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State of New York Public Employment Relations Board Decisions from July 1, 1999

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from July 1, 1999

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE SYRACUSE CITY SCHOOL DISTRICT

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

BOARD DECISION AND ORDER

Under §212 of the Public Employees' Fair Employment Act (Act), certain provisions of the Act do not apply to local governments that have adopted their own substantially equivalent provisions and procedures. That local option applies where there is a current determination by this Board that those local provisions and procedures and their "continuing implementation" are substantially equivalent to the provisions and procedures that apply to the State under the Act.

Each year this Board's Office of Counsel canvasses the appropriate local governments to collect data on the operation of their local public employment relations boards (local boards). This annual canvass permits this Board to ascertain whether the continuing implementation of local provisions and procedures by the local boards meets the "substantially equivalent" requirement of the Act.
The Public Employment Relations Board of the Syracuse City School District (Syracuse PERB), also known as the Mini-Public Employment Relations Board of the Syracuse City School District, reported in response to the 1998 canvass that it had no members. At its September 28, 1998 meeting, this Board instructed Counsel to inquire of the Syracuse PERB whether a chair or any members had been appointed and, if not, whether the Syracuse PERB intended to continue to operate. Counsel made that inquiry. On November 17, 1998, the Syracuse PERB's attorney responded that the law firm that represents the Syracuse City School District was "working with the superintendent to implement the procedure to re-establish a quorum of members to the local PERB," and that he expected "full compliance in the very near future."

Counsel canvassed the local boards in February 1999, and the Syracuse PERB did not respond. In later phone calls, the Syracuse PERB's attorney described continuing but unsuccessful efforts to ensure the appointment of a quorum. Finally, on May 19, 1999, Counsel instructed the Syracuse PERB's attorney to advise this Board by June 1, 1999, regarding the names of the members of the Syracuse PERB, as well as the dates of any meetings scheduled or already held. That letter advised that if the response indicated that the purposes and policies of the Act were still not being effectuated, Counsel would refer the matter to this Board for appropriate action. That letter, too, received no response. Counsel has referred the matter to us.

We can no longer conclude that the continuing implementation of the local provisions and procedures by the Syracuse PERB, if they are being implemented at all,
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is substantially equivalent to the implementation of the provisions and procedures of the Act by this Board.

NOW, THEREFORE, WE ORDER that the determination of this Board dated February 8, 1968,\(^1\) approving the enactment establishing the Syracuse School District local PERB be, and the same hereby is, suspended, subject to reinstatement upon application and demonstration by the Syracuse School District local PERB that the continuing implementation of its local provisions and procedures is substantially equivalent to the implementation of the provisions and procedures of the Act by this Board.

FURTHERMORE, PLEASE TAKE NOTICE that unless such application is filed by August 2, 1999, this Board shall, without further notice, rescind, pursuant to §212 of the Act, its order dated February 8, 1968, approving the Syracuse City School District’s local enactment and such other orders as approved amendments to, or the reinstatement of, its local enactment;\(^2\) upon the ground that the continuing implementation of said local enactment and amendments thereof is no longer


\(^2\) 3 PERB ¶3008 (1970); 4 PERB ¶3012 (1971); 4 PERB ¶3086 (1971); 6 PERB ¶3010 (1973); 6 PERB ¶3061 (1973); 7 PERB ¶3063 (1974); an order dated March 3, 1978; and 19 PERB ¶3078 (1986).
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substantially equivalent to the provisions and procedures that apply to and are implemented by this Board.

DATED: July 1, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
By letter dated March 26, 1999, the Administrative Law Judge (ALJ) assigned to conduct a hearing in this case ruled that the allegations in a charge by William T. Bruns set forth only three arguable violations of the Public Employees' Fair Employment Act (Act). Those allegations involve Council 82, AFSCME's (Council) agreement with the State of New York (Governor's Office of Employee Relations; Division of Parole; Division of Budget) (State) settling an overtime pay claim and the Council's failure to process grievances about a uniform allowance and longevity pay. The ALJ ruled that Bruns' other allegations did not set forth any violation of the Act and that only the three enumerated allegations would be litigated at the hearing that the ALJ had scheduled.

In exceptions, Bruns argues that the ALJ's ruling is incorrect and not adequately explained. No response to the exceptions has been filed.

We dismiss these exceptions as premature.
These exceptions are not filed as of right as Bruns believes they are. An appeal from an ALJ's ruling made during the processing of a charge which is still pending before the ALJ is considered only with our permission pursuant to §204.7(h)(2) of our Rules of Procedure. Permission for such interlocutory appeals has been consistently denied unless the appeal presents extraordinary circumstances.\textsuperscript{1} No extraordinary circumstances are presented by these allegedly incorrect rulings\textsuperscript{2} because they can be reviewed upon timely exceptions to the ALJ's dispositive decision and order.

For the reasons set forth above, the exceptions are dismissed. \textbf{SO ORDERED.}

\textbf{DATED:} July 1, 1999
Albany, New York

\begin{flushright}
Michael R. Cuevas, Chairman
Marc A. Abbott, Member
John T. Mitchell, Member
\end{flushright}

\footnotesize{\textsuperscript{1}United Transp. Union, Local 1440 (LoBianco), 31 PERB \textbar}3027 (1998); Town of Shawangunk, 29 PERB \textbar}3050 (1996).

\footnotesize{\textsuperscript{2}Watertown City Sch. Dist., 32 PERB \textbar}3022 (1999).}
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, HOLLAND PATENT
SCHOOL DISTRICT UNIT #7766, ONEIDA COUNTY
EDUCATIONAL LOCAL 869,

Charging Party,

- and -

HOLLAND PATENT CENTRAL SCHOOL DISTRICT,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of
counsel), for Charging Party

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C. (CRAIG M.
ATLAS 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, Holland Patent School District Unit
#7766, Oneida County Educational Local 869 (CSEA) to a decision of an Administrative
Law Judge (ALJ) on its improper practice charge alleging that the Holland Patent
Central School District (District) violated §209-a.1(a) and (c) of the Public Employees'
Fair Employment Act (Act). The charge, as amended, alleges that the District
constructively discharged Gina Grogan because she filed a grievance by harassing her
to the point that she was forced to resign her employment. The ALJ dismissed the constructive discharge allegation, but found that a statement made to Grogan by Superintendent of Schools Anthony Baretta violated the Act because it was threatening under the circumstances in which it was made. The ALJ also held that a statement made by Carol Rood, Grogan's immediate supervisor, did not violate the Act because it was not threatening.

CSEA filed its charge on May 19, 1997, alleging that the District began harassing Grogan on January 23, 1997, and continued to harass her thereafter because she had filed a grievance.\(^1\) The harassment alleged was statements made to Grogan by Baretta on January 23, 1997, and by Rood on January 24, 1997.

On June 20, 1997, CSEA filed an amendment to the details of the charge, which stated that the allegations set forth in the amendment should be substituted for the allegations set forth in the charge as first filed. In the amendment, CSEA alleges that Grogan resigned from District employment on February 12, 1997, and that her resignation constituted a constructive discharge because it was the result of harassing statements made to Grogan by Rood and Baretta on various dates from November 28, 1996 to February 11, 1997.\(^2\)

\(^1\)Grogan filed a grievance on December 2, 1996, raising questions about her title and the duties appropriate to the full-time position she assumed in September 1996.

\(^2\)The details of the amended charge include the two incidents which were alleged in the original details of charge.
The ALJ dismissed the constructive discharge allegation upon a finding that there was not a causal relationship between the grievance filed by Grogan in December 1996 and her decision to resign in February 1997. However, the ALJ reviewed both the remarks made by Baretta on January 23, 1997, and the remarks attributed to Rood on January 24, 1997. Finding that Baretta had made the statements attributed to him, the ALJ determined that the District violated the Act and ordered it to cease and desist from questioning the appropriateness of unit employees' continued employment with the District based upon the number of grievances filed by an employee. The District was also ordered to post a notice.

CSEA excepts to the ALJ's decision, arguing that the ALJ erred in not applying the correct legal standard for a constructive discharge case and in making certain credibility resolutions. The District excepts to the ALJ’s determination that the Act was violated by Baretta’s remarks to Grogan on January 23, 1997, but supports the remainder of the ALJ’s decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ’s decision, in part, and reverse, in part.

Grogan was employed by the District from 1989 as a part-time food service helper, and from 1992 as a full-time food service helper. In December 1996, she filed a grievance with Rood questioning her title and the duties she was performing. The

3Based on her credibility resolutions, the ALJ determined that Rood had not made the remarks on January 24 which Grogan attributed to her and dismissed that aspect of the charge.
grievance was processed through the third step, which was a meeting with Baretta, Grogan, Robert Nole and Peter Schram. The ALJ found that Baretta remarked to Grogan during the meeting that the number of grievances filed by Grogan and her husband was unusual. He explained that it was important for people to feel good about working for the District and that the District took pride in solving problems in an informal manner.

On January 24, 1997, Grogan told Rood that the grievance was being withdrawn. On February 11, 1997, Grogan informed Rood that she was going to resign. Grogan tendered her resignation on the next day by letter to Baretta in which she alleged that the personality conflicts and the harassments she had endured were forcing her to resign. A few days later, Schram sought to have Grogan’s resignation retracted because he felt her decision had been made under duress. The District thereafter sought elaboration from Grogan as to the allegations of harassment. An investigation was conducted by the District, after which it concluded that Grogan had not been harassed. Grogan’s letter of resignation was formally accepted by the District’s Board of Education on March 25, 1997.

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4 Nole is the District’s Business Administrator and Schram is the CSEA Unit president.

5 Grogan had filed two grievances before the December 1996 grievance and her husband had filed one grievance.

6 The ALJ credited the testimony of Baretta, Nole and Grogan about the substance of Baretta’s remarks.

7 The grievance was in fact withdrawn by CSEA on February 6, 1997.
From December 1996 to February 11, 1997, Grogan alleges that she was subjected to several instances of harassment by Rood, Baretta and several unit employees, all in retaliation for the filing of the December 1996 grievance. The ALJ found that, apart from Baretta's remarks on January 23, 1997, either there was no connection between the filing of the grievance and the actions alleged by Grogan to be improper or that Grogan's version of the incidents could not be credited.

With respect to the events of February 11, 1997, the ALJ found that Rood had called Grogan into the dish room to wash dishes because Grogan was late for her assignment. At the end of the day, Rood called Grogan into her office to discuss her attitude. Grogan indicated that she would be quitting her job. The ALJ took into account that Rood had counseled Grogan on occasions prior to the filing of the December 1996 grievance, and afterwards about issues unrelated to the grievance. The ALJ determined that Grogan, by her own admission, had an ongoing disciplinary dispute with Rood. The ALJ found that Grogan's resignation on February 12 could not be divorced from the events of February 11, where Grogan was called into the dish room and later counseled by Rood about her poor work attitude. As the resignation was not attributable to any actions taken by the District because of Grogan's grievance, the constructive discharge allegation was dismissed.

The ALJ made several credibility resolutions in reaching her decision to dismiss the constructive discharge allegation. The ALJ largely credited Rood's testimony over Grogan's. Specifically, with respect to the January 24, 1997 incident between Rood and Grogan, the ALJ credited Rood. With respect to the January 23 meeting
grievance, the ALJ credited the testimony of Baretta and Nole as to the substance of Baretta's remarks, but she credited Grogan and Schram as to Baretta's demeanor. The ALJ's credibility resolutions are based upon the demeanor of the witnesses, the substance of their testimony and corroboration by other witnesses, or the undisputed nature of their testimony. After a careful review of the record, we find that the ALJ's credibility resolutions are fully supported by the record and should be affirmed. "Our determination in this regard is in keeping with the weight appropriately accorded to such credibility determinations by the trier of fact who had the opportunity to observe and evaluate the demeanor of all the witnesses." 

CSEA argues in its exceptions that the ALJ failed to articulate and apply any legal standard with respect to the allegation that Grogan was "constructively discharged". The ALJ found that Grogan's resignation on February 12 was not proven to have been caused by any harassment stemming from the grievance Grogan had filed in December.

Without specifically stating the standards to be applied, we find that the ALJ, nevertheless, correctly decided CSEA's constructive discharge claim. To establish a violation of §209-a.1(a) and(c) of the Act, it must be proven that the employee was engaged in a protected activity, that the employer knew of the employee's protected activity and that "but for" the exercise of protected rights, the employer's action against

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the employee would not have been taken.\(^9\) Applying that standard, the ALJ determined that Grogan had been engaged in protected activity and that the District knew about the activity. However, the ALJ found that the act complained of in the amended charge, Grogan's "forced" resignation, was not caused by the District's response to the grievance, but by legitimate criticism of Grogan's job performance.

Having found no causal link between the exercise of protected rights by Grogan and the events which led to her resignation, the ALJ dismissed the portion of the charge alleging that Grogan had been constructively discharged. Having found that Grogan's resignation had not been caused by the District's reaction to her protected activity, there was no need for the ALJ to articulate a standard of constructive discharge.\(^10\) Whether a discharge is actual or constructive, it must have been caused by an employee's exercise of rights protected by the Act for there to be a violation of the Act. Not having found the necessary "but for" causation linking the harassment to the grievance filing, the ALJ properly dismissed the constructive discharge allegation. We affirm the ALJ's decision in this regard.

The ALJ erred, however, in considering whether Baretta's and Rood's statements on January 23 and January 24, 1997, respectively, violated the Act. Neither

\(^9\)See City of Salamanca, 18 PERB ¶3012 (1985).

\(^{10}\)Generally, a constructive discharge occurs when an employer "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2nd Cir. 1983)(quoting Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975); Crystal Princeton Refining Co., 91 LRRM 1302 (1976); Kripke v. Benedictine Hospital, 169 Misc.2d 98 (Sup. Ct. Ulster County 1996).
the charge as originally filed nor as amended alleges that any statements made by Baretta or Rood themselves violated the Act. The charge as filed and amended alleges a pattern of retaliatory harassment which finally caused Grogan to resign. Baretta's remarks on January 23, and Rood's remarks on January 24, 1997, were two of twelve incidents which, when taken together, allegedly established a pattern of harassment which eventually forced Grogan to resign from employment with the District. The only violation alleged under the charge as amended is constructive discharge due to harassment.

In its opening statement at the hearing and in its brief to the ALJ, CSEA reinforces that its only allegation is that Grogan was constructively discharged by the District because of the District's continuous harassment of her, harassment caused by the grievance she filed. Because there was no separate allegation of violation based upon Baretta's statement on January 23, 1997, or Rood's on January 24, 1997, the ALJ should not have made a determination as to whether those statements separately violated the Act on a theory that they were threats. As we have held many times, we will not consider allegations which have not been raised.11 The ALJ's determination that Baretta's statements violated the Act but Rood's did not is, therefore, reversed.

Based on the foregoing, we grant the District's exceptions and reverse so much of the ALJ's decision that finds that the District violated §209-a.1(a) and (c) of the Act. The exceptions of CSEA are denied and the decision of the ALJ is otherwise affirmed.

11County of Rockland and Rockland County Sheriff, 31 PERB ¶3062 (1998); New York City Transit Auth., 31 PERB ¶3024(1998).
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: July 1, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ULSTER COUNTY LOCAL 856, TOWN OF SHAWANGUNK UNIT,

Charging Party,

- and -

TOWN OF SHAWANGUNK,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (ROBERT REILLY of counsel), for Charging Party

SHAW AND PERELSON, LLP (DAVID S. SHAW and SUSAN G. WHITELEY of counsel), for Respondent

BOARD DECISION AND ORDER

The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Ulster County Local 856, Town of Shawangunk Unit (CSEA) excepts to a decision by an Administrative Law Judge (ALJ) dismissing this charge. CSEA alleges that the Town of Shawangunk (Town) refused to negotiate in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed a practice of
paying 100% of the health insurance premiums for persons retired from positions in the negotiating unit CSEA represents.

On a stipulated record, the ALJ held that Article IX of the parties' collective bargaining agreement, captioned "Health Insurance and Retirement", covered the subject of the alleged practice. Relying upon our recent decision in Florida Union Free School District (hereafter Florida), the ALJ held that the Town was privileged to adhere to the terms of the contract notwithstanding any more generous practice that might have existed regarding retiree health insurance. Adherence to that contract, according to the ALJ, could not be a unilateral change actionable under the Act.

CSEA argues in its exceptions that the ALJ erred in applying the contract reversion principles of Florida and the cases upon which Florida is based. It claims that the contract simply does not address the health insurance benefits for current unit employees upon their retirement. Therefore, according to CSEA, there cannot have been any waiver of its right to negotiate the changes in the Town's practice regarding retiree health insurance nor could there have been any satisfaction by the Town of its duty to negotiate those alleged changes.

The Town argues in response that the ALJ's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, including those at oral argument, we reverse and remand the case for decision in accordance with 31 PERB ¶3056 (1998).
with our decision herein. For reasons explained hereafter, the ALJ erred in dismissing this charge under Florida.

Florida involved an application of what has come to be called a contract reversion defense to a refusal to bargain charge grounded upon an alleged unilateral change in an extra-contractual practice embodying a mandatory subject of negotiation. That labor law principle, articulated years before Florida again applied it, rests on the axiom that the duty to negotiate any term and condition of employment can be satisfied by negotiations ending with an agreement upon that term. If the parties to a bargaining relationship have exchanged promises on a given subject and have fixed the terms of their agreement as to that subject, then it is that agreement which controls that term and condition of employment notwithstanding any noncontractual practices which may have developed with respect to that same subject.

Barring objection by the negotiating agent, an employer is permitted to establish and maintain a practice more generous than the contract calls for, but the employer is not required by its statutory duty to negotiate to continue that practice. The employer may revert to the terms of the parties' negotiated agreement without violating its duty to negotiate. The reversion to the terms fixed bilaterally by agreement is not an action unilateral in nature, nor does that reversion constitute a change in the status quo of

employment terms and conditions because it is the contract, not the practice, which defines the status quo for purposes of the duty to negotiate under the Act.³

As we recently explained in County of Nassau,⁴ the essence of contract reversion is the parties' satisfaction of their mutual obligation to negotiate terms and conditions of employment. As duty satisfaction involves the fulfillment of statutory obligation, not the surrender of statutory right, waiver standards⁵ are not wholly transferrable for use in contract reversion cases, but neither are those standards entirely irrelevant. Just as the standards for waiver have been formulated in a way that guards against an improvident loss of bargaining right, so also must the standards for duty satisfaction be shaped to avoid too ready a finding that bargaining obligations have been fulfilled. A satisfaction of the duty to negotiate necessitates record evidence of facts establishing that the parties negotiated an agreement upon terms which are reasonably clear on the subject presented to us for decision. We reject any lesser standard for it would compromise the right and duty to negotiate and the public policies underlying the creation of that right and duty.

Our disagreement with the ALJ's application of the contract reversion principle in this case stems from the ALJ's overly broad description of the subject in dispute. The subject in dispute is not as broad as "health insurance" or "retirement". Therefore, the

⁴31 PERB ¶3074 (1992).
parties' agreements in these general areas do not satisfy the Town's duty to negotiate the specific subject of retiree health insurance benefits.

   Article IX of the parties' contract has three sections. Sections 1 and 2, by CSEA's allegation, the Town's admission, and the clear terms of the contract itself, concern the health insurance benefits of active employees only. The health insurance benefits to be extended to employees while they are employed are a form of current wages for services then being rendered by them. The health insurance benefits extended to an individual upon that individual's retirement from employment are a form of deferred compensation representing a payment in the future for the services a former employee has rendered in the past. The parties' agreement to a form of current compensation for active employees does not represent an agreement to any form of deferred compensation for former employees, including health insurance continuation after retirement. An agreement to the former simply does not satisfy any duty to negotiate as to the latter because the subjects of current and deferred compensation are fundamentally different.

   Although the two distinct subjects we have identified fall within the general category of "health insurance", the duty satisfaction principle underlying contract reversion is not correctly applied to the broadest categorization of a subject matter which can be articulated. To hold to that view would substantially negate the duty to negotiate terms and conditions of employment, which is the strong and sweeping public
policy of this State. Applying that theory of contract reversion to extreme, a collective bargaining agreement containing only a wage rate or a salary level would afford an employer the right to discontinue all other extra-contractual forms of current compensation. That result would be wholly contrary to the terms and the policies of the Act and cannot be countenanced.

Without speculating as to how other subjects might be defined for purposes of contract reversion, "health insurance" subsumes many discrete subjects. The contract reversion principle must be applied to each of those separate subgroups. As relevant here, we need only make the most elemental of distinctions in subject matter. Current compensation is not deferred compensation. Therefore, the parties' agreement in sections 1 and 2 of Article IX of the collective bargaining agreement to a form of current compensation for active employees does not afford the Town any basis upon which to defend an alleged change in practice involving deferred compensation for former employees payable to them upon their retirement and thereafter.

*Florida* is readily distinguishable from this case. In *Florida*, the parties had an agreement covering specifically the subjects of hours of work and break time, which were also the subjects of the practice the employer changed. Having fixed by clear agreement the number of hours of work and the amount of release time from work, the employer in *Florida* was permitted to revert to the terms of the parties' agreement, notwithstanding the more generous hours provisions which had existed by practice.

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The ALJ suggested in a footnote to his decision, and the Town argues in its response to the exceptions, that section 3 of Article IX, introduced with the word "Retirement", is another source for a contract reversion defense apart from the health insurance provisions in sections 1 and 2 of Article IX. The ALJ’s note is not explained, but the Town argues that the New York State and Local Employees Retirement System, in which the Town participates, has a health insurance component for retirees. That representation of fact, however, is incorrect. The pension system does not have any health insurance components which we can identify.

Retiree health insurance benefits are as different from a former employee’s pension entitlements as those retirees’ health insurance benefits are different from the health insurance benefits for active employees. Just as the Town’s agreement to provide health insurance for active employees does not satisfy its duty to negotiate health insurance benefits for current employees upon their retirement, its agreement to participate in a pension plan lacking health insurance provisions does not afford it a contract reversion defense either. Pensions and health insurance are wholly different subjects.

If section 3 of Article IX referred to a pension system only, our analysis of the contract reversion defense would be ended with the paragraph above. The analysis becomes more complicated, however, because the contract is arguably more extensive. Section 3, in relevant part, provides as follows:
The Town agrees to participate in the New York State Retirement Plan in accordance with the N.Y.S. Civil Service and to provide benefits thereunder and under the Social Security Law.

Although the pension system referenced in section 3 does not have any health insurance components, Article XI of the State’s Civil Service Law does make provision for health insurance benefits for retirees under a State health insurance plan administered by the Civil Service Commission. Participation in that plan is open to municipalities, but optional, and is subject to approval by the President of the Civil Service Commission and the satisfaction of the several conditions to participation as fixed by extensive statutory and regulatory provisions.

Upon this stipulated record, we cannot determine what the parties may have intended by the reference in section 3 to “in accordance with the N.Y.S. Civil Service.” Section 3 of the parties’ agreement, other than the part that establishes that employees have a pension plan, is ambiguous at best. The parties may or may not have agreed to have the Town participate in the State health insurance plan to provide health insurance benefits to some or all retirees. Even if some agreement had been reached in this regard, the terms of that agreement cannot be ascertained upon this record.

The Town does not rely upon the Civil Service Law as the source of its contract reversion defense and CSEA maintains vigorously that all of Article IX of the contract is silent with respect to retiree health insurance. As the Town has the burden to prove the satisfaction of its bargaining duty, its contract reversion defense, to the extent it is based on section 3 of Article IX, must fail upon this record.
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Given the basis for his decision, the ALJ did not decide whether the record established a past practice with respect to retiree health insurance that was changed by the Town. Nor did the ALJ consider the Town's other defenses or whether there can be a refusal to negotiate upon a unilateral change theory where the change in practice, when implemented, affects persons who are no longer public employees. We remand for consideration of these issues in such decision and order as is appropriate. SO ORDERED.

DATED: July 1, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
This case comes to us on exceptions filed by the Incorporated Village of Garden City (City) to a decision by an Administrative Law Judge (ALJ) on a charge the City filed against the Garden City Police Benevolent Association, Inc. (PBA). The City alleges that the PBA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it did not offer a memorandum of agreement (MOA) for membership ratification and when it submitted three demands in a petition for compulsory interest arbitration that had been resolved or abandoned during negotiations.

1The proposals are for a Martin Luther King holiday, dental insurance and education expense reimbursement.
After a hearing, the ALJ dismissed the charge. The ALJ held that the PBA was not required to submit the MOA for ratification because ratification had been conditioned upon a prior approval of the MOA by the PBA's negotiating committee that rejected the MOA in a split vote. The second allegation was dismissed upon the ALJ's finding that the three proposals had not been resolved or abandoned during the parties' negotiations.

The City argues in its exceptions that the ALJ was incorrect in fact, law and policy in all material respects. It argues that the MOA was reached unconditionally such that the MOA had to be submitted for ratification notwithstanding the negotiating committee's rejection of it. As to the second allegation, the City argues that the three proposals were abandoned by the PBA because they were discussed only twice during ten negotiating sessions, and not at all during four meetings with the mediator.

The PBA argues in response that the ALJ's decision is unquestionably correct legally and factually and should be affirmed.

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

The obligation to submit a collective bargaining agreement for ratification is not always absolute. Just as the parties to a bargaining relationship may condition their collective bargaining agreement upon ratification by members of their respective constituencies, so may they make the ratification itself conditional. In this case, the

2Ratification of a contract is not required by the Act, but it is permitted. These parties expressly agreed to subject the MOA to ratification.
PBA’s President, David Schichtel, and its Vice-President, Stephen Oswald, announced to the persons present when the MOA was drafted, including members of the City’s negotiating team, that the MOA would be submitted for membership ratification if the PBA’s negotiating committee approved it. The Village Administrator, Robert Schoelle, testified that those statements were made contemporaneously with the drafting of the MOA and the City’s representatives did not object to those statements. The City could not reasonably have understood from the comments made by the PBA’s officers that the PBA would submit the MOA for ratification even if its negotiating committee rejected the MOA. The statements reserving voting rights to the PBA’s negotiating committee, several members of which were not present when the MOA was drafted, is consistent only with the parties having an agreement or mutual understanding that the MOA would be submitted for ratification by the PBA membership only if the committee first approved it.

That the MOA does not by its terms make the negotiating committee’s approval a condition to the submission of that document for ratification is not controlling. Nothing in the MOA is inconsistent with ratification itself being conditioned upon the PBA’s negotiating committee’s approval of the MOA, a condition plainly established when the MOA was reached. Similarly, as the ALJ held, there is nothing in the PBA’s constitution or bylaws that is inconsistent with its President’s conditioning the membership’s ratification upon the negotiating committee’s prior approval of the MOA. To the

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3 Schichtel participated in the mediation session at which the MOA was drafted by speaker phone and fax because he was out of state on that date.
contrary, the power vested in the PBA President to negotiate through and with a
committee only emphasizes the President's right to articulate committee approval as a
condition for ratification. Nor does the record establish that the negotiating committee's
vote to reject the MOA was caused or influenced by any impropriety by Schichtel or
Oswald, both of whom endorsed the MOA and testified credibly, according to the ALJ,
that they voted in favor of it at the meeting of the negotiating committee.

The City next argues that even if the PBA is not bound to the terms of the MOA
by its failure to offer that document for ratification, the PBA nonetheless violated its duty
to negotiate by including the demands for the Martin Luther King holiday, dental
insurance and education expense reimbursement in its interest arbitration petition. The
City no longer argues that these three PBA proposals were actually resolved by
agreement in negotiations, only that the PBA abandoned them.

Contract proposals made by either party to a bargaining relationship can be
abandoned and we agree with the City that an abandonment need not rest on an
affirmative, overt act. But the record, fairly read, must establish an intent to abandon a
proposal before we could conclude that an abandonment occurred. The City would
have us find that the PBA abandoned the three proposals in issue because they were
not much discussed. It is, however, not uncommon in collective negotiations for parties
to not discuss one or more proposals for an extended period of time while they focus
their discussions on issues which, either singly or as grouped, are then perceived to be
of greater importance or relevance. The PBA's initial set of proposals, and the only
amendment thereto, which reduced the number of its demands, both included the three
disputed items. There was discussion about those proposals each time the two packages of demands were submitted. Other than the length of time these three proposals were not discussed specifically, there is nothing in the record establishing the PBA's intent to abandon them and we are unwilling to deem an abandonment upon this ground alone.

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

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

DATED: July 1, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
In the Matter of

WILLIAM E. HEFFELFINGER, JR.,

Charging Party,

- and -

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

Respondent,

- and -

NORTH COLONIE CENTRAL SCHOOL DISTRICT,

Employer.

CASE NO. U-20719

WILLIAM E. HEFFELFINGER, JR., pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by William E. Heffelfinger, Jr., to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by failing to pursue to completion most of the grievances he has filed against his employer, the North Colonie Central School
Board - U-20719

District (District). Heffelfinger was informed that his charge was deficient because it failed to specify the conduct of CSEA that allegedly violated the Act. Heffelfinger thereafter filed an amendment to the charge. Finding that the charge remained deficient, the Director dismissed it, noting that although Heffelfinger had alleged that CSEA was negligent and irresponsible in processing his grievances, and that CSEA and the District had an agreement to suppress his grievances, he had not pleaded any facts to support those allegations.

Heffelfinger excepts to the Director's decision, essentially realleging that which is in his amended charge. Neither CSEA nor the District has filed a response to the exceptions.

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

Heffelfinger's lengthy improper practice charge and its amendment are replete with allegations of a lack of representation by CSEA but are almost devoid of facts in support of those allegations. Attached to the charge are copies of forty grievances filed by Heffelfinger, memoranda to various CSEA representatives from Heffelfinger and CSEA's responses to Heffelfinger.

1The District was made a party to this charge pursuant to §209-a.3 of the Act. That section of the Act requires an employee's employer be added as a party to a duty of fair representation charge against the employee's union representative grounded upon the union's processing or failure to process a claim that the employer has violated its collective bargaining agreement with the union.
It appears from these many documents that Heffelfinger is a former president of the CSEA local. It also appears that, at some time in the past, Heffelfinger was employed by the District as the Assistant Head Bus Driver and that the District thereafter eliminated that position. Heffelfinger then became a Bus Driver for the District. His grievances in large part are attempts to restore the position of Assistant Head Bus Driver by alleging that the work of that position has been reassigned to other District employees, both within and out of the unit represented by CSEA, that he should be performing the duties of the Assistant Head Bus Driver or that he is being harassed by fellow employees or supervisory employees of the District. It further appears that some of the grievances have been filed and processed, at least to the first step of the grievance procedure, by CSEA and some by Heffelfinger individually.

Heffelfinger alleges that CSEA has been irresponsible and negligent in the handling of twenty-two grievances which were the subject of an earlier improper practice charge, and approximately eighteen subsequent grievances. CSEA provided Heffelfinger with a detailed response to each of twenty-two grievances filed over a two-year period ending in August or September 1998. CSEA's response reiterates that all of those grievances had been discussed with Heffelfinger and explains CSEA's position with respect to each grievance. Correspondence from March 1999 relates to Heffelfinger's subsequent grievances alleging that the CSEA-District contract will be

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2 An earlier charge filed by Heffelfinger alleging that CSEA had failed to respond to his inquiries about 22 grievances was settled with CSEA's agreement to provide Heffelfinger with a written response to each of those grievances.
Board - U-20719

violated in the future. CSEA responded that it would not seek from the District the extensive data sought by Heffelfinger and reiterated its belief that the contract had not been and would not be violated by the abolition of the Assistant Head Bus Driver position and the reassignment of those duties to other District employees, but that Heffelfinger was free to pursue his own research and to file his own grievances.

The duty of fair representation is breached only by conduct which is arbitrary, discriminatory or in bad faith. Indeed, it has been widely held that allegations that a union has been careless, inept, ineffective or negligent in the investigation and presentation of a grievance do not evidence a breach of the union's duty of fair representation.3

Here, from Heffelfinger's own pleading, it is apparent that the basis of his claim that CSEA breached its duty of fair representation is its failure to process his grievances beyond Step 1 of the contractual grievance procedure. It is evident from his pleadings that many of his grievances are repetitive and are also untimely as they refer back to the abolition of the position of Assistant Head Bus Driver over two years ago. His allegations as to motivation are conclusory, at best. There may well be a difference of opinion between Heffelfinger and CSEA regarding what

should not have been done, or what should have been done differently with respect to his grievances. But a difference in opinion between an employee and his or her union about the handling of grievances does not violate the Act.\textsuperscript{4} Heffelfinger has, therefore, alleged no facts which, if proven, would support a finding that CSEA breached its duty of fair representation in violation of §209-a.2(a) or (c) of the Act.

Based upon the foregoing, the 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: July 1, 1999
Albany, New York

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\textit{\underline{Michael R. Cuevas, Chairman}}
\textit{\underline{Marc A. Abbott, Member}}
\textit{\underline{John T. Mitchell, Member}}
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\textsuperscript{4}District Council 37, supra. note 2. See also Association of Municipal Employees, Inc. and County of Suffolk, 29 PERB ¶3062 (1996).
In the Matter of

WILLIAM HINDS II,

Petitioner,

-and-

JAMESVILLE-DEWITT CENTRAL SCHOOL DISTRICT,

Employer,

-and-

SEIU, LOCAL 200B,

Intervenor.

WILLIAM HINDS II, pro se

GARY LUKE, for Employer

ROBERT TOMPKINS, for Intervenor

BOARD DECISION AND ORDER

On November 2, 1998, William Hinds II (petitioner) filed a timely petition for decertification of SEIU, Local 200B (intervenor), the current negotiating representative for employees in the following unit:

Included: All Maintenance Workers II, Maintenance Workers I, Crew Leaders, Groundskeepers, and Drivers/Messengers.

Excluded: All other employees.
Upon consent of the parties, a mail ballot election was held on March 24, 1999. 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: July 1, 1999
Albany, New York

Michael R. Cuevas, Chairman
Marc A. Abbott, Member
John T. Mitchell, Member

1/Objections to the election filed by the Intervenor were dismissed by the Director of Public Employment Practices and Representation (Director). 32 PERB ¶4008 (1999). No exceptions have been filed to the Director's decision and order.

2/Of the seven ballots cast, three were for representation and four against representation. There were no challenged ballots.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
WEST HEMPSTEAD OFFICE STAFF ASSOCIATION,
Petitioner,

-and-

WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT,
Employer,

-and-

WEST HEMPSTEAD OFFICE STAFF ASSOCIATION OF LOCAL 153 OF THE OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the West Hempstead Office Staff Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.¹

³During the processing of the case, the Intervenor disclaimed any interest in representing the unit.
Included: All Clerk Typists, Telephone Operators, Stenographers, Account Clerks, Library Clerks, Transportation and Building Clerk, Senior Typist Clerks, Senior Stenographers and Nurses.

Excluded: The District Clerk and Board Secretary, Principal Account Clerk, Secretary to the Director of Business, Secretary to the Assistant Superintendent, and the Secretary to the Superintendent.

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

DATED: July 1, 1999
Albany, New York

Michael R. Cuevas, Chairman
Marc A. Abbott, Member
John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 17,

Petitioner,

-and-

TOWN OF BOSTON,

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 International Union of Operating Engineers, Local 17, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: All full-time employees of the Town Highway Department.

Excluded: Highway Superintendent, Deputy Highway Superintendent, Working Crew Chief, clerical employees, and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Union of Operating Engineers, Local 17. 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: July 1, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member