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State of New York Public Employment Relations Board Decisions from March 26, 2004

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from March 26, 2004

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TODD KILBY,

Petitioner,

-and-

CASE NO. C-5355

MONROE 2 - ORLEANS BOCES,

Employer,

-and-

THE ELEMENTARY SCIENCE PROGRAM
ASSOCIATION OF MONROE 2 - ORLEANS
BOCES, UAW LOCAL 1097, UNIT 6,

Intervenor.

TODD KILBY, for Petitioner
LINDA VAN COSKE, ESQ., for Employer
JOHN HUBER, for Intervenor

BOARD DECISION AND ORDER

On November 20, 2003, Todd Kilby (petitioner) filed a timely petition for
decertification of The Elementary Science Program Association of Monroe 2 - Orleans
BOCES, UAW Local 1097, Unit 6 (intervenor), the current negotiating representative for
employees in the following unit:
Included: All regular full-time and part-time Elementary Science Program Kit Processors and Stock Clerks/Couriers.

Excluded: All Supervisory, Managerial and Office Clerical Employees of the Elementary Science Program.

Upon consent of the parties, an on-site election was held on February 19, 2004. The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.

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

DATED: March 26, 2004, Albany, New York

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

1/ Of the 24 ballots cast, 4 were for representation and 20 against representation. There were no challenged ballots.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SYRACUSE TEACHERS ASSOCIATION,

Petitioner,

- and -

SYRACUSE CITY SCHOOL DISTRICT,

Employer,

- and -

SYRACUSE ASSOCIATION OF MANAGERS
AND SUPERVISORS, SAANYS,

Intervenor.

JAMES D. MATHEWS, for Petitioner

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.
(DAVID W. LARRISON of counsel), for Employer

LOUIS J. PATACK, ESQ., for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on exceptions by the Syracuse Teachers Association
(Association) to a decision of an Administrative Law Judge (ALJ) dismissing the
Association's petition for certification/decertification which sought to add the reclassified
title of Cook Manager to its bargaining unit of food service employees of the Syracuse
City School District (District) and to decertify the Syracuse Association of Managers and
Supervisors, SAANYS (SAANYS). The District had placed the reclassified title into the bargaining unit of managers and supervisors represented by SAANYS.

EXCEPTIONS

The Association excepts to the ALJ’s decision, arguing that the ALJ erred in finding that the reclassified title was encompassed within the scope of the SAANYS unit, that the ALJ applied the incorrect uniting standard, and that the ALJ erred in not permitting the Association to develop the record with regard to community of interest of the at-issue title with titles in its bargaining unit.

The District and SAANYS have filed responses in support of the ALJ’s decision.

Based upon our review of the record and our consideration of the parties’ arguments, we remand the case to the Director of Public Employment Practices and Representation (Director) for further processing.

FACTS

The facts are fully set forth in the ALJ’s decision\(^1\) and are repeated here only as necessary for our discussion of the exceptions.

The District’s agreement with the Association covering the period July 1, 2000 through June 30, 2003 recognized “all employees in Unit 7 (Food Service).”\(^2\) Prior to January 2002, the last time the title of Cook Manager was mentioned was in an addendum to the Association’s 1981 collective bargaining agreement with the District. Addendum 1 to the 1981 agreement recognized that, under certain circumstances, cooks assigned a school with a self-contained kitchen that provides services to that

\(^1\) 36 PERB ¶4017 (2003).

\(^2\) Joint Exhibit 7.
school only would be responsible for the supervision and management of the food
service operation of that school as a “Cook Manager,” under the general direction of the
School Lunch Manager.

The District’s subsequent agreements with the Association have omitted any
reference to the title of Cook Manager.

The civil service job descriptions jointly offered into evidence identify the titles of
Cook I, Cook II and Cook Manager. The title of Cook II first appeared in the January 1,
1992 SAANYS collective bargaining agreement with the District and has been included
in all of their successive agreements. The last agreement to include this title was July
1, 2000 to June 30, 2003.

On January 15, 2002, the County of Onondaga Civil Service Commission
reclassified, at the District’s request, the title of Cook II to the title of Cook Manager.
One of the District’s witnesses, Cindy Bonura, Food Service Director, testified that she
initiated the reclassification on behalf of the District because there was a need to reduce
the requisite number of years of food-service experience to qualify for the job. There
was no change in duties between the Cook II and Cook Manager titles. This was
confirmed by the Association’s witness, Andrew Pascale, who formerly held the title of
Cook II and is now holding the reclassified title of Cook Manager. Bonura further
testified that there are no supervisory or administrative differences in duties between
Cook II and Cook Manager.

The distinguishing feature among the title of Cook I, Cook II and Cook Manager
is supervision. The Cook I job description places responsibility for staff supervision,
inspections, testing and menu preparation in a higher-level cook or food service
The recognition clause of the SAANYS' 2000-2003 agreement with the District not only includes the title of Cook II, but also contains a requirement in Article 1.4 that "... when existing positions are reclassified pursuant to civil service law, the District will consult with [SAANYS] in determining whether the new or reclassified title should be included in the bargaining unit as defined above." The recognition clause of the Association's collective bargaining agreement omits any reference to the reclassification of existing positions.

On March 6, 2002, the Association filed a petition for certification/decertification with PERB. The petition alleged that:

[O]n or about February 12, 2002, the Petitioner was notified by the District that the newly-recreated title of Cook Manager has been placed in Unit #11 [SAANYS]... Petitioner seeks to remove the title of Cook-Manager from Unit #11 and place it in Unit #7.\(^3\)

At the hearing held on April 3, 2003, the Association stated to the ALJ that the dispute "focused" on the District's placement of the title of Cook Manager in the most appropriate bargaining unit. In response, the ALJ asked the petitioner whether the issue was one of fragmentation or placement of a new title. The petitioner acknowledged that the issue was placement of a new title.\(^4\)

\(^3\) ALJ Exhibit #1.

\(^4\) Transcript p. 23.
At the conclusion of the first day of hearing, the ALJ adjourned the proceedings in order to review the transcript. The ALJ advised the parties that, since it was a representation proceeding, he would determine whether a more detailed offer of proof would be required from the Association. On May 12, 2003, the ALJ requested that the parties submit offers of proof, in the form of affidavits, as to any additional evidence they would present if the investigation were to continue at a subsequent hearing date. After review of the additional affidavits, the ALJ determined that the record was sufficiently developed and rendered his decision.

DISCUSSION

Representation proceedings are fundamentally investigations conducted pursuant to §201.9 of our Rules of Procedure (Rules). The petition in the instant matter was filed by the Association as a certification/decertification petition and sought to remove the title of Cook Manager from the bargaining unit represented by SAANYS and include it in the Association’s bargaining unit.

At the hearing, however, the Association confirmed to the ALJ that the petition was not grounded in PERB’s fragmentation standards which generally require compelling evidence of the existence of a conflict of interest or inadequate representation of the title by its current bargaining agent. The Association’s theory of the case was that it should be decided using PERB’s unit placement standards, which would warrant the inclusion of the allegedly new title of Cook Manager in the Association’s unit.


The form of the petition denotes the position of the party and the relief sought.\(^7\) Once the District placed the title of Cook Manager into the SAANYS' unit, the Association initiated a petition for certification/decertification. Notwithstanding the form and procedure selected by the Association, the apparent purpose for the petition was placement of the title of Cook Manager into the Association's unit, not fragmentation of the title from SAANYS' unit. Under the circumstances, a petition for unit placement would have been the proper method to challenge the District's action. Regardless of the Association's clearly stated position that it was seeking a placement determination, the ALJ decided the matter using the unit clarification standard.

The criteria used in deciding a certification/decertification or unit placement petition differ markedly from the criteria used to decide a unit clarification petition. A certification/decertification or unit placement petition commences an investigation and an application of the statutory uniting criteria. Then, an assessment must be made as to the community of interest shared by the at-issue title and the titles in the petitioned-for unit, including the potential for conflict of interest.\(^8\) A unit clarification petition seeks only a factual determination as to whether a job title is actually encompassed within the scope of the petitioner's unit.\(^9\) Since the matter came before the ALJ as a certification/decertification petition, we find that the ALJ did not complete an investigation into the statutory uniting criteria, but rather, incorrectly employed the standards used to determine unit clarification without apprising the parties of his

\(^7\) See Rules §201.2(a), (b).

\(^8\) See Regional Tr. Serv. Inc., 35 PERB ¶3022 (2002).

intentions. While it is true the ALJ solicited from the parties offers of proof as to the
evidence that they intended to introduce at a further hearing, the ALJ never advised
them that this type of dispute implicated unit clarification standards, or that he intended
to convert the certification/decertification petition to a unit clarification petition and apply
such standards. Such an omission raises due process concerns because the affected
parties were not provided with enough information to respond accordingly.\textsuperscript{10}

We find, therefore, that the matter should be remanded to the ALJ for further
processing consistent with this decision.

SO ORDERED.

DATED: March 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

\textsuperscript{10} See State Admin. Procedure Act §301.2(c), (d). See, e.g., Alvarado v. State of New
York, 110 AD2d 583 (1\textsuperscript{st} Dep't 1985) (Statutory notice held insufficient and failed to
meet constitutional due process standards).
STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD  

In the Matter of  

COUNTY OF NASSAU,  
Employer,  

- and -  

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO (LOCAL 830),  
Petitioner,  

- and -  

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,  
Intervenor.  

PROSKAUER ROSE, LLP (M. DAVID ZURNDORFER of counsel), for Employer  
NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Petitioner  
WILLIAM P. SEAMON, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for Intervenor  

BOARD DECISION AND ORDER  

By order of this Board dated December 12, 2002,¹ we rescinded our prior decision² establishing, pursuant to §212 of the Public Employees' Fair Employment Act

¹ County of Nassau, 35 PERB ¶3040 (2002).  
² County of Nassau, 15 PERB ¶3009 (1982).
(Act), the County of Nassau Public Employment Relations Board (Nassau PERB) and ordered that all matters pending before the Nassau PERB be forwarded to this Board for further processing.

This case comes to us pursuant to that order, which was not appealed by any party.

FACTS

On or about February 14, 2000, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (Local 830) (CSEA), filed a unit placement petition with Nassau PERB to include Deputy County Attorneys (DCAs) employed by the County in its unit of approximately 11,000 other County employees. On August 2, 2000, the Public Employees Federation, AFL-CIO (PEF), made a demand upon Nassau County to voluntarily recognize PEF as the employee organization designated to represent the DCAs for all purposes under the Act. By letter dated September 18, 2000, Richard J. Roth, a hearing officer appointed by Nassau PERB, wrote to PEF advising it that CSEA had filed a unit placement petition. Roth then suggested that PEF file a petition for certification with Nassau PERB, together with a showing of interest, so that the two petitions could be consolidated for hearing. On or about December 1, 2000, PEF filed its petition for certification with Nassau PERB.

A hearing was held on December 13, 2000, at which time the County produced evidence that it employed approximately 60 DCAs. A subsequent hearing was held on June 27, 2001 to address the impact of the dissolution of the County's Office of Labor Relations and the resulting transfer of labor relation functions to the County Attorney's office. On or about September 6, 2001, Roth issued his recommendation, finding that
there should be a separate unit of DCAs, excluding two DCAs as managerial or confidential employees, and directing that an election be held.

On September 17, 2001, CSEA filed exceptions to the hearing officer's decision with Nassau PERB. PEF and the County were granted an extension to November 9, 2001 to file their cross-exceptions, which both did. Nassau PERB took no further action regarding this matter.

Shortly after Roth's September 2001 decision, the Office of the County Attorney was reorganized under the direction of the new County Attorney, Lorna Goodman, who was appointed to the position on or about January 2, 2002. Significantly, the County alleges in its motion to reopen, discussed infra, that the County has reduced its reliance on outside counsel and increased the number of DCAs from 50 in 2000 to 85 in 2003. The increase in staffing has also resulted in an increase in the duties and responsibilities of the County Attorney's Office, which have been apportioned among the current DCAs and Bureau Chiefs. The County points out also that only 25 of the current staff of 85 were employed as DCAs by the County Attorney's Office in December 2000, when PEF filed its representation petition in the instant proceeding.

**PROCEDURAL MATTERS**

On April 5, 2000, while the instant case was pending, CSEA filed a petition with this agency, the Public Employment Relations Board (PERB), pursuant to §203.8 of the Rules of Procedure (Rules), seeking review of the provisions and procedures of the Nassau PERB. CSEA claimed that the Nassau PERB had been unable to implement its procedures and sought to have PERB rescind its 1982 order approving the Nassau PERB.
PERB's provisions and procedures. On September 23, 2002, the Nassau County Legislature, by local ordinance, repealed the 1982 ordinance establishing the Nassau PERB. By our decision of December 12, 2002, we determined that the County's action had rendered moot CSEA's petition, we rescinded our prior order approving the Nassau PERB and ordered all pending matters before Nassau PERB transferred to PERB.

By letter dated January 6, 2003, PEF requested that PERB issue a decision in the instant matter. Subsequent to this correspondence, in order to clarify the record and the issues before us, PERB's Deputy Chairman and Counsel requested that the parties stipulate to the record before Nassau PERB. Since the parties were unable to stipulate to the contents of the record, PERB assigned this matter to its Director of Public Employment Practices and Representation (Director) for further investigation in accordance with our Rules.

The Director assigned the investigation to an Administrative Law Judge (ALJ), who scheduled two conferences with the parties. During the second conference, the ALJ, unable to obtain a stipulation as to the record's contents, directed the parties to file motions setting forth their respective positions concerning the disposition of this matter. The ALJ, thereafter, returned the matter to the Board for disposition.

The County has moved to dismiss the petitions or, in the alternative, reopen the hearing on the grounds of change in circumstance. The County's motion is supported by an affidavit of County Attorney Goodman. PEF and CSEA oppose the motion and seek a decision of this Board on the exceptions filed to Roth's decision.
DISCUSSION

The disposition of a case transferred to us from a local PERB is one of first impression. Part 203 of the Rules governs our review of local government procedures enacted pursuant to §212 of the Act. When a local PERB is functioning, §212 of the Act does not provide PERB with jurisdiction for de novo review of a decision made by a local PERB. PERB's role in such a situation is merely to ensure that the local PERB's procedures are substantially equivalent to the Act. However, in our view, the dissolution of Nassau PERB is analogous to a situation where there is no local PERB and PERB has original jurisdiction. It is as if this case comes to us on exceptions to a decision of one of PERB's ALJs or the Director.

The Roth decision is before us on exceptions filed by the parties. Our initial review of the record upon which Roth based his decision revealed some factual discrepancies that the parties were thereafter unable to resolve when conferencing with the PERB ALJ assigned for that purpose. In such a case, where a representation issue is before us on appeal and we find that the record is not sufficiently clear to enable us to render a decision, we have remanded the matter to the Director or the assigned ALJ for further development of the record.

4 In other cases where we have rescinded our orders that established local PERBs, the records before us did not evidence that there were any matters pending before those local PERBs. Here, the record before us contained evidence that there was a pending matter that had not been decided by the Nassau PERB.

5 Our remedial order of December 12, 2002 in County of Nassau, note 1, at 3111, supra, ordered that "any and all matters pending before the Nassau PERB be forwarded to this Board for further processing."

Further, the County in its motion to reopen raises the issue that in the intervening years since Roth's decision was issued, the County Attorney's Office has undergone a major reorganization that has resulted in a change in job assignments, titles, duties and an increase in staff size. These developments are all relevant to our inquiry into whether these employees are exempt from representation (managerial and/or confidential) as the County argues or, conversely, our inquiry as to what is the most appropriate unit for purposes of representation. We have previously remanded a representation matter to the Director or the assigned ALJ for the limited purpose of taking evidence about changes in title, duties and unit structure while a petition is still being processed.\(^7\)

Such should be the case here. There are factual discrepancies in the record before Nassau PERB the resolution of which are necessary to our decision on the exceptions and the motions before us. As the parties have been unable, or unwilling, to resolve those factual discrepancies,\(^8\) the matter must be remanded to the Director for assignment to an ALJ to conduct a hearing on those issues. Further, during the processing of this matter, it is alleged that there has been a significant reorganization of the County Attorney's office with an increase in the number of employees covered by the petition, a change in job titles and in job duties. It is, therefore, appropriate in this ongoing investigation to take evidence on these issues as well.

We grant the County's motion to reopen the hearing and deny the County's motion to dismiss, without prejudice. The matter is, therefore, remanded to the Director for further processing consistent with this decision. Based upon our determination, we

\(^7\) See Town of Greece, 25 PERB ¶3047 (1992).

do not reach the exceptions raised by the County, CSEA and the Response thereto from PEF. The exceptions as filed, and such other exceptions as may be filed pursuant to a decision on remand, may be raised to us at the appropriate later date.

SO ORDERED.

DATED: March 26, 2004
Albany, New York

[Signatures]

Michael R. Cuevas, Chairman
Marc A. Abbott, Member
John T. Mitchell, Member
INTERIM BOARD DECISION AND ORDER

This matter comes before us on a motion by Sara-Ann P. Fearon for an interlocutory appeal of a ruling of an Administrative Law Judge (ALJ) after the hearing of the instant charge. The ALJ denied Fearon’s motion to amend her charge to include an additional allegation that the United Federation of Teachers (UFT) also breached its duty of fair representation by failing to respond to Fearon’s correspondence dated July

1 Fearon's employer, the Board of Education of the City School District of the City of New York, is a party pursuant to §209-a.3 of the Public Employees' Fair Employment Act (Act).
4, 2002. Fearon unsuccessfully made the same motion before the conference ALJ resulting in the prior interlocutory appeal. The Board denied that appeal without prejudice to Fearon’s right to appeal the ALJ’s final determination.²

FACTS

The improper practice charge, as amended, was filed on August 2, 2002. At the pre-hearing conference held on February 3, 2003, Fearon disagreed with the ALJ’s assessment of the charge and argued that UFT also failed to respond to her letter of July 4, 2002. The ALJ ruled, inter alia, that the allegation regarding the July 4, 2002 letter was untimely. Fearon, by way of motion, initiated an interlocutory appeal that was denied by the Board on May 7, 2003.

Hearings were held on October 28 and 30, 2003, at which time Fearon renewed her motion before the hearing ALJ to amend the charge to include UFT’s failure to respond to the July 4, 2002 letter. The motion was denied because it was time-barred. Fearon took exception to the ALJ’s ruling and the ALJ noted the exception for the record.³ Fearon presented her case. The ALJ then denied UFT’s motion to dismiss and UFT presented its case. At the conclusion of the hearing, UFT again moved to dismiss the charge and the ALJ reserved decision. The instant appeal ensued.

DISCUSSION

Fearon argues, in support of her motion, that the ALJ “engaged in immediate prejudicial action when she precipitously denied Fearon’s motion to amend her charge without hearing on the motion.” We disagree.

² 36 PERB ¶3023 (2003).
³ Transcript, pp. 9-10.
The circumstances of this interlocutory appeal have not changed since our decision denying Fearon's prior interlocutory appeal. Fearon has not presented any extraordinary circumstances where severe prejudice would result. In any event, the ALJ's adverse ruling on the amendment to the charge is reviewable upon timely exceptions taken at the appropriate time.

As we noted in our prior decision, our reluctance to review interlocutory determinations of a Director or an ALJ until the conclusion of a proceeding is to prevent delays inherent in piecemeal review of such proceedings. Here, the instant interlocutory appeal has only delayed the final decision in this matter and promoted inefficient use of administrative resources. We choose, in our discretion, not to entertain this interlocutory appeal.

Based upon the foregoing, Fearon's motion is denied without prejudice to her right to appeal the ALJ's determination. SO ORDERED.

DATED: March 26, 2004
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member
This case comes to us on exceptions filed by the City University of New York (CUNY) and on cross-exceptions filed by the Professional Staff Congress-City University of New York (PSC) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by PSC, finding that CUNY violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by refusing PSC's demand to bargain concerning the compensation and dispute resolution procedure aspects of a draft intellectual property policy. The ALJ dismissed that part of the charge that alleged that CUNY violated §209-a.1(d) of the Act by unilaterally implementing the intellectual property policy. But the ALJ
Board – U-22948

found that CUNY violated the Act when it refused to bargain during negotiations for a successor agreement PSC’s demands to alter the contract provisions that CUNY relied upon as authority for its right to draft and implement the intellectual property policy.

EXCEPTIONS

CUNY excepts to the ALJ’s decision, arguing that the ALJ erred in finding that PSC had not waived its right to negotiate the draft intellectual property policy, pursuant to Article 2 of the parties’ collective bargaining agreement which expired on July 31, 2000, and in finding that CUNY refused to negotiate PSC’s demand to revise the language of Article 2 during negotiations for the 2000-2002 collective bargaining agreement.

PSC cross-excepts to the ALJ’s decision, arguing that the ALJ erred in finding that CUNY had the contractual right to implement the intellectual property policy, in finding that CUNY had not violated the Act when it refused to negotiate PSC’s demands to negotiate the intellectual property policy in the Fall of 2002, in finding that two of PSC’s demands with respect to the intellectual property policy dealt with non-mandatory subjects of negotiations, and in failing to order a restoration of the status quo as it existed before CUNY implemented the intellectual property policy.

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

FACTS

The facts are set forth in detail in the ALJ’s decision\(^1\) and will be repeated here only as necessary for our consideration of the exceptions and cross-exceptions.

\(^1\) 36 PERB ¶4547 (2003).
CUNY has had in effect for over 30 years a copyright and patent policy applicable to faculty represented by PSC. In late 2000, CUNY established a committee made up of faculty and staff to review that policy and make recommendations. By letter from its counsel dated June 22, 2001, PSC made a demand to negotiate the intellectual property issues “which belong in collective bargaining” and have them resolved “in our current negotiations.” At that time, CUNY and PSC were engaged in negotiations for a successor agreement to the one that expired on July 31, 2000. CUNY refused to negotiate those issues during contract negotiations, relying on the language of Article 2 of the collective bargaining agreement. In all relevant aspects, Article 2 has been in the parties’ collective bargaining agreements since 1973. During the negotiations for the successor agreement, PSC also made proposals to change the language of Article 2.4(c) of the collective bargaining agreement, which provides in relevant part:

The rights, functions and powers of the Board [of Trustees] and its officers and agents, and of the officers of CUNY, under the applicable law of the State and the Bylaws of the Board, including the Board’s right to alter or waive existing Bylaws or policies in accordance with the procedures specified in the Bylaws shall remain vested in the Board and in said officers and agents, subject to the following:

(c) In the event it is proposed that a Bylaw, procedure or policy respecting a term or condition of employment of all or some of the employees covered by the Agreement be adopted, amended or rescinded by resolution of the Board, the PSC shall be given notice and an opportunity to consult in respect of said action prior to said action being taken or becoming effective, in the manner specified below.

On June 5, 2002, the parties reached agreement on a contract with the term of August 1, 2000 to October 31, 2002. Prior to signing the agreement, PSC withdrew its
demands with respect to intellectual property and Article 2, stating that the withdrawal was "without prejudice" to the instant improper practice charge.

On November 5, 2002, PSC sent a demand to CUNY to commence negotiations for a successor to the recently settled 2000-2002 collective bargaining agreement. At the outset, PSC demanded to negotiate the intellectual property policy. CUNY responded that the policy was not subject to negotiation, relying on the language of Article 2, and stating that Article 2 remained in effect until a new agreement was negotiated which changed the terms of Article 2. CUNY implemented the at-issue intellectual property policy on November 18, 2002. PSC's improper practice charge, as amended, alleges that CUNY's refusal to negotiate intellectual property issues violated §209-a.1(d) of the Act.

DISCUSSION

The ALJ found that CUNY did not violate §209-a.1(d) of the Act when it unilaterally implemented the intellectual property policy in November 2002 because it had a contractual right to alter and implement policy under the terms of Article 2 of the expired collective bargaining agreement. We agree. The ALJ, however, found that CUNY violated §209-a.1(d) when it refused to negotiate the compensation and dispute resolution aspects of the policy on demand. The ALJ reasoned that CUNY had an obligation to bargain concerning the terms of the intellectual property policy after expiration of the collective bargaining agreement, either prior to or subsequent to the implementation of the policy. The ALJ’s rationale is that Article 2.4 cannot operate as a waiver in perpetuity of PSC's right to negotiate and that the clause is not a clear and unambiguous permanent relinquishment of PSC's rights to bargain over "mandatory subjects of bargaining not otherwise covered by the agreement". We reverse the ALJ's decision that CUNY violated
§209-a.1(d) when it refused to negotiate the compensation and dispute resolution aspects of the policy.

We have consistently recognized that an employer's unilateral action relating to mandatory subjects that have been expressly settled by the parties' collective bargaining agreement do not trigger the statutory duty to bargain in good faith.² The parties to a collective bargaining agreement may agree that certain matters fall within the authority of the employer to act without negotiations³ or, as in this case, after consultation with the union. Such clauses have been found to be a waiver by a union of its statutory right to bargain.⁴ Article 2.4 vests in CUNY the right to adopt and implement alterations to existing procedures or policies, upon notice to and consultation with PSC. We find that clause to be a waiver of PSC's right to negotiate such policy changes.⁵

That the parties' collective bargaining agreement had expired at the time PSC was seeking to negotiate changes in the proposed intellectual property policy does not extinguish the waiver of PSC's right to negotiate those matters covered by Article 2. The ALJ found that while CUNY had the right to act unilaterally pursuant to Article 2 during the term of the collective bargaining agreement, CUNY was obligated to negotiate about mandatory subjects of negotiations, even if they fell within the purview of Article 2, once

² County of Nassau, 18 PERB ¶3034 (1985); Levittown Union Free Sch. Dist., 13 PERB ¶3014 (1980).
³ County of Nassau, 26 PERB ¶3052 (1993).
⁴ Board of Educ. of the City Sch. Dist. of the City of New York, 8 PERB ¶3011 (1975).
⁵ See City of Schenectady, 18 PERB ¶3035, at 3072 (1985), where the Board favorably cited to Mount St. Mary's Hosp. v. Catherwood, 26 NY 2d 493, 507 (1970): "Parties in voluntary agreement are not limited, except for rare matters contrary to public policy, from agreeing to anything they wish."
the collective bargaining agreement had expired and until a new agreement, incorporating
the language of Article 2 was negotiated. We find, rather, that Article 2, which has
continued virtually unchanged in every agreement between these parties for over 30 years,
is a clear and explicit waiver by PSC of its right to negotiate policies and procedures
covered by Article 2. Unlike cases in which we have held that a contract clause which
consstituted a waiver was limited to the life of the collective bargaining agreement, there is
no language in Article 2, or elsewhere in the parties’ collective bargaining agreement,
which limits the effectiveness of Article 2 to the term of any collective bargaining
agreement.

Additionally, and as the ALJ found, while the collective bargaining agreement
expires at the end of its stated term, by operation of §209-a.1(e) of the Act, all the terms of
such an expired agreement continue until a new agreement is negotiated. Just as CUNY,
or any public employer, may not alter or discontinue the term of such an expired
agreement, so too, must PSC, or any employee organization, abide by the negotiated
terms of an expired agreement until a new agreement is negotiated. Absent language
limiting a provision of a contract to the contract’s stated term, neither party is free to
choose which terms and conditions in their agreement it would deny continuation under
law.

As with any mandatory or nonmandatory subject of negotiations, the parties have
been free to negotiate the continued inclusion or the removal of Article 2 from their
contracts. To find that a clause in a negotiated collective bargaining agreement expires

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6 See Deer Park Union Free Sch. Dist., 28 PERB ¶3038 (1995); Deer Park Union Free Sch.

upon the end of the contract term, without any contractual language to that effect being present, would be to substitute our judgment for the intention of the parties and the Legislature.\(^8\) Article 2 prescribes a process for the parties to deal with policy issues such as those in the at-issue intellectual property policy. We treat that article as continued by operation of law, after the expiration of the parties' collective bargaining agreement. To do otherwise, would be to disrupt the status quo pending negotiations for a successor agreement.

We find, therefore, that CUNY did not violate the Act when it refused to negotiate PSC's demands regarding the proposed intellectual property policy during either the negotiations for the 2000-2002 collective bargaining agreement or for its successor and reverse the ALJ's decision with respect to his finding that such action by CUNY violated §209-a.1(d) of the Act. As CUNY had no statutory obligation to bargain with PSC over the proposed intellectual property policy, it likewise had no statutory obligation to bargain about the implementation of the policy and we affirm the decision of the ALJ in this regard.

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\(^8\)As we noted in Waterford-Halfmoon, id., at 3160:

In ascertaining the nature of the parties' agreement, the character of the evidence necessary to establish an agreement to a term of a contract for purposes of §209-a.1(e) is no different than the character of the evidence necessary to establish an agreement to any other term of an agreement for any other purpose under the Act. The mutual assent essential to the formation of an agreement can be established by evidence short of that which would establish a waiver of statutory rights. As with any agreement, a sunset agreement can exist in any circumstance in which it can be concluded reasonably that the parties intended to restrict or condition a given term of their collective bargaining agreement.
The ALJ also found that the refusal to negotiate PSC's proposals regarding Article 2 violated §209-a.1(d) of the Act because a waiver or zipper clause such as Article 2 is a mandatory subject of negotiations. We reverse the ALJ's finding that CUNY violated the Act when it did not negotiate PSC's demands for revisions of Article 2 during the negotiations for the 2000-2002 collective bargaining agreement. There is no allegation contained in PSC's amended improper practice charge regarding negotiations about Article 2; the charge deals solely with CUNY's alleged refusal to negotiate the intellectual property policy.

In any event, PSC was not privileged to enter into the 2000-2002 collective bargaining agreement with CUNY, which continued Article 2, and also unilaterally claim that it did so “without prejudice” to the pending charge before us. Parties who are negotiating may agree between themselves that a proceeding before PERB will not be affected by their agreement, but we are not bound by their terms. We reserve the right to determine the impact of their actions on the proceedings pending before us. Here, the PSC acted unilaterally in declaring its actions to be “without prejudice” to the instant proceeding. Without the consent of CUNY, that declaration is of no consequence and is certainly not binding on this agency.

Based upon our decision herein, we need not reach the other cross-exceptions raised by PSC.

We grant CUNY's exceptions and, accordingly, reverse that part of the ALJ's decision that found that CUNY violated §209-a.1(d) of the Act by refusing to negotiate the

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9 See Board of Educ. of the City Sch. Dist. of City of Buffalo, 22 PERB ¶3047 (1989).
draft intellectual property policy and by refusing to negotiate PSC's demands to revise Article 2 during negotiations for the 2000-2002 collective bargaining agreement.

IT IS, THEREFORE, ORDERED that the instant charge must be and hereby is dismissed in its entirety.

DATED: March 26, 2004
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

STATE OF NEW YORK,

Charging Party,

- and -

POLICE BENEVOLENT ASSOCIATION OF THE
NEW YORK STATE TROOPERS, INC.,

Respondent.

WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N.
VOLFORTE of counsel), for Charging Party

GLEASON, DUNN, WALSH & O’SHEA (RONALD G. DUNN of
Counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (State) to a
decision of the Director of Public Employment Practices and Representation (Director)
dismissing as untimely its charge which alleged that the Police Benevolent Association
of the New York State Troopers, Inc., (PBA) had violated §209-a.2(b) of the Public
Employees' Fair Employment Act (Act) when it refused the State's demand to withdraw
from fact-finding negotiating proposals dealing with discipline.

The State was advised by the Assistant Director of Public Employment Practices
and Representation (Assistant Director) that its charge, filed on October 8, 2003, was
untimely, having been filed more than four months after the PBA submitted the at-issue
proposals to fact-finding on January 30, 2002.\textsuperscript{1} The State responded to the Assistant Director that the four-month period of limitations should run not from the date the PBA submitted the proposals to fact-finding, but from the date, October 1, 2003, that the State demanded that the PBA withdraw the at-issue proposals from fact-finding.

The Director rejected the State's argument. He held that absent objection by a charging party as to negotiability at the time a nonmandatory or prohibited subject of negotiations is submitted to fact-finding, it is not an improper practice to submit a nonmandatory or prohibited subject to a fact finder for a recommendation. He further found that the charge was untimely as the State did not file within four months after the PBA's submission of the demand to fact-finding and that there is no "continuing violation" theory that has been accepted by this Board.

**EXCEPTIONS**

The State excepts to the Director's decision, arguing, *inter alia*, that the time to file this improper practice charge should run from the date the State demanded that the PBA withdraw the at-issue demands from fact-finding, not from the date of the original submission of the proposals to fact-finding. The State further argues that the Director erred by treating a prohibited subject of negotiations in the same way as a nonmandatory subject of negotiations in deciding the timeliness of the instant charge. The PBA supports the Director's decision.

Based upon our review of the record before us and our consideration of the parties' arguments, we affirm the decision of the Director.

\textsuperscript{1} Rules of Procedure (Rules), §204.1(a)(1).
FACTS

On January 20, 2002, the PBA filed a petition with PERB’s Director of Conciliation requesting fact-finding on certain items that were outstanding from the parties’ prior negotiations. Included among those proposals were three that dealt with discipline. The State and the PBA thereafter participated in at least four sessions with the PERB-appointed factfinder.

On August 29, 2003, Supreme Court, Albany County, held, in PBA of the City of New York v. PERB, that certain of the union’s demands in that case that related to disciplinary records and procedures were prohibited subjects of negotiations because they were reserved to the discretion of the City Police Commissioner by virtue of the New York City Charter and the New York City Administrative Code. The State, based upon that decision, demanded on October 1, 2003, that the PBA withdraw from fact-finding the at-issue proposals related to discipline because Executive Law §215(3) reserves matters of discipline to the Superintendent of the State Police and thereby renders the PBA’s proposals prohibited subjects of negotiations. The PBA refused. The State thereafter filed the instant improper practice charge.

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2 Petition for Fact-Finding, PBA proposals 1, 3 and 5.

3 36 PERB ¶7014 (Sup. Ct. Albany County 2003) (appeal pending), aff’g City of New York, 35 PERB ¶3034 (2002).

4 The State has also filed a declaratory ruling petition which seeks a finding as to the negotiability of the at-issue demands. That matter is still pending before an Administrative Law Judge.
DISCUSSION

It is not until the final stages of the dispute resolution processes provided by the Act that an improper practice charge concerning insistence upon nonmandatory or prohibited subjects will lie. If there is no objection as to the negotiability of a demand at the time of filing the petition for fact-finding, it is not an improper practice to submit such a demand for a determination by the neutral. Under the Act, improper insistence, if any, occurs with the presentation of the nonmandatory demand to the fact-finder for formal recommendation over objection. As the State raised no objection at the time the petition was filed, its charge must be dismissed.

We note further that our dispute resolution procedures also provide for the issuance of a declaratory ruling on the negotiability of a bargaining demand. In fact, the State has availed itself of that procedure with respect to the at-issue demands. We leave the parties to that proceeding to determine whether these demands are, in fact, prohibited subjects of bargaining.

Based on the foregoing, we deny the State's exceptions and affirm the decision of the Director.

5 Peekskill Cent. Sch. Dist, 16 PERB ¶3075 (1983); Monroe-Woodbury Teachers Ass’n, 10 PERB ¶3029 (1977).

6 Local 650, AFSCME, AFL-CIO, 18 PERB ¶3015 (1985).

7 Peekskill, supra, note 5.
IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: March 26, 2004
Albany, New York

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