State of New York Public Employment Relations Board Decisions from January 13, 1999

Keywords
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Comments
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These cases come to us on exceptions filed by the County of Nassau (County) to a decision by an Administrative Law Judge (ALJ) on two charges, consolidated for hearing, filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). Both charges allege that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it closed the employee cafeteria at the Nassau County Medical Center (NCMC) for service or seating between 2:00 a.m. and 4:00 a.m. CSEA alleges further in U-18850 that the County also refused to
negotiate in violation of the Act when it prohibited unit employees from using personal heat-generating appliances, such as microwave ovens, toasters and popcorn makers, at their work stations. In U-18940, CSEA alleges that the County improperly changed the types and quality of the food given to correction officers assigned to guard prisoners undergoing treatment at the NCMC. The ALJ held that the County violated the Act as alleged. He found that the County had acted unilaterally with respect to mandatory subjects of negotiation without meritorious defense.

The County argues in its exceptions that the ALJ erred as a matter of fact and law in holding that it violated the Act. CSEA argues in response that the ALJ’s decision is correct in all respects as the record clearly establishes that the County made unilateral, indefensible changes in existing practices embracing terms and conditions of employment.

Having reviewed the record and considered the parties’ arguments, we affirm the ALJ’s decision in part and reverse in part. There are no material facts in dispute and the ALJ’s decision correctly reflects those facts.

The NCMC cafeteria was open for at least nine years to serve the 200-300 employees who work the midnight shift at NCMC. The cafeteria served soup, one or more hot meals, salads, sandwiches, assorted hot and cold beverages and desserts. The County no longer contests whether employee access to a work-site cafeteria is a term and condition of employment. The opportunity for employees to enjoy a variety of food and beverages within a cafeteria setting at work is both an economic fringe
benefit, as it avoids any need for employees to eat and drink off premises at higher costs, and it is a matter directly affecting their health, personal comfort and convenience.¹

The County argues that by closing the cafeteria during the hours in question it eliminated a service to the public, as allowed by its contractual management rights clause. That argument is not persuasive because the cafeteria was never a public service. The cafeteria at NCMC was intended for employee use only. Although the County may not have strictly enforced that policy, use by nonemployees was discouraged and such use as there may have been by nonemployees between the hours of 2:00 a.m. and 4:00 a.m. was, at most, incidental and infrequent.²

The County also appears to argue that there was no cognizable change in practice because it put in a vending machine and opened a conference room so that employees would have a place to eat. The County’s substitution of a vending machine and a small conference room within which employees could sit is not equivalent to the benefits afforded them under a cafeteria operation. The vending machine provides neither the variety nor the quality of food prepared on premises and the conference room is but a place to sit without the equivalent availability of food or drink. There is also substantial question on the record as to whether the conference room is even

¹State of New York (Dep’t of Taxation and Finance), 30 PERB ¶3028 (1997) (office attire); New York City Transit Auth., 22 PERB ¶6601 (1989) (toilet facilities); City of Buffalo, 15 PERB ¶3027 (1982) (uniform fabric); Local 294, Int’l Bhd. of Teamsters, 10 PERB ¶3007 (1977) (seat style in police patrol cars); Scarsdale Police Benevolent Ass’n, Inc., 8 PERB ¶3075 (1975) (air conditioning).

²See Buffalo Sewer Auth., 27 PERB ¶3002 (1994) (action incidentally affecting public inconsequential in assessing violation).
adequate in size to seat comfortably the number of employees working during the relevant times. There being no question that the decision to close the cafeteria between 2:00 a.m. and 4:00 a.m. was one reached and implemented without any prior negotiation, the County's closing of the cafeteria violated §209-a.1(d) of the Act as alleged.

There is similarly no question that the County unilaterally ordered the removal of the personal heat-generating electrical appliances which employees were allowed to use at their work stations for many years. Unlike the cafeteria, however, the County's prohibition against the use of heat-generating appliances at an employee's work station within a hospital is not a term and condition of employment. Although employees' opportunity to have hot beverages or food available when they want affects their personal comfort and convenience, the inherent nature of such appliances poses substantial risks to patient safety, a recognized managerial prerogative. Although the likelihood of there being a fire, smoke or electrical malfunction caused by the use of these appliances may be small, these incidents can occur, and have occurred at NCMC, and the consequences are potentially catastrophic. Balancing the employees' convenience against the County's right and duty to protect patients' safety while in a hospital persuades us that the predominant effect of the County's prohibition is upon its

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³Massena Memorial Hosp., 25 PERB ¶3023 (1992); County of Niagara (Mount View Health Facility), 21 PERB ¶3014 (1988).
Board - U-18850 & U-18940

mission-related interests. As the change did not affect a term and condition of employment, the County was privileged to act unilaterally in this regard.

We find it unnecessary to consider the questions associated with the type or quality of food made available to the correction officers assigned to the NCMC. That change, to the extent there is any, was precipitated only by the closing of the cafeteria. By ordering the restoration of the cafeteria services, any issues in regard to the correction officers' food are mooted.

For the reasons set forth above, the ALJ's decision with respect to the cafeteria operation is affirmed and otherwise reversed.

IT IS, THEREFORE, ORDERED that the County immediately:

1. Restore the past practice of providing unit employees working at the NCMC, and to the unit correction officers assigned there, the full range of meal and beverage options as provided by the County before the cafeteria at NCMC was closed between 2:00 a.m. and 4:00 a.m.

2. Restore the past practice of providing unit employees working at the NCMC, and to the unit correction officers assigned there, the use during meal breaks of a lounge area equivalent to that provided them before the cafeteria at NCMC was closed between 2:00 a.m. and 4:00 a.m.

3. Make whole any unit employee who, upon a showing of reasonable documentary evidence and/or affidavits, incurred expenses for food or

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4Whether the use of such appliances in a work setting other than a hospital would be a term and condition of employment is an issue we do not decide.
beverages, which they would not have incurred but for the elimination of the food service operation, until the full range of meal and beverage options, as provided by the County when the employees had the use of the food service operation in the cafeteria, is made available to unit employees.

4. Sign and post the attached notice at all work locations at NCMC ordinarily used to post notices of information to unit employees.

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, 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 represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the County of Nassau will immediately:

1. Restore the past practice of providing unit employees working at the Nassau County Medical Center (NCMC), and to unit correction officers assigned there, the full range of meal and beverage options as provided by the County before the cafeteria at NCMC was closed between 2:00 a.m. and 4:00 a.m.

2. Restore the past practice of providing unit employees working at the NCMC, and to unit correction officers assigned there, the use during meal breaks of a lounge area equivalent to that provided them before the cafeteria at NCMC was closed between 2:00 a.m. and 4:00 a.m.

3. Make whole any unit employee who, upon a showing of reasonable documentary evidence and/or affidavits, incurred expenses for food or beverages, which they would not have incurred but for the elimination of the food service operation, until the full range of meal and beverage options, as provided by the County when the employees had the use of the food service operation in the cafeteria, is made available to unit employees.

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

CANASTOTA TEACHERS’ ASSOCIATION, NYSUT,
AFT #2536,

Charging Party,

- and -

CANASTOTA CENTRAL SCHOOL DISTRICT,

Respondent.

HELEN W. BEALE, for Charging Party

HANCOCK & ESTABROOK, LLP (JOHN F. CORCORAN of counsel), for
Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Canastota Central School District (District) to a decision of an Administrative Law Judge (ALJ) holding that the District violated §209-a.1(d) of the Public Employees’ Fair Employment Act (Act) when it appointed nonunit employees to coaching positions that had historically been the exclusive work of the employees in the unit represented by the Canastota Teachers’ Association, NYSUT, AFT #2536 (Association). The Association filed three separate improper practice charges. The first, U-18691, alleges that on November 12, 1996, the District appointed Vinnie Salamone, who is not in the bargaining unit, to the position of Girls Varsity Basketball Coach, a position for which Mark Smith, a teacher in the
The Association alleges in U-18954 that the District, on March 10, 1997, appointed Vinnie Salamone as Girls Softball Coach, even though Smith had applied for that coaching position. In U-19266, the Association alleges that on June 24, 1997, the District appointed Joe Fiacchi, who is not in the bargaining unit, as Varsity Football Head Coach instead of Smith, who had also applied for that position. The ALJ found that employees in the Association's unit had a right of first refusal to the coaching positions that established a discernible boundary of exclusive bargaining unit work. He ordered the District to restore the practice of offering coaching positions to eligible unit employees before appointing nonunit personnel and that it make Smith whole for any loss of wages or benefits he suffered as a result of his not being appointed to the positions of Varsity Girls Basketball Coach and Girls Softball Coach for 1996-97.

1. In December 1995, Smith had written a letter to the Board of Education, copying Superintendent of Schools Sam Tucci and Athletic Director Robert Group, resigning at the end of his appointment from the position of Girls Varsity Basketball Coach, which he had held for approximately ten years. In his letter, Smith pointed out his various concerns with what he saw as a lack of support for sports and a double standard in the treatment of different teams on the part of the District. Nonetheless, in September 1996, he again applied for the position of Girls Varsity Basketball Coach.

2. The ALJ also found that there was no contractual waiver and, because Tucci had recommended to the District's Board of Education the nonunit employees for the in-issue coaching positions, the complained of action was executive, not legislative. The District filed no exceptions to these findings.

3. The Head Varsity Football Coach position was filled by a nonunit individual, but because another unit employee had also applied for the position and received the modified head coach position, and because Smith accepted a coaching position for that sport at another school district, the ALJ ordered no back pay. The Association does not except to this aspect of the decision and we, therefore, do not reach it.
The District excepts to the ALJ's decision, arguing that coaching work is not exclusive to the Association's bargaining unit and that back pay with interest should not have been ordered for Smith. The Association supports the ALJ's decision.

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

The District simultaneously announces coaching positions one or two times each year to bargaining unit members, nonbargaining unit employees and employees of other districts who have previously coached in the District. While there are more teachers in the Association's bargaining unit qualified to coach than there are coaching positions, many choose not to coach. As a result, for several years nonunit employees have filled certain coaching positions in the District, to which, upon application, they are appointed year after year. It appears from the record that, except for the year in question, there were no applications made by unit employees for coaching positions historically held by another coach, whether a unit employee or a nonunit employee. There has only been one instance in the last several years in which a unit employee was appointed to a coaching position previously held by a nonunit employee who had also applied for the position. On the basis of that one instance, the ALJ found that qualified Association unit members have always been appointed to coaching positions for which they have applied.\(^4\) We disagree.

\(^4\)The ALJ also relied upon a letter from the District's previous counsel indicating that there was no history of nonunit employees being appointed to coaching positions for which a qualified unit employee had applied. For the reasons discussed hereafter, that cannot evidence or establish a right of first refusal because there was never a situation bringing the alleged right into application.
In determining the existence of a past practice, it must be found that the practice is unequivocal, has been in existence for a significant period of time and that the employees could reasonably expect the practice to continue without change.\(^5\) The Association has not established that the District has a past practice of always appointing a qualified unit member to a coaching position that was either sought or held by a nonunit employee because one instance cannot establish an unequivocal past practice. That the Association believed that it had a right of first refusal because of that one incident does not evidence that such a practice existed or that the District acknowledged such a right.\(^6\)

The record does not support the Association’s contention that nonunit employees had held coaching vacancies at its sufferance. To ascertain where the Association’s case is lacking, we need only look to *Board of Education of the City School District of the City of Long Beach*,\(^7\) where the teachers’ unit and the District had a clear understanding that the District would only hire nonunit driver education teachers if no unit employee had sought a position, and the District only solicited nonunit employees after it had announced and filled as many vacancies as possible with unit employees.

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\(^6\) In addition to announcing the vacancies to unit employees and nonunit personnel simultaneously, Group testified that he has never felt himself under any obligation to recommend only unit employees. Indeed, he testified that he gives a preference to individuals who have previously coached a particular sport in an attempt to establish and maintain continuity in the District’s athletics program.

\(^7\) 26 PERB ¶3065 (1993).
employees. Here, the District solicits unit and nonunit personnel simultaneously and characterizes its practice as always hiring the most qualified applicant, whether in the unit or not. The one example given of a unit employee being appointed to a coaching position previously held by a nonunit employee is equivocal, at best. The unit employee may, for example, have been appointed, not because of the alleged right of first refusal, but because the unit employee was better qualified, in the District's opinion, than the nonunit employee.

Given these circumstances, the Association has not established that it has exclusivity over coaching positions in the District under a right of first refusal. Therefore, the hiring of nonunit personnel to fill the three coaching positions sought by Smith was not an improper assignment of unit work outside the unit and did not violate the Act.

Based on the foregoing, the decision of the ALJ is reversed.

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
This case comes to us on exceptions filed by Joel S. Amaker, Sr., to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge that the Transport Workers Union of Greater New York (TWU) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by misrepresenting him in an arbitration hearing and by refusing to appeal to court the
Amaker was notified that his charge was deficient and he filed amendments to it. Determining that the charge remained deficient, the Director dismissed it.

Amaker asserts in his charge that he filed a complaint of disability discrimination with the State of New York - Division of Human Rights in March 1990, complaining that the Authority had denied him an appointment to the position of Conductor because of disability discrimination. On June 29, 1995, Amaker and the Authority entered into a stipulation of discontinuance and settlement of that complaint. The Authority agreed to appoint him to a permanent Conductor position. Amaker withdrew his Human Rights complaint with prejudice and agreed not to bring any future claims against the Authority based on its initial refusal to appoint him to a Conductor's position. In October 1995, Amaker was appointed as a Conductor. Amaker thereafter filed a grievance in March 1996 seeking seniority, back pay and benefits from 1990 until the time of his appointment as a Conductor. The TWU represented Amaker in the grievance and at arbitration. The arbitration award was issued on November 22, 1996, which was also the same day as the hearing was conducted. The arbitrator found that Amaker's claim was barred by the agreement which settled the Human Rights complaint and denied the grievance.

Amaker claims in his improper practice charge that the TWU failed to require the arbitrator to administer an oath or affirmation to the witnesses testifying at the

1Pursuant to §209-a.3 of the Act, the New York City Transit Authority (Authority), Amaker's employer, was made a statutory party to the case.
arbitration and failed to insist that the proceeding be transcribed or recorded. Amaker also claims in his charge that the TWU violated the Act by refusing to appeal the arbitrator's decision. In the amendments to the charge, Amaker alleges that the collective bargaining agreement between the TWU and the Authority prohibits the recording or transcription of an arbitration hearing and thus violates his due process rights. With respect to the appeal of the arbitrator's decision, he alleges that the TWU has taken "some arbitration decisions to court for similarly situated Union members."

Amaker was informed that his charge remained deficient unless he could provide specific facts forming the basis for his assertion that the TWU had appealed grievance arbitration decisions to court for similarly situated employees. Amaker responded that he could not provide the specifics requested, but that PERB should be able to obtain such information for him from the TWU and that, in any event, the TWU had represented him in a superficial manner at the arbitration hearing. Amaker's charge was dismissed by the Director on June 4, 1997, for failing to provide facts which, if proven, would support a finding that the TWU violated the Act.

On July 2, 1997, Amaker wrote to the Director requesting an extension of time to "respond" to his decision. His letter was forwarded to Board Counsel and he was given an extension of time, to July 16, 1997, to file exceptions to the Director's decision, with the admonition that there would be no future extensions granted absent the consent of the TWU and the Authority. As discussed infra, no further correspondence from Amaker was received by the Board until August 1998. On November 18, 1997, Amaker wrote to the Director requesting that he reopen his case on the basis of a letter, which
he had enclosed, from Sonny Hall, International President of the Transport Workers of America. In the letter, Hall commented on Amaker's claim that TWU improperly failed to appeal the arbitrator's decision, opining that, in most cases, a local union does not have the money to appeal an arbitrator's decision but:

This is not to say that there aren't a few exceptions and that a Local Union has risked the cost to fight an arbitrator's ruling but they are very, very rare and even in these few cases I cannot recall ever winning a court case to overturn an arbitrator's decision in relation to a Union member.

The Director replied that the matter would not be reopened as Amaker had not pled any new facts that were unavailable to him at the time he filed his charge. At most, according to the Director, Hall's letter could be read as showing that in a few cases the TWU had appealed an arbitrator's decision, but that there were no facts alleged which would warrant a finding that any of those cases were similar to Amaker's. Amaker then spoke to the Director in July 1998, apparently asserting that he had filed exceptions to the Director's decision. Amaker was advised that no exceptions had been received by the Board. He then produced a copy of a letter dated July 14, 1997, in which he asks for an open-ended extension of time to file exceptions while he searches for evidence to support his claims. He closes his letter with the direction that he be contacted if there are any problems with his request. The letter was not received by this Board until August 17, 1998, when a copy was provided by Amaker. Amaker was informed that the

2The letter bears no return address, no inside address to the Board, and is the type Amaker had been using for his 1998 correspondence, a type which is markedly different from the type used in his 1997 correspondence with the Director and the Board.
Board - U-18826

Board had not received the letter in July 1997, but that his request for an open-ended extension would not have been granted in any event because it was for an unknown period of time and because it did not comply with the instructions set forth in the letter granting Amaker his initial extension of time to file exceptions, specifically, that no further extensions of time would be granted absent the consent of the TWU and the Authority.\(^3\) In response, Amaker raises for the first time that he did not receive directions for filing an exception when he received his copy of the Director's decision in June 1997.\(^4\)

In his exceptions, Amaker claims that he thought he had complied with all the Board's requirements when he filed his request for a second extension of time to file exceptions. He also alleges that he did not receive "the form" needed for filing exceptions when he received the Director's decision in June 1997 and, finally, relying on Hall's letter, he asserts that he has established that the TWU was arbitrary, discriminatory and acting in bad faith when it refused to appeal the arbitrator's decision.\(^5\)

\(^3\)Neither the TWU nor the Authority was even copied on Amaker's July 14, 1997 letter.

\(^4\)The Director causes to be enclosed in each decision issued from his section an extract from the Rules of Procedure (Rules), §§200-215, setting forth the procedures for filing an exception to a decision of the Director or an Administrative Law Judge or a judicial appeal of the decisions of this Board. Parties are cautioned in the extract to consult the Rules to ensure compliance with all requirements.

\(^5\)Neither the TWU nor the Authority responded to Amaker's exceptions. Amaker did not file exceptions to that part of the Director's decision that dealt with the TWU's representation of him at the arbitration hearing.
Based upon our review of the record and our consideration of Amaker's arguments, we affirm the decision of the Director.

Amaker's exceptions are clearly untimely. Whether or not he received the excerpt of the Rules provided by the Director as a courtesy, that Amaker had information from some source about filing exceptions is established by his timely request for an extension of time to file exceptions, which he made to the Director. Ignoring the conditions placed upon any future requests for an extension of time, Amaker then allegedly wrote to this Board, indicating that he needed an open-ended extension, again evidencing some awareness of this Board's Rules regarding exceptions. Amaker would not have received an extension of time such as he requested. It is clear from this chronology of events that Amaker knew how to file exceptions and that he has ignored instructions from both the Director and the Board as to how to proceed, electing instead to pursue his case as he saw fit. There is nothing in Amaker's exceptions which justifies the acceptance of exceptions in this case at this late date, and we decline to do so.

Even were we to consider Amaker's exceptions, it is clear from the materials he has filed that he has not pleaded any facts which, if proven, would support a finding that

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6 Recognizing that Amaker's appearance before the ALJ and this Board is pro se and that some latitude in meeting the requirements of our Rules is warranted in such cases, Amaker was afforded the initial extension and his several letters and telephone calls were each addressed to ensure that he understood the procedures to be followed. Even a pro se litigant, however, must comply with the Rules and instructions from the Director or the Board. See Civil Service Employees Assn., Inc., Local 1000, AFSCME, AFL-CIO, Local 815 (Juszczak), 22 PERB ¶3020 (1989).
TWU had breached the duty of fair representation. The TWU made a reasoned decision not to appeal the decision of the arbitrator, holding that Amaker did not have a meritorious grievance based on the agreement that Amaker had signed in settlement of his Human Rights complaint. That the TWU, on rare occasions and in undefined circumstances, appeals an arbitrators decision does not support a finding that its decision not to do so in Amaker’s case was a violation of the Act. Our decisions have always recognized that a union is and must be afforded a wide range of reasonableness in making decisions associated with the processing of a grievance, including how far it will proceed with a particular grievance or case.7

Based on the foregoing, Amaker’s exceptions are denied and the decision of the Director is affirmed.

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

7Public Employees Fed’n and State of New York (Dep’t of Health), 29 PERB ¶3027 (1997).
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) dismissing its charge against the County of Nassau (County). CSEA alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally stopped providing it with a free copy of transcripts of the hearings periodically held regarding an employee's eligibility for benefits under General Municipal Law (GML) §207-c.

After a hearing, the ALJ held that CSEA had not proven the practice it claimed. The ALJ found that transcripts were provided to CSEA in the past in circumstances
falling into two categories. In one category were transcripts provided by or at the
direction of the GML §207-c hearing officers, whom the ALJ held are not agents of the
County. In the second category were transcripts CSEA obtained in circumstances in
which it was unknown from the record how it came into possession of the transcripts.
As they might have been obtained other than through a County agent, the ALJ held that
there was a failure of proof as to any past practice.

CSEA argues in its exceptions that the ALJ erred factually in finding that two
hearing transcripts were provided by or at the direction of the GML §207-c hearing
officer. It argues further that actions by the GML §207-c hearing officers were either
ones taken as agents of the County, or ones resting on at least an implicit recognition
by them of the practice CSEA alleges to exist. CSEA also argues that the ALJ did not
give consideration to a statement made by the County's attorney at a GML §207-c
hearing held after this charge was filed which allegedly admits the practice alleged by
CSEA.

The County argues in response that the ALJ's decision is correct or incorrect in
immaterial respect because there has still been a failure of proof of any change in
practice even when the record is read most favorably to CSEA.

Having reviewed the record and considered the parties' arguments, we affirm the
ALJ's decision.
A practice which an employer may not change unilaterally is one embracing a term and condition of employment and created by the discretionary acts of its agents.\(^1\) Regardless of the identity of the person serving as a GML §207-c hearing officer, that person is required to serve impartially.\(^2\) When serving as a GML §207-c hearing officer, the person cannot be considered an agent of the employer for purposes of the Act, regardless of the employment position that person holds with the County, because the hearing officer is not subject to the employer's control. Therefore, we agree with the ALJ that any transcripts provided to CSEA by or at the direction of the GML §207-c hearing officer, no matter what the reason for the hearing officer's action or directive, cannot evidence a County practice.

Even if the ALJ was incorrect in concluding that the transcripts in two GML §207-c proceedings (hearings involving employees Kelley and Chadha) were provided by or at the direction of the presiding hearing officer, that would only move the provision of those transcripts into the second category, which the ALJ also correctly held did not establish a County practice of providing CSEA with transcripts of GML §207-c proceedings free of charge.

It is not enough to hold the County in violation of the Act to find, as the ALJ did, that CSEA possessed copies of GML §207-c hearing transcripts without paying for them. The controlling question is from whom were those transcripts obtained. As to

\(^1\)Section 209-a.1 makes a public employer responsible only for the acts of its agents.

\(^2\)Curley v. Dilworth, 96 A.D.2d 903 (2d Dep't 1983).
that question, it cannot be determined on this record whether CSEA was given the transcripts by the County attorney, whether those transcripts were given to CSEA by or at the direction of the GML §207-c hearing officer, or whether they were obtained by CSEA in some other way.

The statement attributed to the County attorney at a GML §207-c proceeding held after this charge was filed that "from now on we don't supply free transcripts" is inconsequential. It cannot be an admission of the practice CSEA claims because the County had at least twice before refused to provide CSEA's representatives with free transcripts.

For the reasons set forth above, we affirm the ALJ's decision that CSEA has not proven a unilateral change in a past practice regarding the provision of GML §207-c hearing transcripts gratis. The ALJ's decision is, accordingly, affirmed and CSEA's exceptions are denied.

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PETER ONITIRI,

Charging Party,

- and -

CASE NO. U-20095

NEW YORK CITY TRANSIT AUTHORITY and
TRANSPORT WORKERS UNION, LOCAL 100,

Respondents.

PETER ONITIRI, pro se

MARTIN B. SCHNABEL, VICE PRESIDENT AND GENERAL COUNSEL
(JOYCE RACHEL ELLMAN of counsel), for NEW YORK CITY TRANSIT AUTHORITY

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Peter Onitiri to a decision by the Director of Public Employment Practices and Representation (Director) on a charge Onitiri filed against his former employer, the New York City Transit Authority (Authority) and the Transport Workers Union, Local 100 (TWU), the union representative for Onitiri when he was employed by the Authority. Onitiri was dismissed from employment with the Authority pursuant to an arbitration award dated September 26, 1996, but one perhaps not received by Onitiri until April 1998. Onitiri alleges in his charge that the Authority brought disciplinary charges against him twice for the same offense in violation of §209-a.1(a) and (b) of the Public Employees' Fair Employment Act (Act).
He alleges that TWU did not represent him in good faith during the grievance/arbitration proceedings.

The Director dismissed the charge as factually and legally deficient. He held that the charge was untimely filed and that it set forth no facts to evidence that the Authority's disciplinary charges were brought in retaliation for Onitiri's exercise of any rights protected by the Act or that TWU's representation was inadequate or in bad faith.

Onitiri argues in his exceptions that the response he filed to the Director's notice of deficiency sufficiently corrected his charge. The Authority argues in response that the Director's decision is correct in all respects. TWU has not responded.

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

Even if the charge were timely filed, no improper practice is pleaded against either the Authority or the TWU. An employer's discipline of an employee cannot violate the cited sections of the Act unless the discipline interferes with or discriminates against the employee's exercise of rights protected by the Act. The charge, read most favorably to Onitiri, is without even a suggestion that the Authority's disciplinary charges against him were brought for any reason which would violate the Act. Discipline, by itself, even if it is considered "unfair" upon some standard, does not violate the Act without linkage by cause or effect to statutorily protected rights.¹ There are no facts in the charge which

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would evidence that TWU's representation of Onitiri, which continued through arbitration, was arbitrary, discriminatory or in bad faith.

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

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

- and -

TOWN OF DEWITT,

Employer.

NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ of counsel), for Petitioner

FERRARA, FIorenza, LARRISON, BARRETT & REITZ, P.C. (CRAIG M. ATLAS of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Dewitt (Town) to a decision by the Director of Public Employment Practices and Representation (Director) on a petition for certification filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). The parties stipulated to the appropriateness of a white-collar unit, and two others, except as to the titles of Account Clerk 1 and Data Entry Clerk. The incumbents in these titles work in the Town Comptroller’s office and the Town argued to the Director that they should be excluded from the white-collar unit because they are confidential employees within the meaning of §201.7(a) of the Public Employees’ Fair Employment Act (Act).
After a hearing, the Director held that neither employee is confidential. The Director concluded that although the Comptroller is a managerial employee, the two employees in that office had not assisted with the negotiation or administration of a collective bargaining agreement. Moreover, the Director found that their personnel administration functions are restricted to clerical duties and the collection, recording and filing of routine information and reports pertaining, for example, to unemployment insurance, disability and workers' compensation.

The Town argues in its exceptions that the employees are confidential based on the personnel functions they currently perform for the Comptroller. If not confidential on this basis, the Town argues that they should be designated as confidential based upon duties which will reasonably be required of them upon CSEA's certification in this unit and the two others. CSEA argues in response that the Director's decision is correct because a confidential designation must be based on duties currently performed and neither employee has actually done any work of a confidential nature. Speculation as to what either employee's duties might be in the future cannot, CSEA argues, support a confidential designation.

Having reviewed the record and considered the parties' arguments, including those at oral argument, we affirm the Director's decision.

The Town makes two arguments for reversal of the Director's decision, one focusing on the current duties of the incumbents, the other on duties which it claims

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1 CSEA was certified in November 1998 as the bargaining agent for a unit of the Town's supervisory employees and for a separate unit of blue-collar employees.
they will perform in the near future given CSEA's certification as the bargaining agent for Town employees. We address each argument in order in the context of both the Act's controlling definitions and the legislative policies and purposes underlying the exclusion of confidential employees from coverage under the Act.

For purposes of the Act, confidential employees, who are ineligible for representation in any unit, are only "persons who assist and act in a confidential capacity to managerial employees described in (ii)." Section 201.7(ii) of the Act defines managerial employees as ones "who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration . . . ."

The exclusions for managerial and confidential employees are an exception to the Act's policy to extend coverage to all public employees. The exclusions from the Act's coverage for both managerial and confidential employees recognize that an employer needs to have a cadre of employees to deliver or assist in the delivery of collective bargaining, contract administration or personnel administration services whose loyalties will not be conflicted by extending to them the representation rights the Act affords other employees. The Legislature's policy statement accompanying §201.7(a)\(^2\) and the amendments made to that section in relevant part over time\(^3\)

\(^2\)1971 N.Y. Laws ch. 503, §5.

emphasize that the statutory exclusions, whether managerial or confidential, are to be read narrowly.\(^4\)

The definition of a confidential employee incorporates a two-part test for designation. The person to be designated must assist a §201.7(a)(ii) manager in the delivery of the duties described in that subdivision.\(^5\) Assistance alone, however, is not enough to support a designation. In addition, the person assisting the §201.7(a)(ii) manager must be one acting in a confidential capacity to that manager. The first part of the test is duty oriented, while the second is relationship oriented. As the two parts of the test are distinct, satisfaction of one might not satisfy the other. A person assisting a manager through the performance of duties confidential in nature is not necessarily one performing those duties in a position which has a confidential relationship to the §201.7(a)(ii) manager. A person in a confidential relationship to a managerial employee might never perform or be expected to perform any of the duties warranting a confidential designation. To read the statute in a manner that would have assistance with §201.7(a)(ii) functions by itself establish confidential capacity would make the words "and act in a confidential capacity to" appearing in §201.7(a) entirely superfluous. We do not believe that this is correct as a matter of statutory construction\(^6\) or a correct reflection of legislative intent.

\(^4\)Our decisions have often recited this legislative intent. See, e.g., State of New York, 5 PERB ¶3001 (1972).

\(^5\)County of Orange, 31 PERB ¶3016 (1998).

\(^6\)N.Y. Statutes §213 (McKinney's 1971).
The conclusion that a confidential designation is properly made only upon satisfaction of both of two separate conditions is not only consistent with the language of the statute as actually written, it is wholly consistent with the Legislature's purpose. It is the second prong of the test, in the main, which prevents employers from obtaining a confidential designation by assigning duties, even if confidential in nature, to employees without regard to the relationship existing between the employee assigned those duties and the §201.7(a)(ii) manager. Only this reading of the confidential definition preserves the Legislature's intention to have designations made only as reasonable\(^7\) and as necessary to avoid conflicts of interest.

Neither employee at issue in this case satisfies both parts of the two-part test for confidential status on either of the Town's arguments.

Although each of these employees currently has duties which assist the Comptroller in fulfilling certain of the Comptroller's personnel functions, not all personnel work which an employee performs will satisfy the first prong of the confidential test. Consistent with the underlying purpose of the exclusion of confidential employees from coverage, it is only those personnel functions which present conflicts of interest with the employees' representation for purposes of collective negotiations which will qualify for confidential designation. Thus, our designations of employees as managerial or confidential which have been based upon their personnel functions have

\(^7\)The introduction to the specific definitions of managerial and confidential employees restricts the designation of either to those which may "reasonably" be made periodically.
involved situations in which the designees have been exposed in the course of performing personnel work to information which has a direct relationship to and impact upon collective negotiations and the administration of collective bargaining agreements. Simple access to existing personnel or financial information, as these employees have, is not sufficient for confidential designation because the information is not of a type which presents any actual or apparent conflicts of interest or clash of loyalties.

Stressing, however, that these two employees are the Comptroller’s only assistants, the Town argues that it is reasonable to conclude that these employees will have to assume duties with respect to collective negotiations and contract administration upon CSEA’s certification. We find it unnecessary to decide whether confidential designations can be based upon duties which may reasonably be required of the employees for whom confidential designation is sought. Even were we willing to reverse existing case law, as the Town would have us do, and conclude that confidential duties reasonably required of an employee are relevant in considering

8 See, e.g., Bd. of Educ. of the City Sch. Dist. of the City of New York, 18 PERB ¶3025 (1985); Bd. of Educ. of the City Sch. Dist. of the City of New York, 6 PERB ¶3046 (1973).

9 County of Orange, supra note 5; Watervliet Housing Auth., 18 PERB ¶3079 (1985); Bd. of Educ. of the City Sch. Dist. of the City of New York, 10 PERB ¶3024 (1977).

10 Managerial designations under §201.7(a)(ii) are permitted to be based upon duties which are reasonably required of the manager by the express terms of that subdivision.

whether the “assist” prong of the test for confidential status has been satisfied, nothing in this record is persuasive of a conclusion that either employee acts in a confidential capacity to the Comptroller. Thus, the second prong of the test is not satisfied even upon the Town's alternative argument.

The second prong of the test for confidential status examines not simply the duties performed or to be performed by the allegedly confidential employee, for that is the function of the “assist” part of the definition. Rather, the second aspect of the definition examines the capacity in which those services are delivered by the employee to be designated. The position held by the employee assisting the §201.7(a)(ii) manager must be one in a confidential relationship to the position held by the manager. The person to be designated confidential must be serving in a position the nature of which is one of trust and confidence, vis-a-vis the §201.7(a)(ii) manager.

There is nothing persuasive on this record to establish that the positions of Account Clerk 1 or Data Entry Clerk are in a confidential relationship to the Comptroller as might be the case, for example, with a position such as the personal secretary to the Comptroller or a personnel assistant. A confidential relationship is not inherent in the nature of the two positions themselves nor is it evidenced by the current job descriptions for the positions.

There being no other basis upon which to exclude these titles from the parties' stipulated white-collar unit, the Town's exceptions are denied and the Director's decision is affirmed. The case is remanded to the Director to determine CSEA's
majority status within the white-collar unit the Director found to be appropriate. SO ORDERED.

DATED: January 13, 1999
Albany, New York

[Signatures]

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
This case comes to us on exceptions filed by Arthur Pietraszewski, Jr. to a decision by the Director of Public Employment Practices and Representation (Director) dismissing his charge against the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to which his employer, the State of New York (State), was joined as a party pursuant to §209-a.3 of the Public Employees' Fair Employment Act (Act). Pietraszewski alleges that CSEA violated §209-a.2(c) of the Act by declining to represent him in an age discrimination lawsuit against the State and by refusing to reimburse him for the fees he paid an attorney whom he retained to represent him on that lawsuit.
The Director dismissed the charge as deficient upon his initial review. The Director concluded that there were no facts submitted by Pietraszewski to evidence that CSEA's decision in either respect was arbitrary, discriminatory or in bad faith.

Relying upon dictionary definitions of certain words used by the Director in his decision and by CSEA's agents in denying his request for legal representation and a judge's ruling denying the State's motion to dismiss his age discrimination lawsuit, Pietraszewski argues that he has offered adequate proof that CSEA breached its duty of fair representation.

CSEA argues in response that the Director's decision is legally correct and should be affirmed.

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

CSEA denied Pietraszewski's request for legal assistance because it believed from its review of his allegations of age discrimination that his case was “not sufficiently meritorious for CSEA to take it on.” That Pietraszewski and a judge might disagree with CSEA's assessment of the merit of his discrimination allegations does not establish or evidence that CSEA's judgment was arbitrary, discriminatory or in bad faith. Just as CSEA was privileged to establish a legal assistance program for unit employees, it was privileged to determine in good faith when to grant requests for assistance and when to deny them. The same wide latitude afforded unions regarding the investigation and

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1Pietraszewski offers definitions of “sufficiently”, “meritorious”, “normally”, “merits”, “predict”, and “persuade”.
processing of contract grievances\(^2\) is applicable when a union elects to expand its services to unit employees to include legal representation on matters arising outside of the collective bargaining context. Nothing in Pietraszewski's allegations or arguments evidences that CSEA's denial of his request for legal representation was one made other than in good faith. Even if CSEA were in error regarding the merits of his age discrimination allegations, that judgmental mistake would not constitute a breach of its duty of fair representation.\(^3\) Having properly denied Pietraszewski's request for legal assistance, CSEA was not required by the Act to reimburse him for the legal fees he paid a private attorney.\(^4\)

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

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

DATED: January 13, 1999

Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

\(^2\)See District Council 37, AFSCME (Gonzalez), 28 PERB ¶3062 (1995).
\(^4\)Public Employees Fed'n (Levy), 31 PERB ¶3090 (1998).
This case comes to us on exceptions filed by Christopher Joseph to a decision by an Administrative Law Judge (ALJ) on a charge he filed against the Amalgamated Transit Union, Division 1056, AFL-CIO (ATU), to which Joseph’s former employer, the New York City Transit Authority (Authority) was added as a party pursuant to §209-a.3
of the Public Employees' Fair Employment Act (Act). Joseph alleges that ATU breached its duty of fair representation in violation of §209-a.2(c) of the Act by misrepresenting him at a June 24, 1997 disciplinary arbitration which caused an arbitrator to dismiss him from employment.

After a hearing, the ALJ dismissed the charge pursuant to ATU's motion, in which the Authority joined. The ALJ found that ATU had not failed to represent Joseph at the June 24, 1997 arbitration and that his other allegations concerning ATU having made unspecified misrepresentations of fact or its allowing incorrect information to be placed into his personnel file were not proven.

Joseph argues in his exceptions that he did prove that ATU violated the Act. ATU and the Authority argue in response that the ALJ's decision is correct and that Joseph's exceptions do not raise any factual or legal issues calling the ALJ's decision into question.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

The record establishes that Joseph had a history of attendance problems resulting in several disciplinary charges and actions, which the ATU successfully defended until Joseph was found by the arbitrator to have violated a last-chance reinstatement.

The Authority disciplined Joseph for attendance problems in December 1996. Joseph was defended by ATU and he was reinstated by an arbitrator, who subjected Joseph to a suspension were he to have future attendance problems. His absence from work on December 20, 1996 triggered another disciplinary arbitration, which ATU
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again defended. Joseph was reinstated conditioned upon his not being late or absent from work for the following six months. The arbitrator held that an absence or lateness during that period would result in Joseph's discharge. Joseph was late for work within the prescribed six-month period. ATU again grieved his dismissal, this time unsuccessfully because the arbitrator found that Joseph's lateness was not excusable.¹

Joseph's discharge from employment was the result of his continuing attendance problems, not any breach by ATU of its duty of fair representation. Once the arbitrator concluded that Joseph's most recent lateness could not be excused, the prior last-chance reinstatement order left the arbitrator with no alternative other than to allow the Authority's discharge to stand. Nothing the ATU did or failed to do at or before the June 1997 arbitration could change a result dictated under the terms of the arbitrator's earlier award by Joseph's own actions. The ALJ's material findings of fact are supported by the record and his conclusions of law are correct. There is nothing on the record to establish that ATU's representation before, at or after the arbitration hearing was arbitrary, discriminatory or in bad faith. As Joseph's timely allegations of impropriety fail either as a matter of law or fact, dismissal of the charge at the end of Joseph's case was permissible.

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

¹The same arbitrator issued all of these awards.
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
This case comes to us on exceptions filed by Nancy Viti to a decision by an Administrative Law Judge (ALJ) on a charge she brought against her former employer, the Sewanhaka Central High School District (District). Viti alleges in this charge that she was discharged from employment in violation of §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) because she earlier caused an improper practice charge to be filed against the District.

After a hearing, the ALJ dismissed the charge upon a finding that Viti had not been discharged because of any protected activity undertaken by her or her union.
representative on her behalf. Crediting the District’s witnesses over Viti, the ALJ found that Viti was discharged by the District because it believed her to be a disruptive and potentially violent employee who had job performance problems predating her first improper practice charge, which was settled without adverse effect upon the District.

In her exceptions, Viti argues that she was a good employee and that the District’s representations to the contrary are lies. The District in its response argues that the ALJ’s findings and conclusions are correct and fully supported by the record.

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

The ALJ’s decision rests upon his assessment of the credibility of the witnesses’ testimony regarding the motive for the District’s discharge of Viti. The claims Viti makes to us were also made to the ALJ, who considered and rejected them based upon his credibility findings. The ALJ credited the District’s witnesses’ testimony as to motive and he generally and specifically discredited Viti’s testimony as untrustworthy. There is no basis in a record that supports the ALJ’s credibility determinations to reverse the ALJ’s findings as to the District’s motive. As Viti was not discharged from employment for any reason unlawful under the Act, the ALJ correctly dismissed the charge even if Viti’s actions did not constitute “misconduct” within the meaning of any other statute.

For the reasons set forth above, the ALJ’s decision is affirmed and Viti’s exceptions are denied.
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
This case comes to us on exceptions filed by Michael J. DePinto to a decision of an Administrative Law Judge (ALJ) dismissing a charge alleging that the Town of North Hempstead (Town) violated §209-a.1(a) and(c) of the Public Employees' Fair Employment Act (Act) when it transferred him to another work location in retaliation for his having engaged in activity protected by the Act. DePinto is in a unit of Town employees represented by the Civil Service Employees Association, Inc., Local 882,
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Unit 7555, AFSCME, AFL-CIO (CSEA). CSEA is also a named charging party, but it has not filed exceptions of its own nor joined in DePinto's.

After a hearing, the ALJ dismissed the charge in its entirety, finding that the Town's transfer of DePinto was not in retaliation for the exercise of protected rights and that there was no evidence of improper motivation on the part of any Town officials involved in the decision to transfer DePinto. Rather, the ALJ determined that the transfer was part of the Town's reorganization of its Department of Parks and Recreation. DePinto excepts to the ALJ's decision, arguing that it is factually and legally wrong. The Town fully supports the ALJ's decision.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

DePinto has been a Town employee since 1985. From 1994 to 1997, he was assigned to Bar Beach, a seasonal beach facility operated by the Town. At Bar Beach, DePinto supervised several employees, oversaw the use of Town equipment, had a fixed work schedule, the opportunity for overtime and use of a Town vehicle to travel to and from work and to travel to unstaffed Town facilities under his supervision. In April 1997, DePinto was transferred to Fuschillo Park, a year-round facility which includes a senior citizen center. His hours vary; there are few, and sometimes no, employees to supervise; he has not received any significant overtime opportunities; and he no longer has the use of a Town vehicle.

DePinto points to his election as First Vice-President of CSEA in 1995, his assumption of the office of Executive Vice-President in 1997, and an increase in the
number of grievances and complaints he filed as protected acts which caused the Town to transfer him to Fuschillo Park.

The ALJ’s detailed analysis of the record establishes otherwise. In May 1996, after DePinto’s election as First Vice-President, Parks Commissioner Gerard Olsen applied for a promotion for DePinto from Groundskeeper I, a Grade 17 Civil Service title, to Groundskeeper II, a Grade 19 title. When that application was denied by the Civil Service Commission, Olsen sought and obtained for DePinto a promotion to Labor Supervisor II, also a Grade 19 position. During his probationary period, DePinto was written up for insubordination by his supervisor, Acting Deputy Commissioner Richard Volpe, an action which could have cost him his promotion. The Town, however, merely put a written warning in his personnel file.

The ALJ fully credited the testimony of the Town’s witnesses that the reasons for DePinto’s transfer were legitimate business concerns, and the record supports her findings. In 1997, the Town was faced with a number of retirements and budget constraints which limited its ability to fill vacant positions. To address staffing and equipment needs, Volpe determined to transfer several employees, including the CSEA Unit President and DePinto, and to reassign equipment and duties. Volpe testified that other employees, including other supervisors, had complained to him about DePinto’s control of Town equipment and their difficulties in obtaining the equipment they required from DePinto. Volpe further testified that to address all of these concerns, DePinto was transferred, with no change in grade or salary, to Fuschillo Park, a year-round, smaller
facility with fewer employees to supervise, where he had no control over the use of Town equipment by other supervisors.

DePinto has established the first two elements of a violation of §209-a.1(a) and (c).\(^1\) Our review of the record shows that DePinto was engaged in protected activities and that the Town was well aware of his activities. However, it does not support a finding that the Town would not have transferred DePinto "but for" his exercise of protected rights. DePinto relies on the timing of his transfer, falling as it does during a period of increased union activity on his part, to establish this third element of an (a) and (c) violation. Timing alone cannot establish this part of the violation.\(^2\) Although the timing is relevant, the record also shows that during the same time frame, the Town twice sought a promotion for DePinto and, in fact, obtained the second promotion for him. Additionally, DePinto engaged in insubordination which could have resulted in the loss of that promotion, but the Town gave him only a written warning. It is clear from the record that neither Volpe nor Olsen harbored anti-union sentiments and that DePinto's transfer was part of an overall reorganization involving several employees, including another CSEA officer. DePinto's loss of the use of a Town vehicle was a direct result of the Town's legitimate plan to reorganize. His loss of some overtime opportunities may also be related to his transfer but, on this record, can be equally attributed to a greatly


reduced need for snow removal during the mild winter of 1997. Given these facts, DePinto has failed to establish a violation of §209-a.1(a) and (c) of the Act.

Based on the foregoing, the exceptions are denied and the decision of the ALJ is affirmed.

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
In the Matter of
MARK A. STEPHENS,
Petitioner,

- and -

TOWN OF CLARKSON (HIGHWAY DEPARTMENT),
Employer,

- and -

CSEA, LOCAL 1000, AFSCME, AFL-CIO,
LOCAL 828, TOWN OF CLARKSON
EMPLOYEE UNIT,
Intervenor.

MARK A. STEPHENS, for Petitioner
HARTER, SECREST & EMERY (DAVID KRESOCK of counsel), for Employer
NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM HERBERT of counsel), for Intervenor

BOARD DECISION AND ORDER

On June 1, 1998, Mark A. Stephens (petitioner) filed a timely petition for
decertification of the Civil Service Employees Association, Local 1000, AFSCME, AFL-
CIO, Local 828, Town of Clarkson Employee Unit (intervenor), the current negotiating
representative for employees of the Town of Clarkson (Highway Department) in the
following unit:

Included: All full-time highway department employees including foreman,
mechanics, heavy equipment operators, motor equipment operators and laborers.

Excluded: All other employees.

Upon consent of the parties, an on-site election was held on December 17, 1998. The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.  

THEREFORE, IT IS ORDERED that the intervenor be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

1/ Of the ten ballots cast, three were for representation and seven against representation. There were no challenged ballots.
In the Matter of

OTSEGO COUNTY DEPUTY SHERIFF'S LAW ENFORCEMENT ASSOCIATION,

Petitioner,

-and-

COUNTY OF OTSEGO,

Employer,

-and-

OTSEGO COUNTY SHERIFF and OTSEGO COUNTY DEPUTY SHERIFFS BENEVOLENT ASSOCIATION,

Intervenors.

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 Otsego County Deputy Sheriff's Law Enforcement Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and
described below, as their exclusive representative for the purpose of collective
negotiations and the settlement of grievances.

Unit: Included: Deputy sheriffs, deputy sheriff investigators and security officers.

Excluded: All non-police officers.

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, 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 the Sachem Central Teachers' Association, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Unit: Included: All employees working as Elementary School Classroom Aides, Computer Aides and Special Education Aides for more than six hours weekly or for at least six hours in one day.

Excluded: All other employees.

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Petitioner,

-and-

BEACON CITY SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

Unit: Included: Cook Managers, Cooks and Food Service Workers.
Excluded: All other employees.
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, 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 the Civil Service Employees Association, Inc. has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Unit: Included: All full and part-time school related personnel including the categories of head mechanic, head custodian, maintenance mechanic, custodian, maintenance workers, groundskeepers, mechanics helpers, dispatchers, custodial workers, bus drivers, classroom aides, nurses aides, library aides, matrons, monitors, bus drivers/auto mechanics, school courier and registered nurses hired on or after July 1, 1992.

Excluded: All other employees.

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

DATED: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

__________________________________________________________

In the Matter of

UNITED TRANSPORTATION UNION,

Petitioner,

and-

ALBANY PARKING AUTHORITY,

Employer.

__________________________________________________________

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Transportation Union 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: Parking Meter Manager, Garage Manager, Maintenance Supervisor, Garage Cashier II, Garage Cashier I, Maintenance Worker II, and Maintenance Worker I.
Excluded: Executive Director, Operations Director and Finance Director.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Transportation Union. 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: January 13, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member