denied.

Gregory also makes frequent reference in his exceptions to the manner in which his 1989 grievance and 1990 arbitration hearings were conducted. These matters are not the subject of the original charge, nor could they be, because they occurred well beyond the four-month limitation period contained in our Rules of Procedure (Rules). They are, therefore, not properly before us.

Finally, Gregory disputes the conclusion reached by the ALJ that the evidence presented does not establish any causal connection between Gregory's 1989 case and the reprimands he received from OTB which gave rise to this charge. However, no facts are presented which would support reversal of this finding.

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2/ See Rules §204.1(a)(1).
Indeed, the record is devoid of evidence of any causal connection between the actions of OTB in 1991 and the earlier grievance, which resulted in a shorter suspension than requested by OTB, but with a finding against Gregory on the charges themselves. The charge against the OTB alleging discrimination for the exercise of activities protected by the Act was, accordingly, properly dismissed by the ALJ.

Furthermore, we concur with the ALJ's finding that AFSCME's exercise of discretion and judgment in the handling of Gregory's grievances did not breach its statutory duty of fair representation because the record fails to establish that the handling of those grievances by AFSCME was arbitrary, discriminatory, or conducted in bad faith. The factual findings made by the ALJ in making this finding are adopted here.

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

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member
In the Matter of

LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES,

Charging Party,

-and-

TOWN OF HUNTINGTON,

Respondent.

EDWARD J. HENNESSEY, ESQ., for Charging Party

JOHN J. LEO, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Huntington (Town) to a decision by an Administrative Law Judge (ALJ) upon a charge filed by Local 342, Long Island Public Service Employees (Local 342). After a hearing, the ALJ held that the Town violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when Glen LaMay, the Town's Director of the Department of General Services, entered into an agreement with Charlotte Schombs, a supervisor in the Department of General Services, regarding the compensation to be paid to members of the blue-collar unit for "out-of-class" work. Local 342 represents both the supervisors' unit, which includes Schombs' title, and the blue-collar unit, which represents employees supervised by Schombs.
The ALJ concluded that although Schombs was not authorized by Local 342 to bargain on behalf of its rank-and-file employees, she and LaMay nonetheless negotiated and agreed upon a method of compensation to settle a dispute regarding out-of-class pay. Notwithstanding the fact that the agreement was never actually put into effect, the ALJ found a violation of the Act to have occurred because LaMay knew or should have known that Schombs was not a representative of Local 342, with whom negotiations must exclusively take place.

The Town has filed several exceptions to the ALJ's decision, each of which Local 342 argues in its response is without merit. For the reasons which follow, we must reverse the ALJ's decision and dismiss the charge.

The facts of this case are not in dispute before us. The record establishes that LaMay believed that employees should only be paid for the actual hours they worked out-of-class, while Local 342 believed that employees were entitled, consistent with the Town's past practice, to eight hours' pay for out-of-class work of any duration. Toward the end of 1990, LaMay began to change the timesheets submitted by Schombs to reflect only the time actually worked by the employees out-of-class. After being made aware of these changes, Schombs, who had been advised by her predecessor of the practice of paying employees eight hours for any out-of-class work, discussed the modified timesheets with Local 342 representatives Pauline Higgins and James Ekenstierna and with LaMay. She thereafter, on June 19, 1991, conceived the
notion that a resolution of the difference between LaMay's approach and Local 342's position, apparently supported by a past practice, could be achieved by establishing an out-of-class payment procedure whereby employees would be compensated for four hours of out-of-class pay if they worked four hours or less out-of-class, and would be compensated for eight hours of out-of-class pay if they worked more than four hours out-of-class. On her own initiative, Schombs presented this proposal to LaMay, who accepted it. She immediately thereafter contacted Higgins and presented the proposal to her. Higgins informed Schombs that the proposal or "agreement" was unacceptable to Local 342, and directed Schombs to so advise LaMay. Schombs advised LaMay that the solution she had discussed with him was unacceptable to Local 342 and it was never implemented.

The ALJ concluded, based upon these facts, that LaMay had entered into an "agreement" with Schombs, when he knew or should have known that Schombs was not the duly authorized representative of Local 342 to conduct negotiations on behalf of the rank-and-file employees, and that his negotiations and agreement with Schombs thereby violated §209-a.1(a) and (d) of the Act. We disagree.

It is our determination that, notwithstanding Schombs' reference in her testimony to it as an "agreement", the discussion which she initiated with LaMay constituted nothing more than a proposal on her part, as a mid-level supervisor, to her own supervisor to resolve a dispute concerning compensation
of her subordinates. Schombs' efforts to offer a solution to the problem of compensation did not constitute negotiations on behalf of Local 342, and LaMay's "acceptance" of Schombs' proposal did not give rise to an "agreement" within the meaning of the Act. We find instead that Schombs merely made a proposal for resolution, which she presented to LaMay. LaMay's acceptance of the proposal constituted an authorization to present the proposal to Local 342 on behalf of the Town. In view of Local 342's rejection of the proposal, no agreement was reached which could have been implemented. Indeed, the lack of implementation supports the conclusion that LaMay and Schombs never had as their purpose the settlement of the rank-and-file employees' terms and conditions of employment, that they never negotiated an agreement and that they understood that Local 342's consent to the proposal was necessary to the existence of an agreement. Furthermore, Schombs' immediate presentation of the proposal to the appropriate Local 342 representative after receiving LaMay's "acceptance" of the proposal and her prompt notification to LaMay of Local 342's rejection of the proposal clearly establish her understanding that she was not engaged in negotiations on behalf of Local 342 but was acting as an agent on behalf of the Town to solicit and communicate Local 342's response to the Town's proposal. Therefore, the finding that the Town improperly negotiated an agreement with a nonrepresentative of Local 342 must be reversed.
Based upon the foregoing, we find that the Town, by its agent, LaMay, did not engage in negotiations with a person other than the duly designated bargaining agent, Local 342, and IT IS, THEREFORE, ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson
Walter L. Eisenberg, Member
Eric J. Schmertz, Member
In the Matter of

RONALD GRASSEL,

Charging Party,

-and-

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, and
UNITED FEDERATION OF TEACHERS, LOCAL 2,
AFT, AFL-CIO,

Respondents.

RONALD GRASSEL, pro se

DAVID BASS, ESQ. (JERRY ROTHMAN of counsel), for Respondent
Board of Education of the City School District of the City
of New York

JAMES R. SANDNER, ESQ. (FREDERICK K. REICH of counsel), for
Respondent United Federation of Teachers, Local 2, AFT, AFL-
CIO

BOARD DECISION AND ORDER

This matter comes to us on exceptions of Ronald Grassel to
the dismissal of his charge against the Board of Education of the
City School District of the City of New York (District) and the
United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT)
together, respondents). At the close of Grassel's direct case
after two days of hearing, the assigned Administrative Law Judge
(ALJ) granted the motion of both respondents to dismiss the
charge for failure to establish a prima facie case. For the
reasons which follow, we affirm the ALJ's decision.
Grassel alleges that the District violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) and that the UFT violated §209-a.2(a) of the Act by failing to process grievances, which he filed in accordance with the terms of the respondents' collective bargaining agreement. Grassel's grievances allege various acts of harassment, which appear to relate primarily to: the removal of material from file cabinets which he had utilized in the course of his responsibilities as a teacher, while he was on sabbatical during the first half of 1991; the subsequent request to him that he come in from his sabbatical leave to oversee and participate in the removal of his materials to another location for the purpose of addressing certain space problems; and the movement or disposal of that material by others, following his refusal, because he was on sabbatical leave, to come into the workplace to remove his materials.

In particular, Grassel alleges that grievances which he filed, dated January 11, January 16, February 15, February 25, and March 15, 1991, were not heard at the third step of the respondents' grievance procedure, but were instead remanded from the third step to the second step for the purpose of conducting a Step 2 hearing, which had not previously been held. Grassel argues that the remand of his grievances to Step 2 instead of hearing them at Step 3 violated the terms of the grievance procedure and that, following remand, no Step 2 hearing has been conducted in any event.
The disposition of the grievances in issue is as follows. The January 11 grievance was sustained in part in a Step 2 decision; the January 16 grievance was generally denied, pursuant to the same Step 2 decision, but partial relief was granted in the form of a directive that no materials should be removed from the cabinets in which Grassel was storing his material until he could assist in the process, a matter which was the subject of his grievance. The subsequent grievances filed by Grassel relate to this directive, which Grassel asserted violated his contractual sabbatical leave rights because it forced him to return to the workplace during his leave.

The record discloses that the February 15 grievance was resolved and, at the hearing before the ALJ, was withdrawn by Grassel from consideration as part of his charge. It was, accordingly, primarily the February 25 and March 15, 1991 grievances which were the subject of a Step 3 meeting which resulted, by agreement of the UFT and the District, in the remand of the grievances to Step 2 for the purpose of conducting a hearing at that level. The Step 2 hearing was not, however, held by the District because following the remand, Grassel failed to respond to a written request that he contact the District so that a date for such a hearing could be arranged.

The ALJ determined that Grassel failed to establish a prima facie case that the UFT breached its duty of fair representation by acting in an arbitrary, discriminatory, or bad faith manner in its representation of him concerning his grievances or that the
District's handling of his grievances discriminated against him because of his engagement in activity protected by the Act. The ALJ found that there was no factual basis to conclude that Grassel was treated any differently by the UFT representatives who provided representation to him than were other bargaining unit members, or that any delay in proceeding with his grievances was violative of the Act. The evidence presented by Grassel that the District failed to comply with, and the UFT failed to enforce, the time limits contained in their collective bargaining agreement, does not establish a violation of the Act in the absence of evidence, not here present, that the noncompliance was improperly motivated and/or discriminatory.

Having reviewed the record in this matter, we agree with the ALJ that Grassel has failed to meet his burden of proving a breach of the duty of fair representation with respect to the handling of his grievances by the UFT. Accordingly, the ALJ properly dismissed so much of the charge as alleges a violation of §209-a.2(a) of the Act.

We also find that the ALJ also properly dismissed so much of Grassel's charge as alleges a violation by the District of §209-a.1(a) and (c) of the Act because Grassel failed to establish that any failure on the part of the District to timely process his grievances, to conduct hearings at Steps 1 and 2, or to unilaterally schedule a hearing at the Step 2 level following a remand from Step 3 was due to Grassel's engagement in activities protected by the Act. That these actions may have violated the terms of the respondents' collective bargaining
agreement does not, by itself, establish a violation of the Act by the District. The charge against the District was, accordingly, properly dismissed by the ALJ.

Grassel's final exception relates to the refusal by the assigned ALJ to reopen the record in order to receive evidence concerning the merits of the grievances which he filed. The ALJ properly denied Grassel's motion in this regard because he was afforded a full and fair opportunity to present his case and rested at its conclusion. The evidence Grassel thereafter sought to introduce was not new evidence which could not have been offered during the course of the presentation of his case, and it was, in any event, not relevant to the disposition of the charge.1/ Grassel's motion to this Board to reopen the hearing and/or receive the same additional evidence is properly denied upon the same grounds.

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

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

1/ See County of Nassau, 18 PERB ¶3076 (1985).
By decision dated September 9, 1992, an Administrative Law Judge (ALJ) held that the New York City Transit Authority (Authority) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, in November 1991, it unilaterally adopted a random drug and alcohol testing policy for the Authority's bus operators, maintenance employees and stock...
Board - U-12982 and U-12983

handlers who are represented by the Amalgamated Transit Union, Division 1056, AFL-CIO and Amalgamated Transit Union, Division 726, AFL-CIO (Unions).

The Authority has filed exceptions to the ALJ’s decision in which it argues that the ALJ erred as a matter of fact and law in finding a random drug and alcohol testing policy covering employees in safety-sensitive positions to be a mandatory subject of negotiation.

The Unions have moved to have the Authority’s exceptions dismissed as either moot and/or because further litigation would not effectuate the policies of the Act. The Unions’ papers show that, after the ALJ issued his decision, the parties ratified successors to the collective bargaining agreements which expired on April 30, 1991. The current contracts, covering the period May 1, 1991 through July 31, 1994, contain provisions for the random selection of bargaining unit members for drug and alcohol testing. Further, each contract contains a provision calling for the Unions to withdraw the improper practice charges in issue.1

The Authority has filed papers in response which support the Unions’ motion and urge us to close the cases.

We are in agreement with the parties’ mutual recognition that further litigation in these matters is unnecessary and potentially detrimental to their existing and future bargaining

1/The Director of Public Employment Practices and Representation denied the Unions’ withdrawal request because the ALJ had by then released his decision.
relationship and agreements. We also believe that the novel issues in litigation should be decided in circumstances in which the litigants have a material stake in the outcome of the proceeding. It is the presence of that actual case or controversy which best ensures the careful development of our jurisprudence and safeguards the integrity of our process. The judicious use and conservation of the parties' and our own resources also militate against consideration of these charges at this time. Moreover, permitting the Unions to honor their contractual commitment to withdraw these charges is entirely consistent with the purposes and policies of the Act. As we have previously observed:

The conclusion of final negotiations affords the parties an opportune time to cooperate in achieving stable and harmonious relations by resolving all outstanding disputes.  

The charges in issue center on a disputed refusal to bargain and the parties have reached a negotiated resolution of that dispute which fully disposes of the controversy between them and leads them to their mutual request to close these cases. In such circumstances, further litigation will not yield any tangible gain or serve any statutory purpose.

For the reasons set forth above, the cases are closed, without consideration of the merits of the parties' allegations or arguments and without any review of the ALJ's decision and order. SO ORDERED.

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson
Walter L. Eisenberg, Member
Eric J. Schmertz, Member
In the Matter of

COMMUNICATION WORKERS OF AMERICA,
LOCAL 1170,

-Charging Party,

-and-

TOWN OF GREECE,

-Respondent.

ROBERT J. FLAVIN, for Charging Party

BERNARD WINTERMAN, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Greece (Town) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ sustained, in part, the charge filed against the Town by the Communication Workers of America, Local 1170 (Local 1170), which alleges that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, effective January 1, 1991, it changed its practice of permitting employees to use Town vehicles to commute to and from work. The ALJ found that it was the Town’s practice to permit on-call employees to use Town vehicles to commute. The ALJ found no violation as to those employees whose on-call status was eliminated in conjunction with a departmental reorganization in September 1990. The ALJ found, however, that certain unit employees retained their on-call status until February 10, 1992. As to those employees, the ALJ held that the Town violated its
duty to bargain when it unilaterally discontinued its practice of permitting them to use Town vehicles to commute.

The Town's exception to the ALJ's decision rests upon the argument that Article 22 of the collective bargaining agreement with Local 1170 constitutes a waiver of the right to bargain the discontinuation of the vehicle use practice and that the ALJ erred in failing to so find.\textsuperscript{1} Local 1170 has not responded to the Town's exceptions.

Article 22, captioned "COMPLETE AGREEMENT", provides, in relevant part, as follows:

\begin{quote}
The parties acknowledge that, during the negotiations that preceded this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective negotiations, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, for the life of this Agreement, the employer and the union each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to negotiate collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated and signed this Agreement.

This Agreement shall represent all employees' rights, privileges and benefits granted by the Town to its employees; and unless specifically and expressly set forth in this Agreement, all practices and benefits previously granted are not in effect.
\end{quote}

\textsuperscript{1}That article appeared in the parties' 1989-90 contract and was continued under the terms of an arbitration award covering 1991-92.
The ALJ interpreted Article 22 to mean only that neither party was required to engage in negotiations during the term of the agreement. On that interpretation, the ALJ held that Article 22 did not permit the Town to change what the Town concedes is a long-standing noncontractual practice embracing a mandatory subject of negotiation.

The Town's argument to us is based entirely upon the second paragraph of Article 22. That clause has a meaning distinct from the first paragraph of Article 22, which necessitates our reversal of the ALJ's decision. The second paragraph reduces "all employees' rights, privileges and benefits" to those "specifically and expressly" set forth in the agreement. As we read the second paragraph of Article 22, noncontractual practices, such as the Town's vehicle use practice, are discontinued. The second paragraph of Article 22 is like the contract provision in Sachem Central School District,² in which we found that similarly broad language, under which matters not covered by the parties' agreement were left to the employer's discretion and control, waived the union's right to bargain or contest changes in noncovered terms and conditions of employment. In effect, there could not be a cognizable unilateral change in noncontractual practices after the parties' agreement to the second paragraph of Article 22 because there were not thereafter any past practices which the Town was statutorily required to

²21 PERB ¶3021 (1988)
maintain. The Town having reverted to its contractual rights, its elimination of the practice permitting on-call employees to use Town vehicles to commute cannot violate its duty to bargain.

For the reasons set forth above, the Town's exceptions to the ALJ's decision finding it in violation of §209-a.1(d) of the Act are granted and the ALJ’s decision is reversed.

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

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AFSCME COUNCIL 66, LOCAL 930, ERIE COUNTY
WATER AUTHORITY BLUE COLLAR EMPLOYEES’
UNION,

Petitioner,

-CASE NO. CP-248-

ERIE COUNTY WATER AUTHORITY,

Employer,

-CASE NO. CP-248-

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

Intervenor.

JOEL M. POCH, ESQ., for Petitioner

ROBERT J. LANE, ESQ. and RICHARD D. KRIEGER, ESQ.,
for Employer

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by AFSCME
Council 66, Local 930, Erie County Water Authority Blue Collar
Employees’ Union (AFSCME) to a decision by the Director of Public
Employment Practices and Representation (Director) on a unit
placement petition affecting certain employees of the Erie County
Water Authority (Authority). The following titles are in issue:
Water Maintenance Crew Chief; Water Service Crew Chief;
Hydrant/Valve Crew Chief; Assistant Water Maintenance Crew Chief; Assistant Water Service Crew Chief; Assistant Hydrant/Valve Crew Chief; and Assistant Instrumentation, Electrical and Electronics Technician. The Authority initially placed these titles into the white-collar unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), which has intervened in this proceeding.

After a hearing, the Director dismissed the petition. The Water Maintenance Crew Chief and the Water Service Crew Chief were found not to be new or substantially altered positions, but mere retitlings of positions already included in CSEA’s unit. The Director determined that the other titles were not appropriately placed into AFSCME’s blue-collar unit. After comparing relative skill levels of the employees in both units, the job duties of the positions and the level of supervisory responsibility and authority to be exercised, the Director concluded that placement of the in-issue titles into CSEA’s white-collar unit would more likely give rise to common negotiating goals, would better avoid potential conflicts of interest and would better serve the Authority’s administrative

1/Unit placement petitions may be filed only with respect to such positions. Rules of Procedure §201.2(b).

2/The Director held alternatively that the Water Maintenance Crew Chief and the Water Service Crew Chief were also most appropriately placed into CSEA’s white-collar unit. AFSCME’s exceptions do not directly challenge the Director’s finding that these two titles were not new or substantially altered, only the alternative basis for his unit placement determination.
convenience and operational needs than would a placement of the
titles into AFSCME’s blue-collar unit.

AFSCME argues in its exceptions that the Director’s decision
is generally arbitrary, irrational, contrary to the record
evidence and inconsistent with applicable uniting standards. The
Authority and CSEA in their responses support the Director’s
decision as both factually and legally correct.

Having reviewed the record and considered the parties’
arguments, we affirm the Director’s decision.

Preliminarily, AFSCME argues that this matter should have
been held in abeyance pending a determination on an improper
practice charge filed by AFSCME against the Authority which
alleges that the Authority’s initial placement of the titles into
CSEA’s unit was improperly motivated. Section 205.5(d) of the
Act, however, provides that improper practice charges may not
delay the determination of representation questions. The
Director’s decision to proceed with the investigation of this
representation question was, therefore, entirely consistent with
the Act and did not involve any abuse of discretion which might
otherwise be subject to our review.

AFSCME also argues that the Director incorrectly applied a
per se supervisory exclusion rule in placing the titles into
CSEA’s unit. The Director, however, has not adopted or applied a
per se approach to the disposition of unit placement petitions,
generally or specifically. The Director here found that each of
the titles in issue had and would exercise a level of supervision
over rank-and-file employees different than that exercised by the "working foremen"/"leadmen" in AFSCME's unit. Nor was the level of supervision the only basis for the Director's decision. He also considered the job duties of the positions, required skills, bargaining compatibility, the historical composition of the units and the Authority's administrative convenience and operational needs. It was this combination of factors, not any per se supervisory exclusion, which persuaded the Director that the titles in issue were most appropriately placed into CSEA's unit. Therefore, AFSCME's exception in this respect is dismissed.

The rest of AFSCME's many exceptions allege, directly or indirectly, that the Director inaccurately or incompletely described the record facts and rendered a decision inconsistent with the uniting standards in §207 of the Act. The Director's decision is clearly a summary of the evidence developed during the three days of hearing. Having reviewed the record, however, we find the Director's decision to be accurate and complete in material respects. We also find that the Director properly analyzed and applied the uniting criteria in §207 of the Act to the facts of the case. His decision reflects neither a mechanistic application of any per se placement rule nor an unreasoned, automatic deferral to the Authority's initial placement of the titles into CSEA's unit. In the context of this case, the issue is not whether the Act prohibits the placement of any of the in-issue titles in AFSCME's unit, but whether those titles are most appropriately placed in the blue-collar unit or
CSEA's white-collar unit. The conclusion that the titles were most appropriately placed in CSEA's unit reflects an understanding of the differing interests of blue-collar and white-collar employees and an awareness of the statutory uniting standards.

In closing, we note that AFSCME's exceptions reflect an obvious concern that certain promotional opportunities for its members under the Authority's new career ladder would be to positions in CSEA's unit if the Director's decision were to be affirmed. Although we understand AFSCME's interest in establishing and maintaining promotional opportunities within its unit, that is not a statutory factor to be considered in determining the appropriate unit placement of these employees.

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

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

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member
In the Matter of

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

Charging Party,

-and-

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

NANCY HOFFMAN, GENERAL COUNSEL (MARILYN S. DYMOND of counsel),
for Charging Party

NORMA MEACHAM, ESQ. (ANDREA R. LURIE of counsel), for
Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ). On a stipulated record, the ALJ dismissed CSEA's charge against the State of New York - Unified Court System (UCS), which alleges that the UCS violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused to negotiate CSEA's demand regarding layoff units and layoff order for certain UCS employees it represents. The ALJ held that the determination of layoff units is a civil service function reserved to the Chief Administrator of the Courts and exercised by him in his civil service capacity. Finding that matters reserved to the jurisdiction of a civil service commission are not mandatorily negotiable, the ALJ held that UCS was not required to bargain pursuant to CSEA's demand.
CSEA argues in its exceptions that the ALJ erred in finding the layoff unit aspects of its demand to be nonmandatory and further erred by treating its demand as a unitary one.\(^1\) In the latter respect, CSEA argues that the layoff order aspects of its demand are severable from the layoff units aspects and are themselves mandatorily negotiable.

UCS argues in its response that the ALJ’s finding that the demand is unitary and nonmandatory is correct, but that even if not unitary, the demand is still nonmandatory because it affects appointments that are governed by statute, interferes with UCS’ right to determine which services are to be reduced or eliminated, and concerns appointments over which the Chief Administrator does not have the authority to negotiate.

The demand in issue was submitted by CSEA in response to the Chief Administrator’s designation in August 1991 of layoff units for the suspension and demotion of employees and the abolition in September 1991 of 471 nonjudicial positions statewide. That demand provides as follows:

Temporary and provisional employees in competitive class positions; employees in noncompetitive class positions who have fewer than five years of continuous service; and employees in exempt and noncompetitive-confidential positions will be suspended or demoted among themselves in inverse order of original UCS appointment by title or layoff unit.

\(^1\)A unitary demand is one whose various elements cannot be severed and treated individually as separate demands.
Such employees shall have rights to displace other employees with the same appointment status, in the manner set forth in Rule 25.30(e). Length of service for such employees shall be determined as set forth in Rule 25.30(b) and (c).

Layoff units for these purposes shall be as follows:

Judicial Districts 3-9: Each such district is a unit.

Judicial District 10: Nassau and Suffolk County each form a unit.

New York City: One unit.

All other members shall be in the unit, as specified above, in which their workstation is located (e.g., a Court of Claims Court Clerk in Goshen is in the 9th Judicial District Unit).

Such employees shall be placed on preferred lists for reinstatement among themselves in order of original appointment, in the manner set forth in Rule 25.31.2/

UCS refused to negotiate the demand on the ground that it does not concern a mandatory subject of negotiation.

Judiciary Law §211.1(d) empowers the Chief Judge to establish standards and administrative policies for UCS, consistent with the Civil Service Law (CSL), including but not limited to personnel practices affecting nonjudicial personnel and relating to their removal. Judiciary Law §212.1 provides that the Chief Administrator of the Courts, on behalf of the Chief Judge, supervises the administration and operation of the courts and exercises such powers and responsibilities as have been delegated to him by the Chief Judge. The Rules of the Chief Judge, §25.30, provide that the Chief

2/ The references to various "Rule" sections are to the Rules of the Chief Judge.
Administrator may designate a unit for the suspension and demotion of employees. In an earlier decision, we affirmed the decision of an ALJ that the exercise of such powers as they relate to the establishment of promotion units was nonmandatory because it was "inextricably intertwined with the exercise of managerial prerogatives relating to the determination of employment qualifications and staff deployment." However, we there found it unnecessary to adopt the ALJ's reasoning that the Chief Administrator, in the exercise of his civil service responsibilities, was not acting in the capacity of employer, but as a civil service commission. The ALJ, in the instant matter, relied upon the other ALJ's earlier finding and determined that, likewise, the Chief Administrator's designation of layoff units was part of his civil service function and, therefore, outside the scope of collective bargaining.

We hereby affirm the ALJ's dismissal of the charge; however, we do so on other grounds and decline to adopt the ALJ's rationale. Judiciary Law §36.1 provides that "each justice of the supreme court may appoint and at pleasure remove one law clerk and one secretary, subject to standards and administrative policies promulgated

4/ Id. at 3136.
5/ Unlike the previous matter, Judiciary Law §211, which established the Chief Judge's responsibility to establish promotion units, does not compel the adoption of layoff units. The Chief Judge's Rules allow him that right, which he has delegated to the Chief Administrator, but that right is not sufficient to remove the subject matter from collective bargaining.
pursuant to section twenty-eight of article six of the constitution." The demand made by CSEA covers employees in these positions and infringes upon the statutory right of justices of the supreme court to appoint and remove their confidential law clerks and secretaries by giving displacement rights to other, more senior, clerks and secretaries in the same layoff unit. As such, the demand as to them is nonmandatory as it contravenes a statutory provision.\(^6\)

Additionally, the demand could continue the employment of a provisional employee beyond the statutory term of employment, a result inconsistent with CSL §65.\(^7\) This provision also renders

\(^6\) City of Rochester, 12 PERB ¶3010 (1979); Local 788 and City of Plattsburgh v. N.Y. Council 66, AFSCME, 108 A.D. 2d 1045, 18 PERB ¶7510 (3d Dep't 1985).

\(^7\) CSL §65.4 provides:

Successive provisional appointments shall not be made to the same position after the expiration of the authorized period of the original provisional appointment to such position; provided, however, that where an examination for a position or a group of positions fails to produce a list adequate to fill all positions then held on a provisional basis, or where such list is exhausted immediately following its establishment, a new provisional appointment may be made to any such position remaining unfilled by permanent appointment, and such new provisional appointment may, in the discretion of the appointing authority, be given to a current or former provisional appointee in such position, except that a current or former provisional appointee who becomes eligible for permanent appointment to any such position shall, if he is then to be continued in or appointed to any such position be afforded permanent appointment to such position.
the demand nonmandatory as "[t]he statutory scheme for provisional appointments contained in section 65 of the Civil Service Law implicitly prohibits collective bargaining by a public employer as to the renewal of a provisional appointment." 8/

From its content and presentment, we determine CSEA's demand to be a unitary one whose provisions cannot be severed. Therefore, the nonmandatory portions of the demand render the entire demand nonmandatory. 9/

For the reasons set forth above, the ALJ's decision dismissing the charge is affirmed and the exceptions are denied.

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

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson
Walter L. Eisenberg, Member
Eric J. Schmertz, Member

8/ City of Binghamton, 63 A.D.2d 790, 791, 11 PERB ¶7546 (3d Dep't 1978).

9/ City of Rochester, supra; Pearl River Union Free School Dist., 11 PERB ¶3085 (1978).
This matter comes to us on exceptions filed by the County of Nassau (County) to a decision of an Administrative Law Judge (ALJ) in which the ALJ sustained, in part, a charge filed by the Civil Services Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Nassau Local 830 (CSEA). The ALJ found that the County had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally requiring certain unit employees of the County's Department of Public Works (DPW) to surrender their assigned County-owned vehicles at the end of each workday, thereby altering the long-standing practice of allowing them to use the vehicles on a twenty-four-hour basis in connection with
their employment, as well as for transportation to and from work. CSEA has filed a response to the County’s exceptions, which supports the ALJ’s findings of fact and conclusions of law.

The ALJ found — and the County’s exceptions do not dispute — that in January, 1992, the Commissioner of the DPW directed all employees who had use of County-owned vehicles, excluding those who are on-call twenty-four hours per day, to surrender their vehicles at the end of each workday. As a result, nearly one hundred employees of the DPW who use the vehicles for County-related business lost the right to use them for transportation to and from work. The Commissioner’s directive was implemented without prior negotiations with CSEA.

In finding that CSEA had met its burden of establishing a prima facie violation of the Act, the ALJ relied on our decision in County of Nassau,1/ where we held that the County’s practice of allowing DPW employees to retain their assigned County-owned vehicles for personal use during nonworking hours was a mandatorily negotiable economic benefit which could not be unilaterally withdrawn. Finding no evidence in the record before him which would remove the subject from the scope of mandatory negotiations, the ALJ held that CSEA had met its burden of

proving a prima facie violation of §209-a.1(d) of the Act. He then considered the County's defenses and concluded that they lacked merit. Accordingly, the ALJ ordered the restoration of the practice and a "make whole" remedy.

The County raises three exceptions to the ALJ's decision. First, it contends that CSEA failed to meet its burden of showing a violation of §209-a.1(d) of the Act. In that regard, it argues that CSEA did not prove how the practice was applied within certain of the five divisions of the DPW. However, the DPW's departmental policy concerning the use of its vehicles, which is applicable to all five divisions, provides that once a vehicle is assigned, the employees may use it for transportation to and from work. We find, therefore, that CSEA met its burden of proving that the practice was applicable to all DPW employees, and that this economic benefit was unilaterally withdrawn. If the effect of the Commissioner's directive were different among the various divisions of the DPW, such as to defeat CSEA's prima facie case, it was incumbent upon the County to establish it. There being no proof to that end, we dismiss this exception.

The County next contends that its policy with respect to the assignment and use of its vehicles allowed it to withdraw the in-

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2/ The ALJ dismissed CSEA's charge to the extent it complains of the effect of the Commissioner's action upon employees who had been assigned vehicles but who no longer, or never did, require them for County-related business, noting the conditional nature of the assignment as found in County of Nassau, 19 PERB ¶4580 (1986). No exceptions have been taken to this conclusion.
issue benefit. Contained within the policy is the following language:

The use of the vehicle is restricted to County business. It may include transportation to and from home to the County place of business.

The assignment of all vehicles, County and contractor, shall be reviewed annually by the Commissioner's office for re-evaluation of Department needs. Continued vehicle assignment shall not be viewed as a permanent right, rather a temporary privilege, granted for the performance of specific duties.

Although the County relies upon the second paragraph quoted above, we find that this language concerns only the conditions under which a vehicle will be assigned to a DPW employee, i.e., where the employee requires the use of a vehicle on County-related business. Once assigned, however, the vehicle may be used for transportation to and from work. Since the instant improper practice charge concerns the withdrawal of the right to use the vehicle for transportation to and from work, not the conditions under which a vehicle will be assigned, the County's exception based upon the existence of this policy is dismissed.

Finally, the County contends that the DPW employees executed a waiver of CSEA's right to negotiate concerning a withdrawal of this economic benefit. However, the ALJ held, and we agree, that individual employees have no standing or legal ability to waive a statutory right which belongs to their collective bargaining agent. In support of its claim that CSEA knew of the waivers, and thereby acquiesced to their contents, the County emphasizes a
settlement entered between the County and CSEA arising from a prior proceeding before PERB. The settlement, entered March 30, 1985, provides:

The County does not have the right to require employees to waive any rights under their [collective bargaining agreement] or the Act.

Future "waiver forms" shall be reworded so as to clearly constitute written acknowledgement of the receipt of County rules, regulations, practices and/or interpretations thereof.

According to the County, this settlement establishes a basis upon which the ALJ should have imputed knowledge of the waivers to CSEA.

We find that the language of this settlement simply recites the County’s right to inform employees of their terms and conditions of employment and does not constitute evidence of a waiver of CSEA’s right to negotiate. Accordingly, we agree with the ALJ’s conclusion that there is no evidence to show that CSEA waived its statutory right to bargain concerning the withdrawal of employees’ right to use the County-owned vehicles for transportation to and from work. Therefore, we dismiss this aspect of the County’s exceptions.

For the reasons set forth herein, we affirm the ALJ’s decision and hold that the County violated §209-a.1(d) of the Act by unilaterally withdrawing the right of unit employees within the DPW who are assigned County-owned vehicles to perform County

\(^{3}\)CSEA was represented in that matter by Pauline Kinsella, Chairperson of the Board, who has recused herself from the instant proceeding.
business to use such vehicles for transportation to and from work. The County’s exceptions are, accordingly, dismissed.

NOW, THEREFORE, WE ORDER the County:

1. To restore its practice of allowing unit employees within the DPW who are assigned vehicles to perform County business to use such vehicles for transportation to and from work.

2. To make whole any such bargaining unit members who meet the criteria in paragraph 1 above who, upon a showing of reasonable documentary evidence, and/or affidavits, demonstrate that they incurred expenses which they would not have incurred but for the elimination of the term and condition of employment described in paragraph 1 above, with interest at the maximum legal rate allowed.

3. To post the attached notice at all work locations customarily used to communicate information to CSEA bargaining unit members.

DATED:  June 29, 1993
Albany, New York

Walter E. Eisenberg, Member

Eric J. Schmertz, Member
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 County of Nassau in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Nassau Local 830, that the County of Nassau:

1. Will restore its practice of allowing unit employees within the Department of Public Works who are assigned vehicles to perform County business to use such vehicles for transportation to and from work;

2. Will make whole any such bargaining unit members who meet the criteria in paragraph 1 above who, upon a showing of reasonable documentary evidence, and/or affidavits, demonstrate that they incurred expenses which they would not have otherwise incurred but for the elimination of the term and condition of employment described in paragraph 1 above, with interest at the maximum legal rate allowed.

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

COUNTY OF NASSAU

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 1000, AFSCME, AFL-CIO, DEPARTMENT OF
SOCIAL SERVICES, LOCAL 688,

Charging Party,

-and-

STATE OF NEW YORK (DEPARTMENT OF SOCIAL
SERVICES),

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL S. BAMBERGER of
counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (LAUREN DESOLE of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil
Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO,
Department of Social Services, Local 688 (CSEA) to an
Administrative Law Judges' (ALJ) dismissal of CSEA's charge that
the State of New York (Department of Social Services) (State or
DSS) violated §209-a.1 (a) and (c) of the Public Employees' Fair
Employment Act (Act) when it transferred two employees, Lisa
Hauth and Deborah Yoder, to other work units within DSS, in
retaliation for their successful prosecution of two grievances.

Hauth and Yoder held the same title of Legal Assistant I, a
Grade 14 position represented by CSEA, and were assigned to the
compliance unit within DSS. They were supervised by Henry Pedicone and David Amaraian, who reported to Russell Hanks, Acting Deputy Counsel for the Office of Administrative Hearings. From the time of their hire in 1986, Hauth and Yoder were considered to be exemplary employees whose work was consistently rated highly effective. During their tenure, they performed a variety of tasks which the record established were above the duties of a Grade 14 and were similar to the work performed by the Social Service Specialists (Grade 18) in their unit. Indeed, DSS had been pursuing a title consolidation in order to address the out-of-title work situation.

On February 20, 1990, CSEA filed an out-of-title work grievance on their behalf. On February 13, 1991, a decision from the Governor’s Office of Employee Relations (GOER), at the third, and final, step of the contractual grievance procedure ordered DSS to cease and desist from assigning Hauth and Yoder job duties which were more extensive than those required of a Legal Assistant I, to pay them retroactively for the out-of-title work they had performed and to continue to pay them the higher salary as long as they performed the Grade 18 work. While Hanks at that point thought it was necessary to transfer the two employees out of the compliance unit in order to address the concerns raised in the GOER decision, Amaraian and Pedicone prevailed upon him to

On May 7, 1992, the title consolidation was approved and the Legal Assistant I became the Legal Affairs Specialist, Grade 14.
keep the two in the unit with a modification in their job duties which they believed would bring them into compliance. A memo issued on March 5, 1991, which decreased the level of independent decision-making of Hauth and Yoder and increased their supervision by supervisory staff.

On July 15, 1991, Hauth and Yoder, dissatisfied with the modifications in their assignments, filed an additional grievance. In addition, CSEA, on July 2, 1991, had commenced a CPLR Article 78 proceeding in Albany County Supreme Court on their behalf to enforce the GOER decision. Hanks testified that, although he believed the March 5 modification in the duties had brought Hauth's and Yoder's assignments into compliance with the Step 3 decision, he was concerned about the success of this "second wave" of complaints. He determined that he had no recourse but to transfer Hauth and Yoder out of the compliance unit and to reassign their tasks to two nonunit Social Service Assistants I, Bart Delaney and Julio Ocasio, also Grade 14.²

Amaraian and Pedicone expressed feelings of disappointment and betrayal to Hauth and Yoder over the filing of the grievances, especially the second grievance, which they saw as forcing the transfer of two employees whom they valued.³

² At that time, there was already a Social Service Assistant I assigned to the compliance unit who had been performing substantially the same duties as Hauth and Yoder without any apparent complaint about the assignment.

³ That grievance was also sustained at step 3 in a decision that held that the modified duties performed by Hauth and Yoder were out-of-title and more appropriate to a Grade 18.
The ALJ found that Hauth and Yoder's grievance constituted engagement in a protected activity and that their supervisors, Pedicone and Amaraian, knew of this protected activity. He found, however, that Hauth and Yoder were not transferred out of their work unit in retaliation for filing, prosecuting and prevailing in their grievances, but in order to minimize the impact of the success of their first grievance and the likely success of their second grievance. The ALJ held that action taken to respond to the consequences of a grievance does not violate the Act, absent improper motivation.\(^4\) The ALJ credited Hanks' testimony that it was his good faith belief that the modified job duties were within the duties properly required of the two Grade 14 Social Service Assistants. Finding no evidence of improper motivation, the ALJ dismissed the charge.

CSEA in its exceptions objects to the ALJ's conclusions, advancing essentially the same facts and arguments as were presented to the ALJ. However, CSEA has also moved to reopen the record to take into evidence a GOER step 3 decision on a contractual grievance filed by Delaney and Ocasio, which was rendered after the ALJ's decision. Delaney and Ocasio were also found to have been performing out-of-title work in the compliance unit. The grievance decision notes that DSS conceded that the two employees were performing out-of-title work. As this

\(^4\) Savona Cent. School Dist., 20 PERB ¶ 3055 (1987); County of Nassau v. PERB, 103 A.D. 2d 274, 17 PERB ¶ 7016 (2d Dep't 1984).
concession may impact on the credibility resolutions made by the
ALJ, CSEA's motion to reopen must be granted and the matter
remanded to the ALJ to permit the introduction of the step 3
decision on the Delaney and Ocasio grievance and such other
evidence regarding that decision as may be appropriate.

IT IS, THEREFORE, ORDERED that CSEA's motion to reopen is
granted and the matter is remanded to the ALJ.

DATED: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson
Walter L. Eisenberg, Member
Eric J. Schmertz, Member

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CSEA argues that the decision establishes the pretextual
nature of the reasons given by DSS for Hauth's and Yoder's
transfers because it states that DSS conceded that the work
was not Grade 14 work. The ALJ found that Hanks had
credibly testified to his belief, at the time the
reassignment was made, that the duties generally fell within
the job duties of the Social Service Assistants. If the
concession at Step 3 was made by Hanks, and it is
established that at the time he made the assignment he knew
that it involved out-of-title work, a different conclusion
might be warranted.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, TOWN OF EAST
FISHKILL UNIT, DUTCHESS COUNTY LOCAL 814,

Petitioner,

-and-

TOWN OF EAST FISHKILL,

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 1000, AFSCME, AFL-CIO, Town of East
Fishkill Unit, Dutchess County Local 814 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 Highway Department Employees, all Town
Police Assistants and Records Clerks, and all
Town Hall employees.
Excluded: Superintendent of Highways, Highway Department
Working Foreman, Secretary to the
Superintendent of Highways, Building Inspector,
Town Assessor, Secretary to the Planning Board,
Comptroller, Secretary to the Comptroller,
Recreation Director, and Secretary to the
Supervisor.

FURTHER, IT IS ORDERED that the above named public employer
shall negotiate collectively with the Civil Service Employees
Association, Inc., Local 1000, AFSCME, AFL-CIO, Town of East
Fishkill Unit, Dutchess County Local 814. 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: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member
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 Local 144, Service Employees International Union, 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 custodians, maintenance, grounds and transportation employees, mailpersons, instructional media center technicians, matrons, and supply and material clerks.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 144, Service Employees International Union, 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: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson
Walter L. Eisenberg, Member
Eric J. Schmertz, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION
LOCAL 424, A DIVISION OF UNITED INDUSTRY
WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

THREE VILLAGE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO
(THREE VILLAGE CENTRAL SCHOOL DISTRICT),

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 Public Service
Employees Union, Local 424, A Division of United Industry Workers
District Council 424 has been designated and selected by a
majority of the employees of the above-named public employer, in
the units agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Units:

**Maintenance Unit**

**Included:** All Custodial Workers, Groundskeepers and Members of the Maintenance Staff: A-V Technician, Custodial Worker I, Elementary Senior Custodian, Custodial Worker II, Sr. Custodian Junior High School, Head Custodian Elementary, Head Custodian Junior High School, Chief Custodian Junior High School\(^1\), Chief Custodian Senior High School, General Maintenance, Maintenance I, and Maintenance II.

**Excluded:** All other employees of the District.

**Clerical Unit**

**Included:** All Secretaries, Stenographers, and Members of the Clerical Staff.

**Excluded:** Secretary to the Superintendent of Schools; Secretary to the Assistant Superintendent for Instructional Services; Secretary to the Assistant Superintendent for Personnel Services; Secretary to the Assistant Superintendent for Business Services and all other employees of the District.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union, Local 424, A Division of United Industry Workers District Council 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and

\(^1\) This title, included in the bargaining unit consented to by the parties, was inadvertently omitted in the Decision of the Director, Three Village Cent. School Dist., 26 PERB ¶4023 (1993).
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: June 29, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member