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State of New York Public Employment Relations Board Decisions from February 2, 2001

New York State Public Employment Relations Board

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 106, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner,

- and -

TOWN OF NEW SCOTLAND,

Employer.

SEAN RYAN KIRKER, for Petitioner
MICHAEL RICHARDSON, for Employer

BOARD DECISION AND ORDER

On August 15, 2000, Local 106, International Union of Operating Engineers (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of New Scotland (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All full-time and regular part-time highway, parks, water and sewer employees.

Excluded: Superintendents
Pursuant to that agreement, a secret-ballot election was held on December 7, 2000, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: February 2, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
On September 19, 2000, the International Brotherhood of Teamsters, Local 118 (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Fleming (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: Motor Equipment Operators and Laborers.

Excluded: All other employees.
Pursuant to that agreement, a secret-ballot election was held on December 14, 2000, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election do not indicate that a majority of the eligible voters in the unit who cast ballots desire to be represented for the purpose of collective bargaining by the petitioner\(^3\), IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: February 2, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

\(^3\) Of the 4 ballots cast, 2 were for representation and 2 against representation. There were no challenged ballots.
In the Matter of

WILLIAM ADAMS,

Petitioner,

-and-

JONESVILLE FIRE DISTRICT,

Employer,

-and-

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Intervenor.

WILLIAM ADAMS, for Petitioner

RUBERTI, GIRVIN & FERLAZZO (KRISTINE AMODEO LANCHANTIN of counsel), for Employer

KEVIN P. REILLY, for Intervenor

BOARD DECISION AND ORDER

On October 5, 2000, William Adams filed a timely petition for decertification of the United Public Service Employees Union (intervenor), the current negotiating representative for employees in the following unit of employees of the Jonesville Fire District:

Included: Full-time station keepers.

Excluded: All other employees.
Upon consent of the parties, a mail-ballot election was held on November 27, 2000. The results of this election do not show that a majority of the eligible employees in the unit who cast valid ballots desire to be represented for purposes of collective negotiations by the intervenor.\footnote{Of the 2 ballots cast, 1 was for representation and 1 against representation. There were no challenged ballots.}

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

DATED: February 2, 2001
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

RHINEBECK CENTRAL SCHOOL DISTRICT,

Charging Party,

- and -

RHINEBECK ASSOCIATION OF NON-INSTRUCTIONAL
EMPLOYEES,

Respondent.

SHAW & PERELSON, ESQ. (JAY M. SIEGEL of counsel), for
Charging Party

JAMES R. SANDNER, ESQ. (GERARD JOHN DEWOLF of counsel),
for Respondent

BOARD DECISION AND ORDER

On November 14, 2000, the Rhinebeck Central School District filed a charge
alleging that the Rhinebeck Association of Non-Instructional Employees (Respondent)
had violated Civil Service Law (CSL) §210.1, in that it caused, instigated, encouraged
and condoned a strike against the Rhinebeck Central School District for four workdays
from October 31 through November 3, 2000. The charge further alleged that of the
approximately forty-three employees in the negotiating unit, forty-one of those
employees participated in the strike.
Respondent agreed not to interpose an answer to the charge and has, thereby, admitted the factual allegations of the charge. The parties have agreed to enter into a stipulation of settlement, which provides that:

1. Respondent’s right to have dues and agency shop fee deduction privileges shall be suspended for a period of six (6) months commencing January 1, 2001 and concluding June 30, 2001;

2. No dues or agency shop fees shall be deducted from the salaries of the unit members of the Respondent association until Respondent affirms that it no longer asserts the right to strike against any government as required by the provisions of Civil Service Law §210(3)(g);

3. Upon the Public Employment Relations Board’s acceptance of the aforementioned penalty, the proceeding commenced by the Rhinebeck Central School District shall be discontinued.

Based upon the annexed stipulation of settlement, we find that the Rhinebeck Association of Non-Instructional Employees violated §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one and will effectuate the policies of the Act.

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1We take administrative notice that Respondent has not previously engaged in any strike activity and during the course of this strike the schools remained open and classes were in session.
IT IS, THEREFORE, ORDERED that:

1. Respondent's right to have dues and agency shop fee deduction privileges be suspended for a period of six (6) months commencing January 1, 2001 and concluding June 30, 2001;

2. No dues or agency shop fees shall be deducted from the salaries of the unit members of the Respondent association until Respondent affirms that it no longer asserts the right to strike against any government as required by the provisions of Civil Service Law §210(3)(g);

3. The Board's counsel and/or his designee shall execute the stipulation and, thereafter, the proceeding commenced by the Rhinebeck Central School District shall be, and it hereby is, discontinued.

DATED: February 2, 2001
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

RHINEBECK CENTRAL SCHOOL DISTRICT,

Charging Party,

and

RHINEBECK ASSOCIATION OF NON-INSTRUCTIONAL
EMPLOYEES,

Respondent.

WHEREAS, by Notice and Charge dated the 14th day of November, 2000, the Rhinebeck Central School District (hereinafter “Charging Party”) lodged a charge against the Rhinebeck Association of Non-Instructional Employees (hereinafter “Respondent”) alleging that the Respondent engaged in conduct in violation of Civil Service Law §210 subd. 1 for the period of October 31, 2000 through November 3, 2000, and

WHEREAS, the Respondent has agreed not to interpose an Answer to the Charge and thereby, pursuant to PERB’s Rules of Procedure, admits to the factual allegations of the Charge, and

WHEREAS, in recognition of their respective interests, the parties hereto have agreed to the following terms and conditions:

IT IS ACCORDINGLY HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. That the dues and agency shop fee deduction privileges of the Respondent shall be suspended for the period of six (6) months commencing January 1, 2001 and concluding June 30, 2001 based upon the Respondent’s actions in engaging in a strike, as charged, in violation of Civil
Service Law §210 subd. 1.

2. That no dues or agency shop fees shall be deducted from the salaries of the unit members of the Respondent association until the Respondent affirms that it no longer asserts the right to strike against any government as required by the provisions of Civil Service Law §210(3)(g).

3. Upon the Public Employment Relations Board's acceptance of the aforementioned penalty as being reasonable and one which effectuates the purpose and policy of the Public Employment Relations Act (Civil Service Law Article 14), the foregoing proceeding shall be deemed discontinued and settled, in all respects.

Dated: 12/20/00

JAMES R. SANDNER, ESQ.
Attorney for Rhinebeck Association of Non-Instructional Employees

By:

Gerard John DeWolf, Esq., of Counsel
New York State United Teachers
159 Wolf Road, Box 15008
Albany, New York 12212-5008
(518) 459-5400

Dated: 12/18/00

SHAW & PERELSON, ESQ.
Attorneys for the Rhinebeck Central School District

By:

Jay M. Siegel, Esq.
2-4 Austin Court
Poughkeepsie, New York 12603

Dated: 2/2/01

ROBERT A. DePAULA
Deputy Chairman and Counsel
Public Employment Relations Board

By:

Gary Johnson, Esq., of Counsel
80 Wolf Road, 5th Floor
Albany, New York 12205
This matter comes to us on exceptions filed by the Village of Belmont (Village) to a decision of the Administrative Law Judge (ALJ) which found a violation of §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) on a charge filed by Dorr Glover alleging that the Village violated the Act when it unilaterally changed employees' terms and conditions of employment during the pendency of a representation petition.
Facts

Based upon the stipulated record before us, we adopt the ALJ’s findings of fact.

We will confine our review to the salient facts relevant to the exceptions filed by the Village.

After an exchange of correspondence between the ALJ and the parties in which the ALJ attempted to obtain from the parties a stipulation of the facts, the Teamsters, by letter dated April 5, 2000, submitted a proposed stipulation consisting of thirty-six paragraphs. By letter dated April 17, 2000, the Village responded by indicating the paragraphs to which it agreed.

By letter dated April 28, 2000, the ALJ provided the parties with a stipulation constructed from the agreed-upon facts. The ALJ provided the parties with several opportunities to review the stipulation and respond to her. Having received no response from the parties, on June 16, 2000, the ALJ sent a letter requesting briefs on or before July 14, 2000. By letter dated June 25, 2000, the Village informed the ALJ that it could not provide a brief because there remained “major issues of fact” requiring a hearing.

The ALJ responded on July 5, 2000, directing the Village to file with her by July 21, 2000, a statement which described the so-called “major issues of fact” believed to be in dispute and relevant to a decision in the matter. The Village never submitted the requested statement. On July 25, 2000, the ALJ advised the parties that the record was closed and the matter would be decided on the stipulated record.
ALJ Decision

The ALJ found that the Village violated §§209-a.1(a) and (c) of the Act when it unilaterally implemented wage adjustments during the pendency of the certification petition.

Exceptions

The Village excepted to the ALJ's decision on the law. The Village argues that the ALJ erred by closing the record without holding a hearing on the so-called “major issues of fact”, thus depriving the Village of its right to appear and defend its position.

Discussion

Our procedure for the conduct of conferences and hearings is found in Part 212 of our Rules of Procedure (Rules). Section 212.4(a) notes that “[a] formal hearing . . . shall be conducted as necessary by the administrative law judge . . ..” (emphasis added)

We have addressed the ALJ’s authority vis-a-vis Part 212 of our Rules and determined that “an ALJ has the discretion while processing an improper practice charge, either at a pre-hearing conference, after the conference, during the hearing or at any other appropriate juncture, to require a party to submit an offer of proof in support of the allegations being processed.”

1Amalgamated Transit Union Div. 580 and Cent. New York Reg’l Transp. Auth., 32 PERB ¶3053, at 3125 (1999). See also State of New York (DCS) 29 PERB ¶3015 (1996) (affirming the dismissal of a charge where the charging party failed to offer evidence in support of his allegations that the State acted out of anti-union animus); Nanuet Union Free Sch. Dist. And Nanuet Teachers Ass’n, 17 PERB ¶3005 (1984) (affirming the dismissal of a charge where the hearing officer [ALJ] requested an offer of proof at the close of the charging party's case before deciding the respondent's
The ALJ requested that the Village provide her with a statement [offer of proof] of the so-called “major issues of fact” so that she could determine whether a formal hearing was necessary under our Rules. The Village failed to respond. The Village’s failure to object to this request or to provide this information compels the conclusion that there were no “major issues of fact” necessitating a hearing.2

The Village also argues that the ALJ erred in finding that a “compensation system” was in place in the Village, and that there was insufficient evidence to find that the Village altered “the method used to calculate wage increase.”

The stipulated facts found in the April 28, 2000 letter from the ALJ set forth at ¶17 the Village’s admitted understanding of the wage issue:

[Effective June 1, 1999, the Village unilaterally implemented wage adjustments during the pendency of the certification petition. The method used to calculate wages is vastly different now that the employees have elected to organize. Since 1992 through 1998, average wage increases for those sought to be organized had been about 5.5% across the board. In 1999, one employee received 16.6%, one employee received 10.0%, one employee received 5.5%, and one employee received 2.0%.

We have consistently found a violation of §§209-a.1(a) and (c) of the Act whenever the employer changes the status quo of terms and conditions of employment during the pendency of a representation petition.3 The Village elected to stipulate to the content of ¶17 as set forth in the ALJ’s letter. It is clear from ¶17 that the Village unilaterally

motion to dismiss.)


implemented wage adjustments during the pendency of the representation petition which were vastly different from the past and, as a result, the Village changed the status quo. The effect of such a change is inescapable. We have found that such changes in employment conditions inherently chill employees in their protected right to seek representation . . . [and, thus] [t]o give any employer the legal right to make changes in the employment conditions of its employees during the pendency of a representation question and prior to the certification of a bargaining agent would afford that employer an unfair advantage in any negotiations subsequently required.  

Lastly, the Village argues that the ALJ erred in directing a remedy which required the Village to make employees whole for any wages or benefits lost by reason of the Village’s unilateral wage adjustments. In City of Albany v. Helsby, the Court of Appeals recognized PERB’s authority to fashion a remedy under the Act. The Village contests the ALJ’s remedy because the record is not clear how previous increases factored into the 5.5% average. This argument lacks merit because the manner in which the Village calculated previous wage increases is not material to our assessment of a violation. We have previously held that a make-whole order is not rendered impossible to perform when the record reflects any basis on which such a remedy can be made.

4 Genesee-Livingston-Steuben-Wyoming BOCES, supra note 3 at 3151.
5 29 NY2d 433, 5 PERB ¶7000 (1972).
7 See City of Troy, 29 PERB ¶3004 (1996); Village of Buchanan, 22 PERB ¶3001 (1989); City of Rochester, 21 PERB ¶3040 (1980); confirmed, 155 AD2d 1003, 22 PERB ¶7035 (4th Dep’t 1989).
Based on the foregoing, the Village’s exceptions are denied and the ALJ’s decision is affirmed.

IT IS, THEREFORE, ORDERED that the Village of Belmont:

1. Forthwith restore the method used to calculate wage increases which was in effect on January 19, 1999, when the petition for certification was filed by the Teamsters;

2. Make employees whole for any wages or benefits lost by reason of the change in the compensation system on June 1, 1999, with interest at the maximum legal rate; and

3. Sign and post the attached notice at all locations customarily used to post notices of information to employees in the unit represented by the Teamsters.

DATED: February 2, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

While it is appropriate to restore the parties to positions in which they would have been but for the statutory violation, recoupment of wages paid to employees in excess of the 5.5% wage system would be an unusual remedy causing some hardship to affected bargaining unit members and is not ordered here. While recoupment has been found to be appropriate in some cases, it is a remedy resorted to only under unusual circumstances, which are not here present. See Brookhaven-Comsewogue Union Free Sch. Dist., 22 PERB ¶3037, at 3087 (1989).
NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Village of Belmont (Village) in the unit represented by Teamsters, Local 317, International Brotherhood of Teamsters, AFL-CIO (Teamsters) that the Village will:

1. Forthwith restore the method used to calculate wage increases which was in effect on January 19, 1999, when the petition for certification was filed by the Teamsters.

2. Make employees whole for any wages or benefits lost by reason of the change in the compensation system on June 1, 1999, with interest at the maximum legal rate.

Dated . . . . . . . . . . . . . . .

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

Village of Belmont

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RANDOLPH D. DRAKES, 

Charging Party,

- and -

PUBLIC EMPLOYEES FEDERATION, 

Respondent,

- and -

STATE OF NEW YORK (BANKING DEPARTMENT), 

Employer.

______________________________

RANDOLPH D. DRAKES, pro se

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Randolph D. Drakes to a decision of the Director of Public Employment Practices and Representation (Director) dismissing an improper practice charge alleging that the Public Employees Federation (PEF) violated §209-a.2(c) of the Public Employees’ Fair Employment Act (Act) in its handling of a grievance he had filed against his employer, the State of New York (Banking Department) (State).¹

¹Section 209-a.3 of the Act makes the public employer a statutory party to certain charges filed under §209-a.2(c).
FACTS

On July 12, 2000, Rudolph D. Drakes filed an improper practice charge against PEF. By letter dated July 17, 2000, the Assistant Director of Public Employment Practices and Representation (Assistant Director) advised Drakes that his charge was deficient because “[he] must provide specific facts . . . relating to each act . . . The general conclusions [he] set forth do not establish arbitrary, discriminatory or bad faith conduct by PEF.”

By letter dated September 4, 2000, Drakes submitted a sworn statement amending his original charge.

In response to Drakes’ letter of September 4, 2000, the Assistant Director advised him that his amendment was also deficient. He wrote:

Because an improper practice charge must be filed within four months of the conduct at issue, your charge is timely filed only as to the exchange of correspondence in June 2000.

The difference of opinion between yourself and PEF as to the need for more relevant information does not establish that its request for same is arbitrary, discriminatory or in bad faith.

Moreover, the facts pled do not evidence that PEF’s withdrawal of your grievance meets the above standards.

Drakes submitted an unsworn reply, by letter dated September 11, 2000, to the Assistant Director’s letter and, following this correspondence, the Director dismissed the charge on September 25, 2000. Based upon our review of the record and consideration of Drakes’ arguments, we affirm the decision of the Director.
EXCEPTIONS

Drakes excepted on the grounds that the Director erred in applying the law to the facts.

DISCUSSION

On October 26, 2000, Drakes was granted an extension to file exceptions in this matter with the caveat that "[his] exceptions [would be] deemed timely if filed and served on or before November 6, 2000. Please refer to PERB's Rules of Procedure with regard to service and filing." Subsequently, on November 13, 2000, PERB's Deputy Chairman and Counsel sent courtesy copies of the exceptions to the Respondents because it appeared that Drakes had failed to serve them. In its response to the exceptions, PEF requested dismissal of the exceptions on the ground that Drakes did not comply with §213.2 of our Rules of Procedure (Rules). That section of the Rules requires that a copy of the exceptions be served upon all parties at the same time as the exceptions are filed and that proof of such service be filed with us. Drakes failed to comply with this Rule.²

We have consistently applied the service requirements of our Rules strictly when a party to a proceeding raises an objection to a failure of service, as timely service is a component of timely filing.³ Consequently, Drake's failure to serve the exceptions in

²Although PEF and the State received a courtesy copy of the exceptions from the Board's Deputy Chairman and Counsel, this does not satisfy the service requirements under our Rules nor cure the service defect.

³See County of Washington, 32 PERB ¶3033 (1999); City of Watervliet, 30 PERB ¶3024 (1997); Yonkers City Sch. Dist., 30 PERB ¶3026 (1997); Catskill Regional Off-Track Betting Corp., 14 PERB ¶3075 (1981) (subsequent history omitted).
accordance with the Rules requires dismissal of the exceptions pursuant to PEF's motion. Under these circumstances, we do not reach the merits of the exceptions.

For the reasons set forth above, the exceptions must be, and hereby are, dismissed. SO ORDERED.

DATED: February 2, 2001
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

JOEL FREDERICSON,

Charging Party,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

JOEL FREDERICSON, pro se

MARTIN B. SCHNABEL, GENERAL COUNSEL (EDWARD F. ZAGAJESKI of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Joel Fredericson to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge alleging, as amended, that the New York City Transit Authority (NYCTA) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by filing disciplinary charges against him in retaliation for his exercise of protected rights.

FACTS

The original charge, filed March 30, 1999, alleged, inter alia, that Fredericson was an elected Vice-Chairperson and Safety Committee Member of the Track Division
of Local 100, Transport Workers Union of America (Local 100). On December 2, 1998, he received an arbitration decision which resulted in his employer, NYCTA, imposing the penalty of a warning allegedly in retaliation for engaging in protected activity, to wit: union representation and attendance at union functions during the period of June 27, 1996 to July 17, 1996.

Subsequently, on October 4, 1998, NYCTA allegedly retaliated against Fredericson by serving him with Disciplinary Action Notification (DAN) #98-2877-0006 for submitting a leave request for union business. On December 23, 1998, NYCTA served him with a DAN allegedly in retaliation for his attendance as a witness at an arbitration hearing involving his Chairperson, Roger Toussaint. On January 25, 1999, NYCTA's Superintendent allegedly discriminated against Fredericson by refusing his request to participate in Toussaint's hearing. On February 17, 1999, NYCTA again allegedly discriminated against Fredericson by denying his request to participate in Toussaint's grievance hearing.

On May 12, 1999, Fredericson amended his charge, by including two other instances where NYCTA allegedly discriminated against him because of his union activities. He alleged that, on April 30, 1999, NYCTA retaliated against him by issuing DAN #99-2801-0067 seeking his termination. On May 11, 1999, at an arbitration hearing on DAN #98-2877-0006 and DAN #98-2877-0007, previously issued to him, Local 100's attorney and recording secretary made a request for an adjournment, which
was granted. Allegedly, in retaliation for this adjournment, NYCTA counsel directed that Fredericson surrender his NYCTA pass and was told that he was “out of service”.

In answer to the charge, NYCTA raised, among other things, the timeliness of the charges and that the allegations were the subject of pending contractual disciplinary matters over which PERB has no jurisdiction.

During the processing of the improper practice charge, Fredericson, together with Local 100’s counsel, entered into a stipulation settling the DAN’s, except the allegation referring to the 1996 matters.

Following the execution of the settlement stipulation, NYCTA moved to dismiss the improper practice charge, as amended, because the settlement stipulation resolved the disciplinary grievances brought by Fredericson and waived Fredericson’s right to pursue his improper practice charge. In addition, NYCTA alleged that the charge with respect to the 1996 incidents was untimely. The ALJ found that the allegations relating to the incidents that occurred in 1996 were untimely, but found that the charge as it relates to the most recent incidents in 1998 and 1999 was timely brought.

Notwithstanding the timeliness of the charge, the ALJ found that the stipulation that settled the grievances also waived Fredericson’s right to pursue his improper practice charge.
EXCEPTIONS

Fredericson's exceptions are founded on his assertion that the ALJ made an error of law.

DISCUSSION

We have determined that a charging party bears the burden of presenting the facts in support of an improper practice charge. Thus, a charge will be dismissed if a charging party has not sustained his/her burden of proof.¹ No further hearings need be held where the evidence presented by the charging party does not set forth a *prima facie* case.²

We have held that with respect to "a motion made to [an ALJ] to dismiss a charge after the presentation of the charging party's evidence . . . [w]e would reverse [an ALJ's] decision to grant such a motion unless we could conclude that the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal . . . ."³

The questions here presented are whether Fredericson's charge as to the 1996 incidents is timely and whether he has waived his right to pursue his improper practice charge as to the other allegations by executing the settlement stipulation of the DAN's.

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²*County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).
³*Id.*, at 3029-30.
As the ALJ correctly pointed out, §204.1(a)(1) of PERB's Rules of Procedure (Rules) requires that an improper practice charge be filed within four months of the date of the conduct which is the subject of the charge. Furthermore, the Rules do not provide for any extension of time to file an improper practice charge. We have also determined that the filing period is not tolled while ancillary proceedings (grievance arbitration) are being pursued by or on behalf of a charging party, even when those proceedings have the potential to effectively moot the improper practice alleged.

The original charge, filed March 30, 1999, alleged violations that occurred in 1996, and on October 4, 1998, December 23, 1998, January 25, 1999 and February 17, 1999. The amended charge included incidents which occurred on April 30, 1999 and May 11, 1999. The ALJ correctly found that to be timely, the charge must allege incidents that occurred on or after November 30, 1998. Here, the allegations relating to the 1996 incidents, even though not disposed of by way of arbitration until December 2, 1998, were untimely. In addition, the ALJ correctly dismissed as untimely the

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4 See Transport Workers Union of America, Local 100, 33 PERB ¶3013 (2000); Public Employees Fed'n (Mankowski), 33 PERB ¶3032 (2000). For other cases discussing attempts to toll the four-month limitation of time, see New York City Transit Auth. and Transport Workers Union, Local 100 (Dye), 30 PERB ¶3032 (1997) (allegations of misconduct of Transit Authority more than four months after disciplinary hearing); State of New York (GOER), 22 PERB ¶3009 (1989) (four-month limitation in Rules runs from the date the adverse action took place and not from the date when improper motivation is ascribed to it); Board of Educ. of the City Sch. Dist. of the City of New York, 19 PERB ¶3066 (1986) (exhaustion of administrative review proceedings).

5 See Transport Workers Union, Local 100 (Hokai), 32 PERB ¶3019 (1999); Orange County Correction Officers Benevolent Ass'n, 28 PERB ¶3081 (1995).
allegations relating to the two incidents of October 4, 1998 resulting in DAN #98-2877-0006 and DAN #98-2877-0007. As to the remaining allegations, the ALJ found the charge timely. We agree, as those events fell within the four months preceding the filing of the improper practice charge and its amendment.

NYCTA also argued in support of its motion to dismiss Fredericson's charge that he has waived his right to pursue his improper practice charge based, as amended, upon the executed stipulation of settlement. The ALJ agreed and found that the stipulation effectively waived Fredericson's right to prosecute the remaining timely allegations in the improper practice charge. In support of her decision, she relied upon a prior case involving NYCTA and the application of the same language found in a grievance settlement where an ALJ held this language to be an effective waiver.\(^6\) We agree.

In reaching our decision to affirm the ALJ's decision, we have reviewed the three-prong waiver test in light of the facts of this case.\(^7\) As to the first two prongs of the test, the facts are uncontroverted that Fredericson's charge is founded upon the DANs he received and, secondly, our prior decisions have held that a party may waive

\(^6\)New York City Transit Auth. (Diaz), 31 PERB ¶4566 (1998).

\(^7\)Such a waiver analysis requires a three-prong inquiry: whether the language of the waiver covers the improper practice charge, whether the waiver is unenforceable as against public policy and whether the waiver was clear and knowing. See New York City Transit Auth., 27 PERB ¶3060 (1994); CSEA v. Newman, 88 AD2d 685, 15 PERB ¶7011 (3d Dep't 1982), appeal dismissed, 51 NY2d 775, 15 PERB ¶7020 (1982).
his/her right to file an improper practice charge. It is the third prong that is of interest to us: Was this waiver clear, unmistakable and without ambiguity?

By the terms of the stipulation of settlement, "[g]rievant, [Fredericson] and the union jointly and severally . . . release the Transit Authority from any and all claims, whether at law, in equity or arising by virtue of contract . . . in connection with the underlying disputes in case(s) number(s) 98-2802-0227; 98-2877-0006; 98-2877-0007; 99-2801-0067." We previously held in Board of Education of the City School District of the City of Buffalo that broad language such as this constituted a knowing and intentional waiver of the right to file a charge.

The stipulation, in addition to the foregoing broad language, withdraws the disciplinary grievance appeals "with prejudice". In return, Fredericson received a modified disciplinary penalty. Fredericson, with the assistance of his counsel, knowingly entered into the stipulation.

Looking at the facts most favorable to Fredericson, it is inescapable that, by his execution of the stipulation of settlement, he has waived his right to pursue his claims

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8 Board of Educ. of the City Sch. Dist. of the City of Buffalo, 22 PERB ¶3047 (1989) and the cases cited therein.


10 Supra note 8.

11 The ALJ notes in her decision that "[t]he same attorney who represented Fredericson in the grievance arbitrations and settlement served as counsel for the charging party in NYCTA (Diaz)." 33 PERB ¶4621, at 4267 n. 8.
Board - U-20779

Therefore, we deny Fredericson's exceptions and affirm the decision of the ALJ.

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

DATED: February 2, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

12Fredericson alleged in his exceptions that the settlement stipulation was coerced. This issue was not raised before the ALJ and is, therefore, not before us for review. See Commack Teachers Ass'n, 19 PERB ¶3011 (1986), confirmed sub nom. Margolin v. Newman, 130 AD2d 312, 20 PERB ¶7018 (3d Dep't 1987).
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

________________________________________________________

In the Matter of

KENJAEV JOULDACH,

Charging Party,

- and -

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 237, AFL-CIO,

Respondent,

- and -

NEW YORK CITY TECHNICAL COLLEGE OF
THE CITY UNIVERSITY OF NEW YORK,

Employer.

________________________________________________________

KENJAEV JOULDACH, pro se

JOEL I. SOSINSKY, ESQ., for Respondent

KATHERINE RAYMOND, ESQ., for Employer

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Kenjaev Jouidach to a decision of
the Administrative Law Judge (ALJ) dismissing his improper practice charge. The
original charge, sworn to April 23, 2000 and amended May 6, 2000, alleged, *inter alia,*
that the International Brotherhood of Teamsters, Local 237, AFL-CIO (IBT), violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by not responding to his request to challenge his discharge from employment with the New York City Technical College of the City University of New York (CUNY).

On September 20, 2000, the ALJ dismissed the charge when Jouldach failed to appear at the hearing scheduled for that date and/or communicate to the ALJ his excuse for not attending the hearing.

Section 212.4(b) of PERB's Rules of Procedure (Rules) provides:

The hearing will not be adjourned unless good and sufficient grounds are established by the requesting party, who shall file with the administrative law judge an original and three copies of the application, on notice to all other parties, setting forth the factual circumstances of the application and the previously ascertained position of the other parties to the application. The failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute ground for dismissal of the absent party’s pleading.

On July 18, 2000, the ALJ sent the notice of hearing for September 20, 2000 to all parties. The notice advised Jouldach that:

Failure to appear at the hearing may constitute ground for dismissal of the absent party's pleading. Any request for an adjournment must be made in writing, reasonably in advance, indicating the basis therefor and the position of each party thereon.

On September 20, 2000, counsel for IBT and for CUNY appeared for the hearing. The ALJ postponed the commencement of the hearing in order to give Jouldach an opportunity to appear or communicate with the ALJ. The ALJ attempted to
call Jouldach at the telephone number listed on his pleading but without success. After
waiting one hour past the scheduled hearing time, and not having received any
communication from Jouldach, the ALJ dismissed his charge.

Jouledach argues in his exceptions that he did not receive any notification of the
hearing date, nor was he contacted on the day of the hearing in spite of being home
that day.

A review of the record demonstrates that the notice of hearing was mailed to the
address Jouledach listed on his charge. His telephone number appeared on the charge
and the ALJ used that number to call him on the day of the hearing. Counsel for the
other parties received the same notice and appeared on the hearing date. The notice
sent to Jouledach was not returned by the post office.

We have previously held that an unexcused failure to appear at a scheduled
PERB proceeding constitutes a failure to prosecute a charge which is grounds for
dismissal.¹ Since Jouledach did not provide to the ALJ, and has not provided to us in his
exceptions, any evidence that would excuse his absence from the hearing, we deny
Jouledach's exceptions and affirm the decision of the ALJ.

¹See Smihtown Fire Dist., 28 PERB ¶3060 (1995); Board of Educ. of the City
Sch. Dist. of the City of New York, 16 PERB ¶3067 (1983).
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: February 2, 2001
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 Bellmore Union Free School District (District) to a decision of the Administrative Law Judge (ALJ) on an improper practice charge, as amended, filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Bellmore School Unit, Nassau Educational Local 865 (CSEA). CSEA alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, contrary to established practice, it paid a newly hired teaching assistant a higher salary than that provided for at the first step of the salary schedule set forth in the parties' collective bargaining agreement.
FACTS

The ALJ’s findings of fact are extensive and detailed. We, therefore, adopt them for the purposes of our decision and summarize them, as here relevant, as follows.

CSEA represents “all teaching assistants and non-teaching personnel in Employee’s Unit No. 11, including all non-teaching school nurses, school aides, part-time bus drivers, part-time bus matrons, and part-time cafeteria aides.”

The District posted a position opening, as well as advertised for applicants, for the position of teaching assistant. The successful candidate was to be assigned to the technology program. Aside from the required certification as a teaching assistant (six college credits in the appropriate areas), the posted notice did not require any special technology courses, training or certification. Salary was to be in accordance with the CSEA contract.

On November 16, 1999, the District hired Marie Miccio to fill this position. Miccio was a new employee to the District. Richard Daddio, the District’s Assistant Superintendent for Business and Technology, testified that he hired Miccio at step three of the salary schedule in recognition of her prior teaching experience and her private sector experience in the area of technology.

Both CSEA and the District introduced evidence regarding the District’s hiring of teaching assistants since 1981. CSEA’s evidence pointed to other teaching assistants

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1/ Joint Exhibit 1, Collective Bargaining Agreement (July 1, 1996-June 30, 1999)

2/ Joint Exhibit 2, Position Opening
hired at step one, even with prior teaching experience. The District's evidence showed ten employees hired at a higher step since 1981. Since 1997, only one teaching assistant was hired at a step higher than step one and that was because she had been employed by the District and would have been paid a lower salary than she was making as a school monitor, unless she was hired at step two.

Two other employees who were not teaching assistants were hired at a step higher than step one during that time frame. One, a school nurse, was a former District employee who had been excessed. She was rehired at the salary step she had previously received. The other employee, a maintainer, was given credit for prior experience.\(^3\)

After a review of all the testimony, documents and arguments, the ALJ found a violation.

**EXCEPTIONS**

The District excepted to the ALJ's decision on the grounds that the ALJ erred in law and misinterpreted the facts in reaching her decision. The District argues that the ALJ erred by finding that, because the management rights clause does not address the issue of salary, the District violated §209-a.1(d). Secondly, the District argues that the teaching assistant's position in question was a new position and, therefore, the District is entitled to establish a starting salary. Thirdly, the District argues that the ALJ erred in

\(^3\)Seven employees hired between 1981 and 1997 were hired at a step higher than step one. None of them were teaching assistants. Two were former District employees who were placed on the same step they had held previously.
finding that CSEA demonstrated the existence of a past practice of hiring all teaching assistants at step one of the salary schedule. Next, the District argues that the ALJ erred in rejecting the District's position that the past practice should be evaluated on a unit-wide basis. Lastly, the District contends that the ALJ erred in rejecting the District's argument in equity, i.e. it would be inequitable to find for CSEA because it would have a serious and deleterious impact on the District's ability to hire qualified individuals.

**DISCUSSION**

The charge before us alleges that the District violated §209-a.1(d) of the Act by refusing to negotiate in good faith with CSEA by hiring a teaching assistant at a starting salary step higher than the first salary step contained in the collective bargaining agreement contrary to established practice.

The ALJ found that the District's change in its past practice of hiring teaching Assistants at the first step of the contractual salary schedule was a violation of the Act. However reluctantly, we are compelled to disagree and reverse the ALJ's decision and order.

It is undisputed that the parties' collective bargaining agreement does not specify a hiring rate or salary step for newly hired employees.4 The parties have each submitted evidence to support their respective positions that the District either did or did not have a past practice of hiring new employees at the first step of the salary schedule contained in the collective bargaining agreement.

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4The District raised the issue that the management rights clause (Article XVIII) of the parties' contract provided it with the defense of waiver or duty satisfaction.
It is axiomatic that wages and salaries, or starting salaries of titles in the bargaining unit for that matter, are the most basic of terms and conditions of employment and, therefore mandatory subjects of negotiation.\textsuperscript{5} The change in a practice involving wages and salaries, without negotiations, would give rise to a failure to bargain charge. Such a failure to bargain charge can be defended by proof that either: (1) the parties have satisfied their statutory obligation to bargain over the at-issue subject,\textsuperscript{6} or (2) the charging party has waived its' right to bargain over the subject.\textsuperscript{7}

Indeed, the District first argues that its bargaining obligation has been satisfied as evidenced by the management rights clause of the collective bargaining agreement. We disagree. As the ALJ correctly noted, Article XVIII cannot reasonably be interpreted as dealing with the issue before us.\textsuperscript{8} The right to make hiring decisions and to deploy personnel are generally considered management prerogatives and are separate and distinct issues from salary, wages or starting salaries, and, therefore, cannot serve as a

\begin{footnotesize}

\textsuperscript{6}County of Nassau, 31 PERB ¶3074 (1998).


\textsuperscript{8}The language of the management rights clause deals with the Districts ability to “hire and assign personnel.”
\end{footnotesize}
basis for a waiver or duty satisfaction defense.\footnote{9} We have previously found that a broad, nonspecific management rights clause did not support a contractual waiver defense.\footnote{10} The management rights clause asserted here is such a broad, nonspecific clause. The District’s first exception is, therefore, rejected.

The District next argues that since it had created a new position, “Teaching Assistant – Technology”, it was entitled to set the salary for the position regardless of any salary schedule contained in the contract. The record does not support the District’s contention. The announcement of the position at issue describes it as “Teaching Assistant” (a position that is within the CSEA bargaining unit) and the qualifications required were not changed from prior announcements for teaching assistant vacancies. If, as the District argues, it was difficult to fill the position at the salary level indicated for teaching assistants, other lawful procedures could have been followed to have the position upgraded.\footnote{11} The argument of necessity, to the extent that it can be deemed a separate District argument, is rejected for the same reason.

\footnote{9} See Board of Educ. of the City Sch. Dist. of the City of New York, 22 PERB ¶3011 (1989); Churchville-Chili Cent. Sch. Dist., 17 PERB ¶3055 (1984).

\footnote{10} Onondaga-Madison BOCES, 13 PERB ¶3015 (1980), confirmed, 82 AD2d 691, 14 PERB ¶7025 (3d Dep’t 1981).

\footnote{11} Compare County of Monroe, 29 PERB ¶3060 (1996), confirmed sub nom., CSEA v. PERB, 248 AD2d 882, 31 PERB ¶7007 (3d Dep’t 1998) and Rye City Sch. Dist., 33 PERB ¶3053 (2000), where the District employed teacher assistants assigned as computer laboratory assistants. These computer laboratory assistants were represented by CSEA. The District, following civil service procedures, reclassified the computer laboratory assistants to computer aide. This enabled the District to place the computer aide into the appropriate bargaining unit at the appropriate salary scale.
Finally, the District argues that CSEA failed to meet its burden of proof to establish a past District practice of hiring new employees at the first step of the salary scale when the history of unit-wide hiring is considered. CSEA, in turn, argues that it did meet its burden, contending that only the hiring practices concerning teaching assistants is relevant. The ALJ rejected the District's argument and agreed with CSEA that the past practice test is title specific. We disagree.

A past practice must be unequivocal and have been in existence for a significant period of time such that the employees in the unit could reasonably expect the practice to continue without change.\(^{12}\) A past practice will generally be viewed as a practice that affects the unit as a whole. While CSEA argues that the District's hiring practice as relevant to this case is title-specific, there is no evidence in the record to compel us to take such a circumscribed view.\(^{13}\) Since this is an issue of unit-wide concern, we find, in the absence of evidence to the contrary, that the test as to whether the District had established a practice as to this term should be tested on a unit-wide basis.

The ALJ correctly stated the elements of proof necessary to establish the existence of a practice which the employer cannot unilaterally change. However, we take this opportunity to order them differently. The first test is whether the charge

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\(^{13}\) See County of Essex, 31 PERB ¶3026 (1998).
concerns a mandatory subject. If not, our analysis need go no further as the employer would not then be required to bargain and no charge could be sustained.

Here, we are dealing with a mandatory subject so our analysis must continue. We, therefore, must test whether the charging party has demonstrated an unequivocal practice that continued uninterruptedly for a significant period of time, such that the employees could reasonably expect the practice to continue unchanged. The District asserts, and CSEA does not dispute, that out of sixty-two new hires, the District hired seven individuals in titles in this bargaining unit since 1986 at salary steps other than the first step. CSEA would have us limit our consideration to the District's twelve-year history in hiring teaching assistants. We cannot say that either view of the District's history would establish an unequivocal, clear and unambiguous practice that new employees are always placed on the first step of the salary schedule. At best, the District's practice with respect to new-hires is susceptible to two equally reasonable and diametrically opposed conclusions: one supporting a step-one hiring practice and the other not. Therefore, CSEA must be considered to have failed in meeting its burden of proof.

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16 County of Nassau, supra note 12.
17 County of Essex, supra note 13.
Nor do we feel that we can discount those individuals hired into bargaining unit positions for the first time with other experience with the District. There is no contract basis for hiring anyone with District or non-District experience at any particular salary step. CSEA cannot, on the one hand, argue against Miccio's hiring on a higher step despite her prior experience in another District and, on the other, argue that they should not be penalized for allowing others to be hired above step one based on their experience in the District. To do so would be to create an artificial distinction. It would allow the District to engage in direct dealing with new hires with prior District experience but not with other new hires.

At the outset of this discussion, we noted our reluctance to reach the conclusion we feel the law compels us to reach. The issue of starting salary is a fundamental one that the parties should address through collective negotiations. That an employer could choose to hire new employees at different salary steps without negotiated standards violates the spirit, if not the letter, of the Act. Had this case come to us as a failure to bargain upon demand, a different result would likely have been reached.\(^\text{19}\) It is, therefore, our hope and expectation that the parties will deal with this issue through collective negotiations in the immediate future.

Based on the foregoing, we grant the District's exceptions and reverse the decision of the ALJ.

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\(^{19}\)See City of Syracuse, supra note 14.
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: February 2, 2001
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

POLICE BENEVOLENT ASSOCIATION OF
SOUTHAMPTON TOWN, INC.,

Charging Party,

- and -

TOWN OF SOUTHAMPTON,

Respondent.

ALLEN M. KRANZ, ESQ., for Charging Party

VINCENT TOOMEY, ESQ. and CHRISTINA A. GAETA, ESQ.,
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Southampton (Town) to a decision of an Administrative Law Judge (ALJ) finding that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused to calculate and pay a daily rate of pay to employees in a unit represented by the Police Benevolent Association of Southampton Town, Inc. (PBA), in accordance with the terms of an expired interest arbitration award which covered the period of January 1, 1995 through December 31, 1996. The improper practice charge was filed by the PBA.
FACTS

The Town and the PBA were parties to a collective bargaining agreement which expired on January 31, 1994. The parties attempted to negotiate a successor agreement, but their negotiations resulted in a declaration of impasse filed by the PBA. The parties then proceeded to interest arbitration. The arbitration panel made certain findings as to the items in dispute between the parties and also, at the parties’ request, agreed to incorporate into the award a list of items agreed to by the parties, including the following item, which is the subject of this improper practice charge:

Overtime: Effective upon the issuance of this Award employees [sic] hourly and daily rate of pay shall be calculated incorporating longevity pay, night differential pay and holiday pay earned the previous calendar year.

Upon receipt of the draft of the award, labor counsel for the Town advised the panel that the above language was in error, contending that the PBA's proposal upon which the overtime provision was based had sought only to change the calculations for the hourly rate of pay in accordance with the Fair Labor Standards Act (FLSA) and not the daily rate of pay. The PBA disagreed with the Town's assertion and the arbitration award was issued on October 21, 1996, including the above language, with the panel's chair noting that it was the language submitted by the parties in the document setting forth the items they had agreed upon and he was powerless to change the language.

The term of the arbitration award was January 1, 1995 through December 31, 1996.

The Town thereafter implemented the award as to the hourly rates of pay but not as to the calculation of the daily rate of pay. The Association filed a grievance dated
January 22, 1997, alleging that the Town had failed to comply with the stipulation incorporated into the parties' 1995-1996 interest arbitration award. The Town denied the grievance and the PBA thereafter filed a demand for arbitration on May 5, 1997. The parties then stipulated that the issue to be decided was whether the Town violated the interest arbitration award by failing to include amounts earned for night differential, longevity, and holiday pay in calculating the daily rate of pay for sick days and holidays.

The PBA also moved to confirm the interest arbitration award, which resulted in another stipulation between the parties that the interest arbitration award would be confirmed with the exception of the overtime clause, which would be interpreted by the grievance arbitrator. An order was entered in Supreme Court, Suffolk County, on December 3, 1997, granting the PBA's motion.

On June 16, 1997, the parties entered into a memorandum of understanding for a collective bargaining agreement for the term January 1, 1997 through December 31, 2000. The memorandum reflected the parties' agreement that the provisions of the memorandum and the uncontested portions of the prior collective bargaining agreement would be incorporated into a new collective bargaining agreement. The parties at the time did not finalize the collective bargaining agreement. Further, they did not discuss whether the decision of the arbitrator on the PBA's grievance would be incorporated into the new collective bargaining agreement.

The PBA's grievance was decided by the arbitrator on January 2, 1999. The arbitrator found that the Town had violated the interest arbitration award by failing to include amounts earned for night differential, longevity and holiday pay in calculating
the daily rate of pay for holidays but not for sick days. The award required the Town to
do the calculations and, within sixty days, to pay the PBA unit members at the correct
rate, retroactive to January 22, 1997. The Town did not pay the amount awarded. The
Association requested, by letter dated May 4, 1999, that the Town honor the award. By
letter dated May 14, 1999, the Town advised the PBA that it would not pay. The PBA	hen moved in Supreme Court, Suffolk County, to confirm the grievance arbitrator’s
award. The PBA’s motion was granted by Supreme Court on October 12, 1999. In
confirming the grievance arbitration award, the court noted that the award concerned
only the period of the interest arbitration award, January 1, 1995 through December 31,
1996. The effect of the award on the status quo was left by the Court to be determined
by PERB.

THE ALJ’S DECISION

Initially, the ALJ found that PERB had jurisdiction because the PBA was not
seeking to enforce the terms of either the interest arbitration or grievance arbitration
awards, allegations which would be beyond PERB’s jurisdiction.¹ The charge alleged
that the Town violated §209-a.1(d) of the Act by failing to continue the status quo, as
established by the terms of the interest arbitration award and defined in the grievance
arbitration award, an allegation over which the ALJ found this Board has jurisdiction.

¹Act, §205.5(d).
The ALJ also found that the charge was timely, having been filed within four months of when the PBA was advised by the Town that it would not calculate the daily rate as set forth in the interest arbitration award, as defined by the grievance arbitration award. Finally, the ALJ found that the Town had violated §209-a.1(d) of the Act by failing to continue the status quo of calculating the daily rate as required by the expired interest arbitration award. The ALJ relied upon the decision of another ALJ in Town of Blooming Grove (hereafter, Blooming Grove)\(^2\), where it was held that an employer violates §209-a.1(d) of the Act by failing to continue the terms of an expired interest arbitration award. The ALJ there determined that the status quo after the expiration of an arbitration award is defined by the terms of the expired award and the expired collective bargaining agreement, if the terms of the collective bargaining agreement have not been superseded by the award.

**EXCEPTIONS**

The Town excepts to the ALJ’s determination that PERB has jurisdiction over the charge, that the terms of an interest arbitration award can define the status quo and that the Town had an obligation to provide a benefit for which it was not liable during the term of the interest arbitration award.

**DISCUSSION**

The issue presented to us by this case is one of first impression. We are asked to decide whether the terms of an interest arbitration award can set the status quo

\(^2\)33 PERB ¶4581 (2000).
between the parties until a new collective bargaining agreement is negotiated. We find that it can.

The decision of the ALJ in Blooming Grove was well reasoned and we adopt the rationale and conclusions therein. Briefly, the ALJ relied on an early Board decision in Massapequa Union Free School District, which found that after a legislative hearing resulting in a legislative imposition, the legislative imposition's terms constituted the status quo which an employer is obligated to continue until the parties negotiate a new agreement. The ALJ in Blooming Grove determined that the same rationale should apply to interest arbitration awards. The ALJ relied upon our decisions in City of Kingston and City of Buffalo for the rationale that an employee organization may rely on the protections of §209-a.1(e) to continue the terms of an expired agreement when no new agreement has been reached or may participate in the impasse procedures in §209 of the Act to resolve the collective bargaining impasse. Having chosen to participate in the impasse procedures, an employee organization may not seek the continuation of the terms of an expired collective bargaining agreement that have been superseded by the interest arbitration award. While noting that legislative imposition and interest arbitration are different procedures, the ALJ reasoned that both result in the resolution of an impasse in negotiations and both are part of the statutory scheme.

8PERB ¶3022 (1975).

4See Triborough Bridge and Tunnel Auth., 5 PERB ¶3037 (1972).

518 PERB ¶3036 (1985).

619 PERB ¶3023 (1986).
While the legislative determination is imposed by the public employer's legislative body and the interest arbitration award is determined by a three-member arbitration panel, only one of whom is a representative of the public employer, both procedures take into account the public employer's financial ability to pay.

The Act intended to bring about harmonious and cooperative relations between public employers and employee organizations, by effecting stability in the employment relationship and finality in bargaining. As the ALJ in *Blooming Grove* noted:

> Reversion to the expired contract's terms at the expiration of an award, the terms of which had replaced the contractual terms, is inconsistent with this policy: it would institute the *status quo ante*, not the *status quo*; penalize the unions for obtaining impasse resolution and thereby undermine the Act's intended bargaining finality...\(^7\)

We have long held that terms and conditions of employment, whether contained in an expired collective bargaining agreement or existing as a result of a past practice between the parties, must be continued until a new agreement is negotiated.\(^8\)

Having determined that the *status quo* may be defined by the terms of an interest arbitration award leads us to the second question raised by this case: what is the *status quo* with respect to the daily rate of pay?

We find that the *status quo* is set forth in the terms of the interest arbitration award, as construed by the grievance arbitration award and confirmed by Supreme Court, Suffolk County. The interest arbitration panel, the grievance arbitrator and the

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\(^7\) *Supra* note 2, at 4711.

\(^8\) See, *Triborough Bridge and Tunnel Auth.*, *supra* note 4.
court have all determined that the parties agreed to recalculate hourly overtime pay and
daily holiday pay by incorporating into base pay amounts earned for night differential,
longevity and holiday pay earned the previous calendar year. The interest arbitration
award was for the period of January 1, 1995 through December 31, 1996. It defined the
terms and conditions of employment between the parties unless and until the terms are
varied by a subsequent collective bargaining agreement or interest arbitration award.
That it took until October 12, 1999 for the at-issue terms of the interest arbitration award
to be given definition does not alter the status quo. Neither does the fact that the Town
has not complied with the terms of the interest arbitration award.

The Town argues that the PBA must prove that a term and condition of
employment actually existed before it can prove a violation of §209-a.1(d) of the Act. It
is the Town’s position that the obligation to calculate the daily rate using the
components contained in the interest arbitration award never existed because the
award expired effective December 31, 1996, well before the grievance arbitrator’s
decision finding that the Town was violating the interest arbitration award by failing to
include amounts earned for night differential, longevity and holiday pay in calculating
the daily rate. We disagree. The Town’s failure to comply with an interest arbitration
award for over four years does not provide a basis for our finding that the status quo is
noncompliance with the terms of the interest arbitration award. To do so would encourage parties to ignore the terms of an interest arbitration award. While the Town
may have had no obligation to comply with the disputed terms of the interest arbitration
award while the grievance as to the terms’ meaning was pending, once the grievance
arbitrator issued his award and it was confirmed by Supreme Court, the Town's obligation was fixed until such time as the parties negotiate a collective bargaining agreement which varies the terms of the interest arbitration award or another interest arbitration award is issued.

We further reject the Town's argument that requiring it to comply with the terms of the interest arbitration award extends the award beyond the two-year limit set by the Legislature. We are not extending the award, we are simply finding that the terms and conditions of employment set forth in the award define the status quo until the parties negotiate a new agreement. Upon the negotiation of a new collective bargaining agreement, to the extent the agreement changes the terms and conditions of employment set forth in the award, the collective bargaining agreement will set the status quo.

We, therefore, find that the Town violated §209-a.1(d) of the Act by failing to continue the status quo, as set forth in the 1995-1996 interest arbitration award and defined by the 1999 grievance arbitration award, in the calculation of the daily rate by including amounts earned for night differential, longevity and holiday pay.

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

IT IS, THEREFORE, ORDERED that the Town of Southampton

1. Cease and desist from failing to include the amounts earned for night differential, longevity and holiday pay in calculating the daily rate of pay for holidays,
2. Make employees in the unit represented by the PBA whole for any monetary loss sustained as a result of the failure of the Town to make payments in accordance with the method of calculation set forth in paragraph 1, since December 31, 1996, with interest at the maximum legal rate.

3. Sign and post the attached notice at all locations normally used to communicate with unit employees.

DATED: February 2, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Town of Southampton (Town) in the unit represented by the Police Benevolent Association of Southampton Town, Inc. (PBA) that the Town will forthwith:

1. Include the amounts earned for night differential, longevity and holiday pay in calculating the daily rate of pay for holidays.

2. Make employees in the unit represented by the PBA whole for any monetary loss sustained as a result of the failure of the Town to make payments in accordance with the method of calculation set forth in paragraph 1, since December 31, 1996, with interest at the maximum legal rate.

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

TOWN OF SOUTHAMPTON

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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 ON MOTION AND ORDER

The charging party, Martin Freedman, has moved this Board to reconsider our decision and order previously issued on January 24, 2000. The respondent has opposed the motion.

133 PERB ¶3004 (2000).
Having reviewed the moving papers, we determine that there is neither such newly discovered material or overlooked propositions of law to justify reconsideration of our Decision and Order, issued over one year ago, on January 24, 2000.

ACCORDINGLY, the motion for reconsideration is denied.²

DATED: February 2, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that Teamsters, Local 693, 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 MEOs and HEOs.
Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters, Local 693. 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: February 2, 2001
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
TEAMSTERS LOCAL 264, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Petitioner,

-and-

NIAGARA FRONTIER TRANSPORTATION
AUTHORITY,
Employer.

CASE NO. C-5039

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 Teamsters Local 264, International Brotherhood
of Teamsters, 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 and regular part-time Dispatchers/Reservationists, Relief Dispatchers/Reservationist and Dispatchers/Schedulers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 264, International Brotherhood of Teamsters. 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: February 2, 2001
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

ICHABOD CRANE REGISTERED NURSES ASSOCIATION,

Petitioner,

-and-

ICHABOD CRANE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, ICHABOD CRANE
CENTRAL SCHOOL DISTRICT CSEA UNIT,

Intervenor.

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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 Ichabod Crane Registered Nurses
Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time registered nurses.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Ichabod Crane Registered Nurses 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: February 2, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member