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State of New York Public Employment Relations Board Decisions from May 1, 2001

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from May 1, 2001

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This matter comes to us on exceptions filed by Serban P. Ruse to an Administrative Law Judge’s (ALJ) determination dismissing an improper practice charge alleging, as amended, that the New York City Transit Authority (NYCTA) and the Transit Workers Union, Local 100 (TWU) violated, respectively, §§209-a.1(a) and (c) and §209-a.2(c) of the Public Employees’ Fair Employment Act (Act) when NYCTA terminated his employment and TWU refused to provide him with representation to defend himself or to respond to his communications.
Exceptions

Ruse excepted on the grounds that the determination was contrary to the testimony and the evidence presented. He also excepted on the ground that, since the determination was made at the close of his case, further evidence and testimony was excluded.¹

Facts

A hearing took place on November 21, 2000, at which time Ruse presented his direct case. At the conclusion of his direct case, NYCTA and TWU moved to dismiss the improper practice charges. At that juncture, the ALJ closed the hearing and provided the parties with the opportunity to file briefs addressed to the motion. The ALJ rendered a decision on March 1, 2001, dismissing the charges.

We will confine our analysis to the salient facts relevant to our resolution of the issues. A detailed description of the facts is set forth in the ALJ’s decision.

Discussion

In deciding the motion to dismiss, the ALJ correctly applied the standard we enunciated in County of Nassau (Police Dep’t),² that the ALJ “must assume the truth of all of the charging party’s evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts.”

¹Ruse fails, however, to specifically cite the testimony to which these exceptions refer. Our Rules of Procedure, §213.2(b)(1) through (4) require that the issues to be reviewed be set forth specifically and designate by page citation the portions of the record relied upon.

Ruse had alleged that NYCTA had violated §§209-a.1(a) and (c) of the Act. After reviewing the record, and giving Ruse every favorable inference from the facts, we concur with the ALJ that Ruse failed to establish a prima facie case. He failed to establish that he was engaged in a protected activity. His only link to this element was testimony that he was asked by an unknown union representative to sign a petition to amend disciplinary procedures. In addition, he failed to establish the second element, that NYCTA had knowledge of this protected activity and, lastly, that it acted because of it.

Ruse also charged that the TWU breached its duty of fair representation by failing to assist him in his efforts to regain his position with the NYCTA.

Upon our review of the record, we find that Ruse failed to make a prima facie showing of arbitrary, discriminatory or bad faith conduct on the part of TWU. The record is replete with correspondence from the TWU to Ruse evidencing their communications with him. Furthermore, as the TWU pointed out in its brief on the motion to dismiss, the parties’ collective bargaining agreement excluded from grievance arbitration the termination of employment of a probationary employee. We have consistently held that we would not substitute our judgment for that of a union’s regarding the filing and

3See City of Salamanca, 18 PERB ¶3012, at 3027 (1985); see also State of New York (SUNY-Oswego), 34 PERB ¶____ (2001), decided by us today, for an explanation of the burden of persuasion in a charge alleging a violation of §§209-a.1(a) and (c) of the Act.

4See United Fed’n of Teachers (Ayazi), 32 PERB ¶3069 (1999); CSEA, Local 1000, AFSCME (Heffelfinger); 32 PERB ¶3044 (1999); Public Employees Fed’n, AFL-CIO and State of New York (Dep’t of Health), 29 PERB ¶3027 (1996); CSEA v. PERB and Diaz, 132 AD2d 430, 20 PERB ¶7024 (3d Dep’t 1987), affirmed on other grounds, 73 NY2d 796, 21 PERB ¶7017 (1988).
prosecution of grievances, for a union is given a wide range of reasonableness in this regard.  

For the reasons set forth above, we deny Ruse's exceptions and we affirm the decision of the ALJ.

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

DATED: May 1, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

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5See Public Employees Fed'n, supra note 4; see also District Council 37, AFSCME (Gonzalez), 28 PERB ¶3062 (1995).
This matter comes to us on an exception filed by the State of New York (State University of New York - Oswego) (State) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) which found that the State violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it issued counseling memoranda to Daniel Hoefer in retaliation for his having engaged in activities protected by the Act.

**EXCEPTION**

In its exception, the State does not challenge the Assistant Director's findings of fact. Instead, the exception relates solely to the Assistant Director's interpretation of
the law, as applied to the legitimate business reasons defense, and whether the State waived its right to assert such defense because it was not set forth as an affirmative defense in the State’s answer.

FACTS

In view of the limited scope of the State’s exception, the factual findings made by the Assistant Director are adopted in full and will not be repeated here.¹

DISCUSSION

Based on our review of the record as it relates to the State’s exception, and our consideration of the parties’ arguments, we grant the State’s exception and so modify the Assistant Director’s decision to reflect that the legitimate business reasons defense need not be raised as an affirmative defense for the reasons that follow.

The State in its exception raises an issue which, heretofore, we have not had to decide. Our Rules of Procedure (Rules) merely state that the contents of an answer shall include a specific admission, denial or explanation of each of the charging party’s allegations. In addition, the answer shall include a specific, detailed statement of any affirmative defense.² Notably, §204.3(c)(2) does not list the specific affirmative defenses to which it refers, except the timeliness defense when the alleged violation has occurred more than four months prior to the filing of the charge. By contrast, the Civil Practice Law and Rules of New York (CPLR) offers two alternative definitions of an affirmative defense, as well as a list of the most common affirmative defenses.³ We

¹See 34 PERB ¶4509 (2001).
²Rules of Procedure, §§204.3(c)(1) and (2).
³CPLR §3018 (b).
have adopted these CPLR definitions through our decision in New York City Transit Authority. Thus, we have defined an affirmative defense as "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading . . . ."5

We must consider the State's exception in light of CSEA's charge. CSEA alleged that the State's actions, i.e. counseling, interfered with and discriminated against Hoefer in furtherance of a protected activity [co-chair of the Health and Safety Committee] and, that "but for" this protected activity, Hoefer would not have been counseled. The State's answer denied the material allegations of the charge, in effect, denying that its actions were improperly motivated, and set forth certain affirmative defenses. The State did not, however, allege as an affirmative defense "legitimate business reasons" for its counseling of Hoefer.

Our improper practice jurisdiction began on September 1, 1969, with the addition of §209-a.1 to the Act. Shortly thereafter, in July 1970, we decided what was to become the seminal case involving interference and discrimination charges.6 In that case, the City of Albany merely interposed an answer denying the material allegations and set forth two affirmative defenses unrelated to legitimate business reasons. Notwithstanding the absence of such a defense, the hearing officer relied on a decision

420 PERB ¶3037 (1987).

5Id. at 3066, wherein the Board held that contract waiver is an affirmative defense and respondent's failure to raise the defense [in its answer] barred it from doing so at all.

6City of Albany, 3 PERB ¶3096 (1970), confirmed as modified, 36 AD2d 348, 4 PERB ¶7008 (3rd Dep't 1971), affirmed as modified, 29 NY2d 433, 5 PERB ¶7000 (1972), on remand, 5 PERB ¶3002 (1972).
of the United State Supreme Court which held that an employer may take action\(^7\) "for any reason other than union activity"\(^8\) or, as the Circuit Court of Appeals described it, "absent unlawful motivation an employer may act upon a good reason, poor reason or no reason at all."\(^9\)

Our body of case law in this area has evolved since *City of Albany*; however, certain principles have remained constant. The burden of persuasion lies with the charging party to demonstrate by a preponderance of the evidence that the public employer acted with improper motivation.\(^10\)

We have consistently held that in order to establish such improper motivation, a charging party must prove that he had been engaged in protected activities, and that the respondent had knowledge of and acted because of those activities.\(^11\) If the charging party proves a *prima facie* case of improper motivation, the burden of going

\(^7\)*City of Albany*, 3 PERB ¶4507, at 4534 (1970).


\(^9\)*NLRB v. Condenser Corp. of America*, 10 LRRM 483, at 489 (1942).


forward shifts to the respondent to establish that its actions were motivated by legitimate business reasons.\textsuperscript{12, 13}

Thus, "where the respondent meets its burden of producing evidence of a legitimate business reason for its action, a violation can only be found if the charging party has proven, by a preponderance of all the evidence that the respondent would not have taken the action 'but for' the protected activity."\textsuperscript{14} It has been our position, therefore, that the ultimate burden of persuasion always remains with the charging party.

Until the instant decision, the introduction of evidence which would meet the respondent's burden of going forward in interference and discrimination cases has never been dependent upon legitimate business reasons being pled as an affirmative defense.\textsuperscript{15} As we noted in City of New Rochelle,\textsuperscript{16}

"we have had from clientele . . . proposals to amend the Rules to require a respondent to affirmatively plead the nondiscriminatory reasons for the actions which are the subject of an improper practice charge. We have not adopted this pleading requirement out of a concern that it might compromise settlement efforts and distort the respective burdens of proof. It is also our opinion that a charging party's opportunity to move for particularization of the answer affords adequate protection against surprise and ensures that any required hearing proceeds efficiently."

\textsuperscript{12}City of Salamanca, supra, note 11.

\textsuperscript{13}David D. Siegel, New York Practice, §223 Affirmative Defenses. Under a denial, a [respondent] can disprove anything the [charging party] is required to prove.

\textsuperscript{14}Board of Educ. of the City Sch. Dist. of the City of New York, supra note 10, at 4663.

\textsuperscript{15}Board of Educ. of the City Sch. Dist. of the City of New York, supra, note 10.

\textsuperscript{16}27 PERB ¶3062, at 3144, n. 1 (1994).
The Assistant Director erred in his decision when he determined that the State had waived the defense of legitimate business reasons because it was not specifically set forth as an affirmative defense in its answer.

As no exceptions were taken to the Assistant Director's findings of fact or his conclusions of law, except as heretofore mentioned, we are constrained by our Rules from reviewing those facts or conclusions. We hereby grant the State’s limited exception to that portion of the Assistant Director’s decision that identifies legitimate business reasons as an affirmative defense and, to his conclusion, that the State waived this defense because it was not raised in its answer. The Assistant Director's decision is affirmed in all other respects.

IT IS, THEREFORE, ORDERED that the State:

1. Cease and desist from issuing counseling memoranda to Hoefer because he contacted the local newspaper to rectify safety problems for unit employees occasioned by the location of its newspaper boxes.

2. Forthwith rescind Santiago's March 24 and April 10, 2000 counseling memoranda to Hoefer and expunge from its files all references to them or to the relocation of the newspaper box incident.

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17 Rules of Procedure, §213.6; see also Chenango Forks Cent. Sch. Dist., 29 PERB ¶3058 (1996); City of Dunkirk, 23 PERB ¶3025 (1990).

18 We need not remand the matter to take evidence as to the State's alleged legitimate business purposes. The Assistant Director accepted the State's evidence into the record and made an alternative finding based upon that evidence.
3. Sign and post the attached notice at all locations normally used to communicate with employees at Oswego in the unit which includes Hoefer's position.

DATED: May 1, 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 State of New York (State University of New York - Oswego) (State) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, SUNY Oswego Local 611 (CSEA) that the State will:

1. Not issue counseling memoranda to Hoefer because he contacted the local newspaper to rectify safety problems for unit employees occasioned by the location of its newspaper boxes.

2. Forthwith rescind Marta Santiago's March 24 and April 10, 2000 counseling memoranda to Hoefer and expunge from its files all references to them or to the relocation of the newspaper box incident.

Dated

By

(Representative) (Title)

STATE OF NEW YORK (SUNY-OSWEGO)

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

SCHUYLER-CHEMUNG-TIOGA EDUCATIONAL ASSOCIATION,

Charging Party,

- and -

SCHUYLER-CHEMUNG-TIOGA BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Respondent.

JOHN SCHAMEL, for Charging Party
JILLIAN R. LUTHER, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Schuyler-Chemung-Tioga Educational Association (Association) to a decision of an Administrative Law Judge (ALJ) conditionally dismissing its improper practice charge which, as amended, alleged that the Schuyler-Chemung-Tioga Board of Cooperative Educational Services (BOCES) had violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it refused to provide information requested by the Association in its investigation of a potential grievance.

The ALJ noted that the failure to provide to an employee organization information that it is entitled to and which is necessary for it to administer a collective
bargaining agreement, including the processing of grievances, violates both §209-a.1(a) and §209-a.1(d) of the Act.\(^1\) However, the ALJ found that the parties had entered into a collective bargaining agreement that had a provision "containing terms that mirror the rights and obligations under the Act" and, therefore, determined that the dispute was properly deferred to the parties' contractual grievance procedure, which ends in binding arbitration. He conditionally dismissed the charge, subject to a motion to renew under the criteria set forth in *New York City Transit Authority (Bordansky)*.\(^2\)

The Association excepts to the ALJ's decision on the law and the BOCES supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the ALJ, and remand the matter to him for further proceedings consistent with our decision herein.

**FACTS**

The parties entered into a stipulation of fact upon which the ALJ based his decision. As here relevant, the Association was investigating a potential grievance regarding the filling of two vacant positions. On March 28 and May 2, 2000, the Association president requested that BOCES provide certain information relevant to its investigation. On April 7 and June 15, 2000, respectively, BOCES denied the requests for information, stating that the BOCES did not release information pertaining to the

\(^1\)*See Greenburgh No. 11 Union Free Sch. Dist.*, 33 PERB ¶3059 (2000).

\(^2\)4 PERB ¶3031 (1971).
interview process to fill vacancies. On June 23, 2000, the Association filed its grievance alleging that certain contractual provisions regarding the posting and filling of vacant positions had been violated by BOCES. On June 23, 2000, the Association filed the instant charge.\footnote{As of the date of the ALJ’s decision, the Association had not received the requested information.}

Section 33.2(d) of the parties’ collective bargaining agreement provides that:

There shall be made available to appropriate Association representatives all relevant materials, documents, communications and records concerning a grievance, unless same are confidential, such as personnel pre-hire information, psychological reports, etc. While such material may be copied by the Association, the furnishing of copies thereof will be solely discretionary with the Superintendent.

**DISCUSSION**

A refusal to provide information is typically the subject of a charge alleging a refusal to negotiate under § 209-a.1(d) of the Act. In *City of Rochester*,\footnote{29 PERB ¶3070, at 3165 (1996).} we held that an employer’s improper refusal of a demand for information also violates §209-a.1(a) of the Act.

The denial of a reasonable demand for information which is relevant to collective negotiations, grievance adjustment, the administration of a collective bargaining agreement, or the resolution of impasses arising in the course of collective negotiations impairs the union’s ability to effectively represent the interests of the employees in its unit. By rendering the union less able to represent the interests of its unit employees, an employer which improperly refuses a
demand for information interferes per se with the statutory rights of its employees, in violation of § 209-a.1(a) of the Act.

In a recent decision,\(^5\) we reiterated our recognition "that the right of public employees to be represented in grievances is one of the most important afforded them by the Act and that the withholding of relevant grievance information necessarily interferes with that right." However, an employee organization's right to necessary information is not unfettered. We long ago found that the obligation of a public employer to provide information to an employee organization is circumscribed by rules of reasonableness, including the burden on the employer, the availability of the information elsewhere, the necessity of the information and its relevancy and materiality to the grievance being investigated or processed.\(^6\)

Here, the Association alleges that the refusal of BOCES to provide it with the requested information violates both §§209-a.1(a) and (d) of the Act. In its answer to the charge, BOCES alleges that the language of §33.2(d) of its contract with the Association provides the Association with a procedure for obtaining the requested information. Because we do not have jurisdiction to enforce the terms of a collective

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\(^5\)Greenburgh No.11 Union Free Sch. Dist., supra note 1, at 3165.

\(^6\)Board of Educ. of the City Sch. Dist. of the City of Albany, 6 PERB ¶3012 (1973).
bargaining agreement, BOCES argues that PERB does not have jurisdiction over this charge.

In making our jurisdictional determination, the Association's two allegations must be viewed separately. As we stated in City of Albany,

Although we have jurisdiction over the subparagraph (a) and (c) allegations, we do not by virtue of that fact automatically acquire jurisdiction over the subparagraph (d) allegation. The jurisdictional inquiry under § 205.5(d) of the Act is issue oriented. Each allegation in the charge must be considered separately in determining whether we have been empowered to consider the merits of the particular allegation.

We turn first to the alleged violation of §209-a.1(a) of the Act. After determining that PERB has exclusive jurisdiction over the alleged (a) violation, the ALJ deferred a

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7 Act, §205.5(d).

8 "A jurisdictional issue is properly raised at any stage of a proceeding (footnote omitted), including by the board on exceptions, even if the issue has not been raised by a party or the administrative law judge...." Jerome Lefkowitz, et al., Public Sector Labor and Employment Law 651 (2d ed. 1988).

925 PERB ¶3006, at 3020 (1992).

10 The ALJ found that an analysis of the language of §33.2(d) of the parties' contract established a waiver of the Association's statutory right to receive information. We do not consider the waiver arguments raised by the ALJ. BOCES' answer alleges only that PERB does not have jurisdiction over the charge by virtue of the language in §33.2(d) of the parties' collective bargaining agreement. "Waiver by contract and lack of jurisdiction are fundamentally different concepts. Lack of jurisdiction is not an affirmative defense and it need not be raised in an answer because jurisdiction relates to our power to hear and decide a case. Waiver, however, affects only the disposition on the merits of the particular improper practice charge or an issue arising thereunder. Waiver is an affirmative defense which must be raised in the answer if the defense is to be properly considered." Clarkstown Cent. Sch. Dist., 24 PERB ¶3047, at 3096-97 (1991) and cases cited therein.
determination on the merits of the alleged violation of §209-a.1(a) of the Act based
upon his analysis of our decision in City of Cohoes (hereafter, Cohoes). We reverse
his decision in this regard.

Initially, we note that the language of §33.2(d) of the parties’ collective
bargaining agreement does not mirror the language of §209-a.1(a) of the Act. Section
33.2(d) provides that the Association will receive information concerning a grievance,
with limitations as to confidentiality. Our decisions interpreting §209-a.1(a) of the Act
have concluded that §209-a.1(a) is violated when a public employer improperly refuses
to provide an employee organization with information relevant and material to the
investigation or processing of a grievance. At best, the language of §33.2(d) of the
parties’ collective bargaining agreement provides the Association with rights similar to
those which we have determined flow from §209-a.1(a) of the Act.

The ALJ read our decision in Cohoes, which found that "if the subject proposed
for negotiation by employer or union otherwise embraces a term and condition of
employment, that the bargaining proposal duplicates in whole or part the language of a
statute is not, by itself, reason to treat the proposal as a nonmandatory subject of
negotiation," as support for his analysis that where the parties to a bargaining:

1131 PERB ¶3020 (1998), on remand in part, 32 PERB ¶4561, aff’d in part, rev’d
in part, 32 PERB ¶3046 (1999), confirmed sub nom. Uniform Firefighters of Cohoes,
Local 2562, IAFF v. Cuevas, 32 PERB ¶7026 (Sup. Ct. Albany County), aff’d, 276
AD2d 184, 33 PERB ¶7019 (3d Dep’t 2000), motion for leave to appeal denied,
__AD2d __, 34 PERB ¶7004 (3d Dep’t 2001), motion for leave to appeal pending.

12Id. at 3043.
relationship have negotiated an agreement containing terms that mirror the rights and obligations under the Act, merits deferral may be appropriate where the charge alleges a failure to abide by the same statutory rights. Our decision in Cohoes dealt only with the mandatory nature of a demand which sought to restate or reiterate statutory language. We there found that the reiteration of statutory rights alone was not a sufficient reason for finding a demand to be nonmandatory. We recognized that one of the reasons that had been given in support of a determination that such a demand was nonmandatory was that the demand was redundant. In rejecting that rationale in Cohoes, we stated, as here relevant, that "[a]s the reiteration of statutory language in a contract or award is the potential source of additional and different rights and remedies, bargaining demands with that purpose or effect can never be 'redundant'." (Emphasis added.)

Given our emphasis in Cohoes that the negotiation of language that reiterates or restates statutory language might well give parties additional rights, that decision can not be read as an indication that we are prepared to abandon our long-held position that we will not defer alleged violations of §209-a.1(a) of the Act, where the alleged violation of (a) is not purely derivative of the alleged (d) violation.

\[13\] Id.


\[15\] See County of Westchester, 30 PERB ¶3059 (1997).
Further, we are not inclined to follow the ALJ's rationale that to give effect to our decision in *Cohoes* we should find that if language in a collective bargaining agreement reiterates language in the Act, we will defer to the parties' contractual grievance procedure a determination that the contract and, thus, §209-a.1(a) of the Act has been violated. Indeed, the ALJ recognized that such a deferral may be inappropriate where the remedies available to an arbitrator cannot adequately effectuate the policies of the Act or where the factual allegations suggest that the alleged violation may be flagrant or egregious.

The litigation before PERB of an improper practice charge alleging a violation of §209-a.1(a) of the Act differs significantly from the arbitration of a grievance alleging the violation of a contractual provision that restates the provisions of that section of the Act. The standard of proof differs, the nature of the proceeding itself is different in the two forums and the arbitrator is limited to a determination only as to whether the contract has been violated.\(^{16}\) Even the courts have noted the unique nature of the litigation of an improper practice charge, the standards of proof necessary and the criteria which must be met if PERB is to defer to the decision of an arbitrator or hearing officer in a companion grievance or disciplinary hearing.\(^{17}\)

\(^{16}\)See *Addison Cent. Sch. Dist.*, 17 PERB ¶3076, at 3116 (1984). "Deferral is discretionary and is not usually applied when a violation of §209-a.1(a) is alleged.... The arbitrators remedied violations of the contract. We are remedying flagrant violations of §209-a.1(a), (d) and (e) of the law.

\(^{17}\)See *Civil Serv. Emp. Ass'n v. PERB*, 32 PERB ¶7027 (3d Dep't 1999); *City of Albany v. PERB*, 57 AD2d 374 (3d Dep't 1977). See also, *State of New York (Dep't of Mental Hygiene)*, 11 PERB ¶ 3084 (1978); *New York City Transit Auth. (Bordansky)*, *supra* note 2.
This is not to say that if the parties intend to have such a dispute heard by an arbitrator, they cannot negotiate an election of forums, in addition to reiterating or restating statutory rights in their collective bargaining agreements. We have found that parties may elect a different forum by a clear, unmistakable and unambiguous clause in their collective bargaining agreement that selects arbitration or a court proceeding to decide disputes that might also constitute an improper practice charge. Such clauses do not divest us of improper practice jurisdiction, as indeed, they cannot, but instead waive the parties' right to proceed before us.

For all these reasons, we hold that we will not defer an alleged violation of §209-a.1(a) of the Act simply because there is a provision in the parties' collective bargaining agreement that restates or reiterates the language of §209-a.1(a) or provides rights similar to those found by PERB to flow from §209-a.1(a) of the Act.

We now examine the §209-a.1(d) allegation. We first determine that we will not defer the alleged (d) violation under our jurisdictional deferral policy first articulated in Herkimer County BOCES. Where, as here, the (d) violation is inextricably intertwined with the alleged (a) violation, we do not defer a determination on the jurisdictional issues raised by contract language which touches upon the subject-matter of the charge.

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20 City of Albany, supra note 14.
Having determined that we will not defer the jurisdictional issues raised by the (d) allegation, we must now determine whether we have jurisdiction over the alleged (d) violation. We find that we do have jurisdiction over this allegation.\(^{21}\) Section 205.5(d) of the Act reserves to PERB jurisdiction over an alleged violation of an agreement that would "otherwise constitute an improper employer practice...." We have held in certain matters where there is contractual language related to the subject-matter of the charge, if there exists an independent, statutory right with respect to the subject-matter, we retain jurisdiction even if the respondent's action is also arguably in violation of the contract language.\(^{22}\)

Having determined that we have jurisdiction over the alleged §209-a.1(d) violation, we move to a consideration of whether we should defer a decision on the merits to the parties' contractual grievance procedure. Entirely apart from our jurisdictional deferral policy, we have had a policy of much longer duration under which consideration of the merits of certain charges within our jurisdiction is deferred when a contractual grievance has been filed under a grievance procedure ending in binding arbitration.\(^{23}\) However, where, as here, there are other alleged violations over which we

\(^{21}\)In his decision, the ALJ references two prior ALJ decisions, *Schuyler-Chemung-Tioga BOCES*, 15 PERB ¶4552 (1982) and *Schuyler-Chemung-Tioga BOCES*, 18 PERB ¶4606 (1985), where the parties' contractual language was identical to §33.2(d), as dismissing for lack of jurisdiction charges which alleged a violation of §209-a.1(d). The first ALJ's dismissal was jurisdictional, but the later ALJ decision found jurisdiction over the (d) allegation, then deferred a decision on the merits of that allegation. To the extent that these decisions are contrary to our holdings in this case, they may be distinguished on the basis of later Board decisions which are cited herein.

\(^{22}\)*City of Buffalo (Fire Dep't)*, 17 PERB ¶3090 (1984).

\(^{23}\)*State of New York (SUNY Health Science Center)*, 30 PERB ¶3019 (1997).
have exclusive jurisdiction, we have determined not to bifurcate the proceedings and have retained jurisdiction over all the allegations in the charge.\textsuperscript{24}

The ALJ, having deferred a determination on the merits of both the (a) and (d) allegations to the parties' contractual grievance procedure, did not decide either of those alleged violations. We find that it is appropriate, given the facts of this case, to remand the matter to the ALJ for a decision on the merits.

For the reasons set forth above, we reverse the decision of the ALJ and remand the matter to him for further action consistent with this decision. SO ORDERED.

DATED: May 1, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

\textsuperscript{24}\textit{Supra} note 14.
In the Matter of
UNITED FEDERATION OF TEACHERS,

Petitioner,

-and-

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

Employer.

STROOK & STROOK & LAVIN LLP (ALLEN M. KLINGER of counsel) and MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK of counsel), for Petitioner

JAMES F. HANLEY, for Employer

BOARD DECISION AND ORDER

The Board of Education of the City School District of the City of New York (District) has filed exceptions to rulings made by the Director of Conciliation (Director) in conjunction with impasse proceedings initiated by the United Federation of Teachers under §209.3 of the Public Employees' Fair Employment Act (Act) and Part 205 of our Rules of Procedure (Rules). The Federation has filed a response to the District's exceptions to the Director's determination that an impasse exists between the parties and the Director's appointment of a mediator.

The District alleges in its exceptions that the parties have not reached an impasse in their collective negotiations and that the Federation's declaration was, therefore, premature. The Federation responds that there has been little progress in
the parties' negotiations and that there remains a large rift separating the parties on major issues, including salary.¹

The Director reviewed the District's exceptions to the Federation's declaration of impasse and a response to the District's exceptions filed by the Federation. He thereafter met with the parties and then appointed a mediator on April 6, 2001.

We have for many years reviewed Director determinations involving the dispute resolution provisions of the Act and Rules.² Our right and power to review staff determinations is inherent in our delegation³ to those persons of the power to make them. Moreover, our review is necessary for there to be a final order which can be appealed judicially.⁴

Notwithstanding our ability to review determinations made by the Director, allegations that an impasse has been declared prematurely usually take the form of improper practice charges filed pursuant to §209-a.1(d) or §209-a.2(b) of the Act.⁵ We

¹The most recent collective bargaining agreement between the Federation and the District expired on November 15, 2000. We note that §209.1 of the Act provides that an impasse may be deemed to exist if the parties fail to achieve agreement at least one hundred twenty days prior to the end of the fiscal year of the public employer.

²Niagara Frontier Transp. Auth., 30 PERB ¶3009 (1997) (subsequent history omitted); County of Oneida and Oneida Co. Sheriff, 20 PERB ¶3044 (1987); Village of Southampton, 16 PERB ¶3049, aff'd 16 PERB ¶7026 (Sup. Ct. Albany County 1983).

³Act, §205.4(a) and §205.5(k).

⁴Russell v. PERB, 13 PERB ¶7015 (Sup. Ct. Albany County 1980).

have, however reviewed decisions of the Director in other matters involving the statutory dispute resolution procedures, such as determinations on petitions for compulsory interest arbitration.⁶

Here, after meeting several times over the space of seven months, the Federation declared impasse and requested that the Director appoint a mediator. The Director considered the written submissions of both parties and met with the parties before he concluded that an impasse existed and a mediator should be appointed.⁷

Having reviewed the facts and arguments submitted by the District and the Federation, we confirm the designation of a mediator by the Director in this matter. SO ORDERED.

DATED: May 1, 2001
Albany, New York

[Signatures]

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

⁶See, e.g., Yates Co. and Yates Co. Deputy Sheriff's Ass'n, 16 PERB ¶8001 (1982).

⁷There is here no dispute that PERB has the authority to determine the existence of an impasse in collective negotiations and to appoint a mediator. See City of Newburgh v. PERB, 97 AD2d 258 (3d Dep't 1983).
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 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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: Accountant, Assistant Supervisor of School Facilities and Operations, Assistant Supervisor of School Food Service I, Assistant Supervisor of School Food Service II, Personal Computer Specialist, Programmer, Programmer Supervisor, Senior Personal Computer Specialist, Senior Software Programmer, Supervisor of Accounts Payable, Chief Clerk, Assistant Supervisor Custodians, Assistant Supervisor Maintenance, Supervisor of Transportation, Planner of School Facilities, Project Coordinator/Construction, Purchasing Agent.

Excluded: Accounting Analyst, Assistant Superintendent (Operation Services), Assistant to the Director of Personnel, Chief Accountant, Director of Management Information Services, Director of Research and Evaluation, Employee Benefits Manager, Executive Assistant to the Board of Education, Executive Secretary to the Superintendent, Human Resources Manager, Secretary to the Superintendent of Schools, Senior Budget Analyst, Supervisor of School Facilities and Operations, Supervisor of School Food Service Programs.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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: May 1, 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 294,

Petitioner,

-and-

VILLAGE OF MENANDS,

Employer,

CASE NO. C-5064

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 Teamsters Local 294 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.
Certification - C-5064

Included: All full-time and regular part-time employees in the Water, Street and Sanitation departments.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. 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: May 1, 2001
Albany, New York

Michael R. Cuevas, Chairman
Marc A. Abbott, Member
John T. Mitchell, Member
In the Matter of

TEAMSTERS LOCAL UNION #693,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO,

Petitioner,

-and-

TOWN OF BINGHAMTON,

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 Teamsters Local Union #693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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: Heavy and light equipment operators.

Excluded: Highway superintendent, deputy highway superintendent, secretary to the highway superintendent and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local Union #693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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: May 1, 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 the International Union of Operating Engineers, Local 138 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 employees in the titles of Public Works Laborers, MEOs (highway) and MEOs (Sanitation).

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Union of Operating Engineers, Local 138. 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: May 1, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member