1-24-2000

State of New York Public Employment Relations Board Decisions from January 24, 2000

New York State Public Employment Relations Board

Follow this and additional works at: https://digitalcommons.ilr.cornell.edu/perbdecisions
Thank you for downloading an article from DigitalCommons@ILR.
Support this valuable resource today!

This Article is brought to you for free and open access by the New York State Public Employment Relations Board (PERB) at DigitalCommons@ILR. It has been accepted for inclusion in Board Decisions - NYS PERB by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.
State of New York Public Employment Relations Board Decisions from January 24, 2000

**Keywords**
NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

**Comments**
This document is part of a digital collection provided by the Martin P. Catherwood Library, ILR School, Cornell University. The information provided is for noncommercial educational use only.

This article is available at DigitalCommons@ILR: https://digitalcommons.ilr.cornell.edu/perbdecisions/441
This matter comes to us on exceptions filed by the North Rose-Wolcott Central School District (District) to the Administrative Law Judge's (ALJ) decision on an application to designate Carolyn Smith, a clerk/typist, as a confidential employee pursuant to §201.7(a) of the Public Employees' Fair Employment Act (Act).

The District created the clerk/typist position on August 11, 1998. Ms. Smith was appointed to the position effective October 26, 1998. The application to designate Ms. Smith as a confidential employee was opposed by the North Rose-Wolcott Central Service Employees Association (SEA).

The District's Business Executive, Keith Henry, was its only witness. He testified about his responsibilities, which include discipline of the noninstructional staff, being a
member of the District's negotiating team for the SEA unit and with the union that represents the District's department heads.

Henry described the various tasks Ms. Smith performed, such as copying and collating District proposals prior to negotiations. On occasion, she has retrieved personnel files to obtain information and opened mail that contained negotiation material or materials relating to an employee's discipline.

The District has filed exceptions to the ALJ's decision dismissing the District's application. The District argues in its exceptions that there was sufficient evidence in the record to grant the application to designate Ms. Smith as confidential.¹

After reviewing the record and considering the parties' arguments, we affirm the ALJ's decision.

In 1972,² the Board expressed the policy underlying the 1971 amendment to the Act, to wit: "It was not the intention of the Legislature to increase substantially the

¹The District moved on October 6, 1999 to reopen the record to introduce evidence of Ms. Smith's duties of a confidential nature since the close of the hearing. By letter dated December 14, 1999, the District's motion was denied. The District moved on December 16, 1999 to reconsider the denial. The Association submitted an affirmation in opposition dated December 21, 1999. By letter dated December 22, 1999, the District was notified that its motion would be reconsidered. The District's motion is denied. The evidence the District sought to present represented duties assigned after the close of the hearing. Margolin v. PERB, 130 A.D.2d 312, 20 PERB ¶7018 (3d Dep't 1987), appeal dismissed, 71 N.Y.2d 844, 21 PERB ¶7005 (1988). The denial of the District's motion is without prejudice to refile (consistent with the provisions of §201.10(b) of our Rules of Procedure) if the District considers the circumstances of Ms. Smith's employment to have changed.

²State of New York, 5 PERB ¶3001, at 3004 (1972).
number of employees designed as managerial or confidential . . . . It [the Amendment] expressed a legislative caution to this Board that the statutory criteria should be applied conservatively in order to preserve existing negotiating units.”

This policy has been embodied in our decisions. We have held that an employee is confidential only when, in the course of assisting a managerial employee who exercises labor relations responsibilities, that employee has access to personnel/labor relations information on a *regular* basis which is not appropriate for the eyes and ears of rank-and-file personnel or their negotiating representative.  

Although Keith Henry was responsible for disciplining the District’s noninstructional staff and was a member of the District’s negotiating team which negotiates with the union representing its department heads, the ALJ did not decide the issue of Mr. Henry’s managerial status, choosing instead to assume his managerial status for the purposes of her analysis. Similarly, we need not decide that issue in order to make our determination.

Mr. Henry testified that Ms. Smith was only occasionally asked to retrieve documents from personnel files or to open mail which might contain documents relating to personnel or labor negotiations.

Most recently, we discussed the two-part test to be applied in determining whether a particular employee should be designated confidential. The first part of the

---


Case No. E-2134

test is duty oriented while the second is relationship oriented, and the two parts are distinct; satisfaction of one might not satisfy the other.

Since not all personnel tasks will satisfy the first part of the test, it is only those personnel functions which present conflicts of interest with the employees' representation which qualify for confidential designation. Simple access to existing personnel information, as Ms. Smith had, is not sufficient because the testimony failed to establish that the information presented a conflict of interest or a clash of loyalties with Ms. Smith's representation for the purposes of collective negotiations.

The relationship of Ms. Smith to Mr. Henry also fails to satisfy the second part of the test. There is nothing in the record to establish that the position of clerk/typist is in a confidential relationship to the Business Executive. Ms. Smith was hired to share clerical assistance between the Business Office and the Curriculum Coordinators. There was no evidence adduced, either testimonial or through a job description, that elevated Ms. Smith's clerical assistance to Mr. Henry to a confidential level.

We find that the District has failed to establish a confidential relationship between the clerical assistance Ms. Smith provided and Mr. Henry's managerial responsibilities.

Based on the foregoing, we deny the District's exceptions and affirm the ALJ's decision.

---

(Id. at 3003.)
IT IS, THEREFORE, ORDERED that the application must be, and it hereby is, dismissed.

DATED: January 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
In the Matter of

SARA-ANN P. FEARON,

Charging Party,

- and -

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

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

Employer.

SHELLMAN D. JOHNSON, for Charging Party

JAMES R. SANDNER, GENERAL COUNSEL (MARIA ELENA GONZALEZ of
counsel), for Respondent

ROBERT E. WATERS, ESQ., for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions of Sara-Ann P. Fearon to the Director's
decision of September 15, 1999 which denied Ms. Fearon's motion to reopen the
improper practice charge she filed against the United Federation of Teachers (UFT).
The charge alleged a violation of §209-a.2(c) of the Public Employees' Fair
Ms. Fearon charged that UFT failed in its duty to represent her during her grievance against her employer, the Board of Education of the City School District of the City of New York (District).

During the processing of this charge, the parties reached a settlement which was embodied in a written agreement dated June 3, 1999. The agreement provided, among other things, that Ms. Fearon's grievance filed September 28, 1998 would be heard at Step II by the District's Assistant Superintendent. Furthermore, at paragraph "6" of the agreement, Ms. Fearon declared that she did not want UFT to represent her. She would argue her own case with the assistance of Ms. Hawkins.

On June 15, 1999, the Director informed the parties that he approved the request to withdraw the above matter. However, Ms. Fearon objected to the closure of this case, in a series of letters commencing on June 23, 1999, urging the Director to reopen the charge. Ms. Fearon sought to reopen the charge on the grounds that the UFT had repudiated the settlement agreement.

By a decision dated September 15, 1999, the Director closed the matter. Ms. Fearon filed timely exceptions to his decision. Ms. Fearon excepts on various grounds, most notable of which to form the basis to reopen the charge are exceptions "3" and "4".

1The District was made a statutory party pursuant to §209-a.3 of the Act.

2Rivkah Hawkins is the UFT Chapter Chairperson who assisted Ms. Fearon at the Step II hearing.
We have held that the Board's jurisdiction to prevent improper practices is limited by the statutory provision found in §205.5 (d) of the Act. We have, nevertheless, extended jurisdiction to contract disputes whenever one of the parties has repudiated the terms of an agreement. In this regard, the Board's jurisdiction has extended to collateral agreements as well as collectively negotiated contracts.

In order for us to find a repudiation of the settlement agreement of June 3, 1999, which would warrant a reopening of the improper practice charge, we must find upon this record a denial of the existence of a valid agreement or of a contractual obligation without any colorable claim of right to do so.

For the reasons that follow, we affirm the Director's denial of the motion to reopen. This Board has permitted recission of the withdrawal of an improper practice charge in extremely rare and limited circumstances. This is in keeping with the interest in finality of settlement agreements. Consequently, a mere difference of opinion between the parties over the interpretation of a settlement agreement or a difference of

---

3See Glens Falls PBA v PERB, 195 A.D.2d 933, 26 PERB ¶7009 (3d Dep't 1993); State of New York (Dep't of Taxation and Finance), 24 PERB ¶3034 (1991). See also §205.5(d), of the Act which states, inter alia, "the Board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice..."


5Glens Falls PBA, supra.

6New York State Pub. Employees Fed'n (Farkas), 15 PERB ¶3020 (1982).
opinion concerning the extent to which compliance has been achieved is insufficient to warrant the reopening of a settled improper practice charge.⁷

Upon a review of the record, set forth in the Director's decision dated September 15, 1999, there appears to exist a difference of opinion as to the extent to which compliance with terms of the settlement agreement has been achieved. Ms. Fearon urges us in exception "3" that "UFT failed to perform paragraph "7" of the agreement...." Conversely, UFT points out in its response of August 23, 1999, that Rivkah Hawkins was the UFT representative at the Step II hearing.

In exception "4", Ms. Fearon argues that "respondents clearly repudiated the settlement-agreement until June 21, 1999." By letter dated June 23, 1999 to the Director, Ms. Fearon wrote that she "proceeded pro se with Rivkah Hawkins P.S. 221 local representative... It is the agreement I speak to and it has been breached." UFT has never denied the existence of the settlement agreement. In the August 23, 1999 letter, UFT pointed out that Ms. Hawkins was present at the Step II hearing. Section 205.5(d) of the Act and our decisions thereunder constrain us from exercising jurisdiction over a difference of opinion concerning whether and to what extent a settlement agreement has been performed.

We hereby deny Ms. Fearon's exceptions and affirm the decision of the Director.

---

⁷State of New York (State Univ. of New York - College at Potsdam), 22 PERB ¶3045 (1989); See also County of Suffolk, 22 PERB ¶3032 (1989).
IT IS, THEREFORE, ORDERED that the motion to reopen the charge herein be, and it hereby is, denied.

DATED: January 24, 2000
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

MARTIN FREEDMAN,
Charging Party,

- and -

UNITED FEDERATION OF TEACHERS,
Respondent,

-and-

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

MARTIN FREEDMAN, pro se

JAMES R. SANDNER, GENERAL COUNSEL (RICHARD A. SHANE of
counsel), for Respondent

DALE C. KUTZBACH, DIRECTOR OF LABOR RELATIONS (ANGEL L. ORTIZ
of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of the Director of Public
Employment Practices and Representation (Director) denying Martin Freedman’s
motion to reopen an improper practice charge filed by him against the United
Federation of Teachers (UFT), which had been withdrawn pursuant to an agreement
between the parties. The charge alleged a violation of §209-a.2(a), (b) and (c) of the Act by UFT when it failed to represent him in numerous grievances about the District's failure to place him in specific elementary schools in a position within his license area.

During the processing of Freedman's charge, Freedman, the UFT and the District entered into an agreement in settlement of the improper practice charge. Pursuant to the terms of the settlement agreement, Freedman withdrew the charge and the withdrawal was approved by the Director on June 15, 1999. On July 23, 1999, Freedman wrote that he had satisfied the terms of the agreement but that the District had not and that unless he was "offered a position I will consider this Agreement to be null and void and will reopen my improper practice charge."

---

1Freedman's employer, the Board of Education of the City School District of the City of New York (District), was made a statutory party pursuant to §209-a.3 of the Public Employees' Fair Employment Act (Act).

2In relevant part, the agreement provided that the UFT would assist Freedman in obtaining a Restoration of Health (ROH) leave of absence for the 1998-1999 school year. Freedman was to submit the Confidential Medical Application to the District and cooperate with requests for medical information in order to process his request for ROH leave for the 1998-1999 school year. Upon resolution of Freedman's leave status and as long as the District did not determine that Freedman was unfit for teaching, the District agreed to offer to Freedman the next available position in certain specified schools within the District in Kindergarten through sixth grades for the 1999-2000 school year, after it had satisfied its contractual obligations to other teachers and with attention paid to Freedman's preference for a position in either the fourth, fifth or sixth grades.

3The District wrote to Freedman on August 9, 1999, pointing out to him that he had not yet been examined by the Medical Bureau, pursuant to District procedure and the terms of the settlement agreement. Once he had fulfilled that requirement, the District indicated that it would comply with the remainder of the terms of the settlement agreement.
Both the UFT and the District objected to the reopening of the charge. The UFT argued that Freedman was not seeking to reopen his charge, only that he indicated a predisposition to do so if he was not offered a position for the 1999-2000 school year. Further, the UFT argued that Freedman had not alleged that a position which met the requirements of the settlement agreement was available for the 1999-2000 school year. The District also opposed reopening the case, alleging that while Freedman had been approved for his ROH leave, he had not yet been approved by the District’s Medical Bureau to return to teaching. Freedman responded that he is fit for duty because his confidential medical report indicated that he did not need a prior recommendation from the Medical Bureau to return to work.

By letter decision dated September 24, 1999, the Director determined that the correspondence submitted to him evidenced nothing more than a difference of opinion as to whether the settlement agreement had been complied with by the parties. Noting that an improper practice charge will not be reopened when the basis for the motion to reopen is a difference of opinion about compliance with the settlement agreement which withdrew the charge, the Director denied the motion to reopen.

Thereafter, Freedman filed exceptions to the Director’s decision, arguing that because the Confidential Medical Application approval form does not have a check mark in the box next to the statement “Individual not to return to work without further recommendation of Medical Division”, he does not have to be examined by the Medical Bureau for fitness before he returns to teaching. The UFT responded that Freedman had not identified a vacant position to which he would be entitled to appointment by
virtue of his seniority, that PERB's policy was against the reopening of improper practice charges, and that Freedman had presented no evidence that the settlement agreement had been repudiated by the District. The District's response to the exceptions argues that Freedman has failed to comply with the Rules of Procedure (Rules) requirements for exceptions and that, substantively, his arguments are without merit because it is Freedman who has failed to comply with the terms of the settlement agreement, i.e., he has failed to appear for the medical examination which is the prerequisite for his appointment to an appropriate vacant position.

---

4 The UFT also argues in its response that Freedman has been returned to the District's payroll for the 1999-2000 school year and is currently assigned to Community School District No. 10 awaiting assignment to an available elementary position. As this fact was not before the Director when he denied the motion to reopen, we may not consider it. Margolin v. PERB, 130 A.D.2d 312, 20 PERB ¶7018 (3d Dep't 1987), appeal dismissed, 71 N.Y.2d 844, 21 PERB ¶7005 (1988).

5 Freedman's exceptions are in the form of a letter and, while technically not in compliance with §213.2 of our Rules, they are sufficiently clear to indicate his objections to the Director's decision and the reasons therefor. See New York State Canal Corp., 30 PERB ¶3070 (1997); Uniondale Union Free Sch. Dist., 27 PERB ¶3077 (1994). As conceded by the District, we do offer some latitude to pro se litigants in their pleadings. See Transport Workers Union of Greater New York, 32 PERB ¶3004 (1999).

6 Although Freedman thereafter moved, on October 2, 1999, for reconsideration by the Director of the denial of his motion to reopen, his motion for reconsideration is more appropriately considered as a reply to the UFT's and the District's response to his exceptions. Section 213.3 of our Rules precludes the filing of any pleading other than exceptions, cross-exceptions or a response to either exceptions or cross-exceptions, unless requested or authorized by this Board. Freedman's October 2 reply was neither requested nor authorized by the Board, therefore, it will not be considered. See also United Fed'n of Teachers, Local 2 (Moore), 29 PERB ¶3025 (1996).
In State of New York (State University of New York--College at Potsdam), 22 PERB ¶3045, at 3103 (1989), we set forth the standard for reopening a charge, as follows:

In our view, settlement agreements reached between the parties in resolution of improper practice charges should not be set aside and the charges reopened except in the same extraordinary circumstances which would establish a repudiation of the settlement agreement, as we have defined repudiation in our review of our analysis of our jurisdiction under §205.5(d) of the Act . . . . [A] mere difference between the parties . . . concerning the extent to which compliance has been achieved is insufficient to warrant the reopening of a settled improper practice charge. It is only under circumstances in which there is no colorable claim of compliance with the settlement agreement or in which it can be shown that the noncomplying party has otherwise repudiated the agreement that a charge will be reopened. A difference of opinion concerning whether, and the extent to which, compliance with a settlement agreement has taken place is a matter for enforcement procedures in another forum.

Here, all that was presented to the Director was Freedman's argument that he has complied with the requirements for reappointment as set forth in the settlement agreement, the District's argument that Freedman has not yet complied with the requirements of the agreement which would trigger the District's obligation to appoint him to a vacant position, and the UFT's argument that Freedman has not identified any appropriate position for which he is eligible. The Director correctly found that all that was presented to him in Freedman's motion to reopen was a difference of opinion
Board - U-20764

about compliance with certain provisions of the settlement agreement, a dispute which is beyond PERB's jurisdiction to hear. 7

Based on the foregoing, the exceptions are denied and the Director's decision is affirmed.

IT IS, THEREFORE, ORDERED that the motion to reopen the charge must be, and it hereby is, denied.

DATED: January 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

7See United Fed'n of Teachers (Fearon), 33 PERB ¶3003 (January 24, 2000).
In the Matter of

PUTNAM COUNTY SHERIFF’S OFFICE
MANAGERS ASSOCIATION,

Petitioner,

- and -

COUNTY OF PUTNAM,

Employer,

- and -

SHERIFF OF THE COUNTY OF PUTNAM,

Intervenor.

GERALD P. BUTLER, for Petitioner

DONOGHUE, THOMAS, AUSLANDER & DROHAN (JOHN M. DONOGHUE
and STUART S. WAXMAN of counsel), for Employer

DECATALDO AND DECATALDO (ROBERT T. DECATALDO of counsel), for
Intervenor

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Sheriff of the County of
Putnam (Sheriff), and on the exceptions and cross-exceptions filed by the County of
Putnam (County) concerning two decisions issued by the Director of Public
Employment Practices and Representation (Director) in a representation proceeding
brought by the Putnam County Sheriff's Office Managers Association (Association). The Sheriff filed a reply to the County's cross-exceptions, and each filed a supporting brief. The Association filed no exceptions or other papers in this appeal.

There are two issues presented to us. The first is whether the Director correctly determined that the County is the sole employer of employees in the County's Sheriff's Department, as the County contends, or whether the County and the Sheriff jointly employ those employees, as the Sheriff contends. The second issue is whether the Director correctly determined that certain employees holding titles in the Sheriff's Department are entitled to be represented by the Association. The County argues that the Director erred in concluding that all but two of the at-issue employees are not managerial. The Sheriff has taken no position concerning the Director's uniting determination.

**PROCEDURAL HISTORY**

On November 19, 1996, the Association filed a petition seeking to be certified as the exclusive bargaining agent for a unit of unrepresented lieutenants, captains, and a chief criminal investigator, employed by the "Putnam County Office of the Sheriff." The County filed a response claiming that it is the sole employer of the at-issue employees and that they are not entitled to representational rights because they are managerial under §201.7 (a) of the Public Employees' Fair Employment Act (Act or Taylor Law).¹

¹The County also alleged that the proposed unit is not appropriate because the employees do not share a sufficient community of interests. However, it later abandoned that position.
The Sheriff also filed a response claiming that he and the County jointly employ the employees and that the unit is appropriate.

In an interim decision dated September 1, 1997, the Director determined that the County is the sole employer of the at-issue employees.\(^2\) The County and the Sheriff filed exceptions, but, because the proceeding had not run its course, we declined to consider them.\(^3\) Instead, we remanded the matter to the Director to consider the uniting issues raised by the County. In our view, if the employees were managerial, as the County argued, then the nature and identity of the employer would be moot.

On remand, the Director determined that two of the employees are managerial, but that the rest are not.\(^4\) Therefore, he directed that there be a unit of employees holding the titles road patrol, corrections and communications captains, and corrections lieutenants. He gave the Association fifteen days to provide evidence of majority support, or he would conduct an election.

In this appeal, the Sheriff again argues that the Director erred in concluding that the County is the sole employer. The County argues that the Director was correct in that regard, but that he erred in finding that all but two of the employees are not managerial.

\(^2\) 30 PERB ¶4037 (1997).
\(^3\) 31 PERB ¶3031 (1998).
\(^4\) 32 PERB ¶4020 (1999).
DISCUSSION

Because we affirm the Director's uniting determination, we first address the more important aspect of this case - whether an elected sheriff and a county are joint employers under the Act.

In finding that the County is the sole employer, the Director held that the historical basis for the joint employer relationship between a sheriff and a county no longer exists. The effect of that determination is to relieve elected sheriffs of their right and duty to negotiate under the Act, and it could elicit petitions to consolidate some or all of the titles in existing sheriff's department units with county-wide units, often the very units from which they were fragmented in the first place. As discussed below, we reverse.

Public employers are required to negotiate and to enter written agreements with recognized or certified employee organizations concerning represented employees' wages, hours, and other terms and conditions of employment.\(^5\) The duty to negotiate and to enter such agreements on behalf of a public employer falls to the employer's chief executive officer,\(^6\) and those agreements are binding on the employer except as to terms that require approval by the employer's legislative body.\(^7\) Therefore, among the criteria that we must apply in fashioning the most appropriate bargaining unit under

---

\(^{5}\) Act §§200, 204.

\(^{6}\) Act §201.12.

\(^{7}\) Act §204-a.
§207.1 is that:

(b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate.\(^8\)

Necessarily, the officials of government to which §207.1(b) refers are, or are acting on behalf of, the employer's chief executive officer.

The primary significance of a joint employer relationship under the Act is that it implicates §207.1(b). Unless there are common officials of both employers at the level of the unit who can enter binding agreements concerning all of the unit employees' terms and conditions of employment, that criterion can never be satisfied, and the unit is not the most appropriate.\(^9\) Simply put, only where §207.1(b) is satisfied can there be effective negotiations. Anything less defeats the policies underlying the Act.

It is of no moment that the chief executive officer of one employer has acquiesced to agreements negotiated by the chief executive officer of the other.\(^10\) At best, such acquiescence establishes that the latter served as the bargaining agent for

\(^8\) Act, §207.1(b).

\(^9\) County of Clinton and Sheriff of County of Clinton, 18 PERB ¶3070 (1985).

\(^10\) See County of Jefferson and Jefferson County Community College, 26 PERB ¶3010, at 3018 (1993), conf'd sub nom. Jefferson County v. PERB, 204 A.D.2d 1001, 27 PERB ¶7010 (4th Dep't), leave to appeal denied, 84 N.Y.2d 804, 27 PERB ¶7014 (1994). In finding that it is the possession of power to determine terms and conditions of employment, and not the exercise of that power that is material, the Board implicitly adopted the same view articulated by the dissent in Town of Ramapo, 8 PERB ¶3057, at 3105 (1975).
the former. Only where §207.1(b) has been satisfied, may the criteria provided in §201.7(a) and (c) be considered and, as appropriate, balanced.

In County of Ulster and Ulster County Sheriff, the Board first determined that an elected sheriff and a county are joint employers and that a separate bargaining unit of sheriff's department employees was most appropriate. While noting that an elected sheriff's powers can be effected by local law to the extent authorized by the Municipal Home Rule Law, the Board observed:

The sheriff is responsible for appointing his deputies and they serve at his pleasure. This authority is derived from State Law and is not a delegation from the county. The same is true of the authority of the sheriff to assign job duties and other responsibilities to his deputies, promote them, lay them off, determine their work schedules, and approve time for vacation, holiday and overtime work. The Sheriff alone is responsible for the discipline and training of his deputies and has the sole authority to hear and resolve

---

11 See, e.g., William B. Martin, Sheriff of Ulster County, 6 PERB ¶3084 (1973); County of Jefferson and Jefferson County Community College, supra note 10.

12 See, e.g., Town of North Castle, 19 PERB ¶3025 (1986), where the chief executive officer of one employer was, as a matter of law, the chief executive officer of the other. There, however, the other employers, water districts, did not have any influence over employees' terms and conditions of employment.

13 See County of Erie and Sheriff of Erie County, 29 PERB ¶3031 (1996), conf'd 247 A.D.2d 671, 31 PERB ¶7004 (3d Dep't 1998) (separate bargaining units for road patrol and corrections officers most appropriate under §207.1(a)).

14 3 PERB ¶3032 (1970), conf'd sub nom. County of Ulster and Ulster County Sheriff's Office v. CSEA, 37 A.D.2d 437, 4 PERB ¶7015 (3d Dep't 1971).
their grievances.\textsuperscript{15}

However, the county controlled the economic terms and conditions of employment for sheriff's department employees. According to the majority in \textit{County of Ulster}, that shared control over all of the essential subjects to be negotiated dictated that the county and the sheriff participate in collective bargaining with a separate unit of sheriff's department employees as "joint employers."\textsuperscript{16} Although the Board did not specifically discuss §207.1(b), we view that decision to have been designed to accommodate that statutory criterion.

In \textit{County of Nassau and Nassau County Sheriff},\textsuperscript{17} the Board had occasion to reexamine the concept of a joint employer relationship as it applies to an appointed sheriff. There, the Board concluded that an appointed sheriff is essentially a department head, with no independent status as a joint employer. As we noted in remanding this matter to the Director, that decision may not have any dispositive impact on the status of an elected sheriff. We now take the opportunity to consider the reasoning underlying \textit{Nassau County} as it applies to an elected sheriff.

The office of sheriff is an instrumentality of government that exercises

\textsuperscript{15}3 PERB ¶3032, at 3529.

\textsuperscript{16}The dissent in \textit{County of Ulster} opined that the sheriff is the sole employer, despite the fact that the county controlled the employees' economic terms and conditions of employment.

\textsuperscript{17}25 PERB ¶3036 (1992).
governmental powers under the laws of the state,\textsuperscript{18} whether or not the official holding that office is elected.\textsuperscript{19} Therefore, although the government of which the office of sheriff is an instrumentality is the county, it meets the technical definition of public employer under the Act.\textsuperscript{20} But, as the Board noted in \textit{Nassau County}, the mere fact that a person or entity is a public employer establishes only that it is subject to the Act.\textsuperscript{21} It does not impose any bargaining obligations\textsuperscript{22} and, therefore, it does not dictate any uniting results under §207.1(b).

However, unlike other instrumentalities of government, the office of Sheriff of Putnam County is an elective office under Article XIII, §13, of the State Constitution. In contrast to an appointed sheriff, who serves at the pleasure of the county executive who appointed him, the Sheriff can only be removed from office by the Governor.\textsuperscript{23}

There is no higher executive office or official in the County to which the Sheriff is

\textsuperscript{18}See, e.g., County Law §650 (sheriff is the conservator of the peace); Correction Law §§500-a, 500-c (sheriff operates the county jail); CPLR Article 51 (sheriff is the enforcement officer for court orders); Judiciary Law Article 13 (sheriff provides court security); General Municipal Law §71 (sheriff to take all lawful means to protect persons or property threatened by mob or riot).

\textsuperscript{19}See \textit{County of Nassau and Nassau County Sheriff, supra} note 17.

\textsuperscript{20}Act 201.6.

\textsuperscript{21}County of Nassau and Nassau County Sheriff, supra, n. 19.

\textsuperscript{22}See, e.g., \textit{Hudson Valley Dist. Council of Carpenters v. State of New York, Dep't of Correctional Serv.}, 152 A.D.2d 105, 23 PERB ¶7514 (3d Dep't 1989).

\textsuperscript{23}N.Y.S. Constitution, Article XIII, §13. However, the office itself can be abolished by the County legislature if approved by referendum. \textit{Westchester County CSEA v. Del Bello}, 70 A.D.2d 604 (2d Dep't.), rev'd, 47 N.Y.2d 886 (1979).
accountable. Therefore, the Sheriff is the chief executive officer of the Sheriff’s Department. Consistent with that status, and like the sheriff in Ulster County, the Sheriff’s duties and powers under the County Law can only be altered by local legislation, to the extent authorized under the Municipal Home Rule Law.

In addition to being the chief executive officer of the Sheriff’s Department, as in Ulster County, the Sheriff wields executive control over significant noneconomic terms and conditions of employment flowing from his powers under the County Law. Those powers include the power to hire and fire employees, who serve at his pleasure.\(^{24}\) Moreover, inherent to his statutory duties,\(^{25}\) the Sheriff has the power to direct his employees and to determine their day-to-day working conditions.

In finding that the County is the sole employer for the at-issue employees, the Director relied on the effect that a recent amendment to Article XIII, §13, of the State Constitution had on sheriffs. That amendment, effective January 1, 1990, deleted from Article XIII, §13, the sentence: “But the county shall never be made responsible for the acts of the sheriff.” Prior to the amendment, a sheriff was personally liable for the misdeeds of the department’s civil deputies. In Nassau County, upon which the Director relied here, the Board held:\(^{26}\)

A sheriff was liable for the negligence or misconduct of his deputies, any of whose duties related to civil matters,

\(^{24}\)County Law §652.

\(^{25}\)See supra note 18.

\(^{26}\)25 PERB ¶3036, at 3075.
[footnote omitted] even when those civil duties were arguably slight and incidental to criminal duties. [footnote omitted] Because of this liability, a sheriff was generally permitted to hire and fire deputies, without benefit or restriction of any civil service requirements. [footnote omitted] The sheriff's control over certain aspects of the deputies' employment relationship stemmed from this centuries-old imposition of vicarious liability. Construing Ulster not long after it was issued, the Board stated that a joint employer relationship was found in that case because "the Sheriff was responsible for appointing his deputies, who served at his pleasure, while the County controlled appropriations covering benefits sought by the deputy sheriffs." [footnote omitted]

It is our opinion that this uniqueness of a sheriff's office, which is the primary underpinning for a joint employer relationship between a county and sheriff, has been removed by a recent change in the State Constitution, at least insofar as an appointive sheriff is concerned. [footnote omitted]

Therefore, the Board concluded there that an appointed sheriff is not a joint employer with the county, but that the county is the sole employer of sheriff's department employees.

We agree with that Board's determination that a county is the sole employer of employees of a sheriff who is appointed by superior executive county officials. We also agree that sheriffs' vicarious liability was the underpinning for the unfettered discretion that sheriffs had in hiring and firing civil deputies under the County Law. We disagree, however, with the prior Board's determination that that vicarious liability was also the underpinning for the joint employer relationship found in Ulster County. In fact, the majority in Ulster County specifically found that the sheriff's liability was immaterial to a

27 See Flaherty v. Milliken, 193 N.Y. 564 (1908)
uniting determination under the Act, and, in confirming the majority's decision, Justice Simons, then writing for the Appellate Division, Third Department, specifically agreed. We find that the existence or nonexistence of a sheriff's vicarious liability for the misdeeds of his or her employees is no more material in fashioning the most appropriate bargaining unit now. Indeed, the amendment to Article XIII, §13, does not automatically relieve sheriffs of that liability.

Likewise, we do not consider it material that civil deputies are now included in the classified civil service as a result of the amendment. That fact does not extinguish a sheriff's power to hire and fire employees, who continue to serve at his pleasure under the County Law. It simply limits the field of candidates from which he may select and promote employees, and the conditions under which he may discipline and dismiss them. Indeed, sheriffs have always been so constrained with respect to deputies engaged in law enforcement and they were even potentially so constrained with respect to civil deputies.

In our view, the material distinction between this case and Nassau County is that

---


29 County of Ulster and Ulster County Sheriff's Office v. CSEA, supra note 14, at 7101.


33 Id.
the sheriff in *Nassau County*, as an appointee of the county executive, is not a chief executive officer of an instrumentality of government. Although his powers and duties are the same as those of an elected sheriff, an appointed sheriff serves at the pleasure of the county executive who appointed him. Like any other department head, an appointed sheriff who declines to exercise his powers as the county executive sees fit can expect a brief term in office, assuming he or she is hired at all. Thus, as the Board found in *Nassau County*: 34

[A]n appointive sheriff, for purposes of the Act, is no differently situated as a matter of law than the many different officials of state and local government who carry out statutory mandates of various types, none of whom have been identified as independent public employers or have been made part of a joint employer relationship. [footnote omitted]

In contrast, because an elected sheriff does not hold office as an appointee of higher executive officials, he is not a department head. He is a chief executive officer who, like an elected county executive, is accountable only to the county legislature and the citizens of the county.

Therefore, we reaffirm the long line of Board decisions holding that the uniting criteria set forth in §207.1(b) requires that an elected sheriff, as the chief executive officer of an instrumentality of government who wields ultimate executive control over significant noneconomic terms and conditions of employment, must participate in

34 *Supra*, note 17, at 3075. However, *Nassau County* should not be read to mean that employees of an appointed sheriff must be placed in a county-wide collective bargaining unit. Such a uniting determination requires our traditional analysis under §207.1(a) and (c).
collective bargaining as a joint employer with the county that controls the employees' economic terms and conditions of employment. Only then can the policies of the Act be effectuated through meaningful negotiations. In our view, the amendment to Article XIII, §13, of the State Constitution and the concomitant inclusion of civil deputies in the classified civil service do not warrant a contrary result.\(^\text{35}\)

Contrary to the County's argument to us, we find it similarly immaterial that the State Legislature declined to act on a bill that would have amended the Taylor Law by making elected sheriffs and counties joint employers.\(^\text{36}\)

We now turn to the Director's uniting determination. We first note that there is no dispute that if the at-issue employees are not managerial, as the Director found, then they are appropriately included in a separate unit of Sheriff's Department employees. The only question before us is whether the employees are managerial.

The County argues that the Director failed to consider the civil service job descriptions applicable to the employees, and that his summary of their duties was incomplete. However, having reviewed the entire stipulated record, we find that the at-issue employees' tasks and responsibilities support the Director's determination for the reasons stated in his decision. We disagree with the County's assertion that the duties not specifically described by the Director merit a contrary conclusion. Indeed, the record overwhelmingly establishes that these employees are high-level supervisors akin

\(^{35}\)In so finding, we note, but do not adopt, the former Director's decision in Essex County and Essex County Sheriff, 29 PERB ¶4002 (1996).

\(^{36}\)Assembly bill A05910; Senate bill S04900.
to the clerks of the Court of Appeals and the Appellate Division, First and Second Departments, in *State of New York - Unified Court System*,\(^{37}\) who, we held, are not managerial or confidential despite their role in personnel and policy-making determinations. The bare fact, emphasized by the County, that some of these high-level supervisors have the power to hire and fire part-time employees does not, in our view, evince the sort of conflicts of interest designed to be minimized by designations as managerial. Nor does the fact that some of the employees write and implement personnel policies. Such duties are common to high-level supervisors,\(^{38}\) but do not warrant the deprivation of representational rights associated with a designation as managerial.\(^{39}\)

IT IS, THEREFORE, ORDERED that the County's exceptions and cross-exceptions are denied and that the Sheriff's exceptions are granted.

IT IS FURTHER ORDERED that the matter be, and hereby is, remanded to the Director for proceedings to determine whether a majority of the employees in the


\(^{39}\)See, *e.g.*, *Watervliet Housing Auth.*, 18 PERB ¶3079 (1985).
bargaining unit that the Director found to be most appropriate desire to be represented
by the Association.

DATED: January 24, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
This matter comes to us on exceptions filed by the Owego-Apalachin Administrators' and Supervisors' Association (Association) to the Administrative Law Judge's (ALJ) decision on its petition for unit placement filed pursuant to §201.2(b) of PERB's Rules of Procedure (Rules).

The Owego-Apalachin Central School District (District) created the position of Administrative Assistant on September 24, 1998. The District considered this position managerial/confidential. On November 8, 1998, the Association filed a petition for unit placement seeking to place the Administrative Assistant title in the unit of administrative
and supervisory personnel which it currently represents. The District objected to the proposed placement and a hearing took place on April 27, 1999.

The Association has filed exceptions to the ALJ’s decision dismissing the Association’s petition. The Association argues, *inter alia*, that the ALJ “failed to consider the record as a whole” in making his decision.

We disagree. After reviewing the record and considering the parties’ arguments, we affirm the ALJ’s decision. The record supports the ALJ’s decision that the Administrative Assistant title should not be placed in the Association’s bargaining unit.

We have long held that an employee’s status as either managerial or confidential may be considered in a proceeding brought by a party other than the employer.\(^1\) This matter comes to us on a unit placement petition filed by the Association. The District objected on the grounds that the at-issue title should be outside the bargaining unit because of the duties relating to collective bargaining negotiations connected with the Administrative Assistant’s position. The District considered this position managerial.\(^2\)

We have seen an evolution in the treatment of managerial employees. The language of the current statute defines who may be designated “from time to time as

---

\(^1\) *McGraw Cent. Sch. Dist., 21 PERB ¶3001 (1988), aff’g 20 PERB ¶4073 (1987)*, where the Board dismissed a representation petition based on the Director’s decision that the employees at issue were managerial.

\(^2\) The District not having filed an application pursuant to the Act and §201.10 of the Rules of Procedure precludes us from making a designation of this title as either managerial or confidential.
managerial . . . upon application of the public employer to the appropriate board . . . . 3

Any doubt as to the managerial status of an employee must be decided in favor of coverage by the Act. The statutory criteria have been applied conservatively in order to prevent an employee from being denied collective bargaining rights based on speculation. 4

The statute 5 is quite specific regarding the criteria for managerial designation. There are only two alternate standards. The employee must (1) formulate policy or (2) reasonably be required to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of collective agreements or personnel administration. We have determined that the bases for managerial designation are alternative and not cumulative. Consequently, it is not necessary to satisfy both standards in order to consider an employee managerial. 6

We note that in 1994, the Association filed a petition seeking to represent certain administrative employees and the District sought to exclude as managerial the Director of Education and the Director of Special Services. A hearing was held before the same ALJ as the instant proceeding. PERB's Director of Public Employment Practices and

3Act §201(7)(a)(i)(ii).


5Act §201(7)(a).

Representation determined that both of the District's Directors should be included in the unit to be represented by the Association.\(^7\)

In 1998, the District reorganized its administrative structure and abolished the positions of Director of Education and Director of Special Services. The District replaced these titles with the Director of Instruction and Administrative Assistant.

The Association, in its exceptions, principally argues that the record as a whole does not support ALJ Mayo's determination. We disagree. The District's Assistant Superintendent, Gerald Russell, was the first witness called by the Association. He testified that "at the time Mr. Comerford was hired there was an expectation that he would be actually involved in all phases of [collective bargaining] negotiations . . . ."\(^8\) He was part of the negotiating team . . . ."\(^9\) "He [Comerford] would be involved with all the negotiations from the day he was hired . . . ." "It was a perfect time for training . . . ."\(^10\) "We were acting prospectively anticipating a future need for another negotiator." Russell "fully expected that Mr. Comerford's role would increase as he gained more experience."\(^12\)

---

\(^7\)Owego-Apalachin Cent. Sch. Dist., supra, note 4, before ALJ Gordon R. Mayo.

\(^8\)Tr. p. 53.

\(^9\)Id. p. 55.

\(^10\)Id. p. 64.

\(^11\)Id. p. 65.

\(^12\)Id. pp. 71-72.
In addition, the Association argues that the ALJ failed to follow prior PERB decisions regarding unit placement and as such violated the rule of *stare decisis*. In support of this position, the Association relies upon, among others, our decisions in *Town of Dewitt*\(^{13}\) and *City of North Tonawanda*.\(^{14}\) The Association's reliance upon these decisions is misplaced. *Dewitt* dealt with the designation of an employee as confidential and *North Tonawanda* is also distinguishable on its facts. The employer in *North Tonawanda* failed to produce sufficient evidence for the Director to designate certain employees managerial or confidential. Consequently, the Director found that unit placement was appropriate.

We have previously held school district Administrative Assistants to be managerial employees excluded from all units when we have found that their duties involved administering labor agreements or the conduct of negotiations for the district.\(^{15}\) As we have stated and, as noted by the ALJ, the record is clear that the Administrative Assistant, Thomas Comerford, had been involved in collective bargaining issues even though negotiations over successor agreements had not yet begun.\(^{16}\) Furthermore, the

\(^{13}\)32 PERB ¶3001 (1999).

\(^{14}\)31 PERB ¶4029 (1998).

\(^{15}\)Frewsburg Cent. Sch. Dist., 17 PERB ¶3074 (1983); Whitesboro Cent. Sch. Dist., 12 PERB ¶3111 (1979).

\(^{16}\)Jamestown Professional Firefighters Ass'n., Local 1772, AFL-CIO v. Newman, 19 PERB ¶3019 (1986), conf'd, 126 A.D.2d 826, 518 N.Y.S.2d 318, 20 PERB ¶7004 (3d Dep't 1987). See *City of Newburgh*, 16 PERB ¶3053 (1983), where we held that an employee may be designated "managerial" on the basis of services that may reasonably be required of him in the future, while an employee may be designated "confidential" only on the basis of services already performed. Citing *City of Binghamton*, 12 PERB ¶3099 (1979).
Board - CP-580

Job description for Administrative Assistant includes "[service] on the District's negotiation team for negotiations with all employee bargaining units; [assisting] the Assistant Superintendent in the development of negotiation positions; [assisting] the Assistant Superintendent in the development of negotiation proposals."\(^{17}\)

The record clearly demonstrates that Comerford was hired to succeed Russell as negotiator and, in the interim, he was being trained in the art of collective bargaining. He also directly participated in the limited amount of negotiations that were ongoing prior to the opening of negotiations for successor agreements. Under the circumstances, this activity is sufficient to meet our standard.\(^{18}\) The exceptions are, therefore, dismissed in their entirety.

We accordingly affirm the decision of the ALJ that the title of Administrative Assistant is not appropriately included in the petitioner's unit.

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

DATED: January 24, 2000
Albany, New York

[Signatures]

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

\(^{17}\)See District's Answer Ex. 4, ¶VII. Personnel Administration.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 342, UNITED MARINE DIVISION, ILA,
AFL-CIO,

Petitioner,

-and-

BOARD OF COOPERATIVE EDUCATIONAL
SERVICES, COUNTY OF NASSAU,

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 Local 342, United Marine Division, ILA, 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.
Included: Employees of the Department of Career Education employed as Adult Educators who work less than twenty (20), and a minimum of three (3) hours, or more of pupil contact hours per week.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 342, United Marine Division, ILA, 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 24, 2000
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,

Petitioner,

-and-

WEEDSPORT CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc.,
Local 1000, AFSCME, 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.
Included: All regularly employed full and part-time bus drivers, teacher aides, custodians, building maintenance helpers and bus mechanic.

Excluded: All other employees, including substitute and casual employees in the included titles above, and specifically excluding all administrators, head of transportation, head custodian, district office clericals, secretaries to school principals and nurses.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. 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 24, 2000
Albany, New York

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