This case comes to us on exceptions filed by the Fashion Institute of Technology, (FIT) to the decision of the Administrative Law Judge (ALJ) granting the unit placement petition filed by the United College Employees of Fashion Institute of Technology (UCE), placing the titles of Instructor for Saturday Live, Instructor for Summer Live and Instructor for Middle School Live into the UCE unit.

EXCEPTIONS

The FIT filed four exceptions alleging the ALJ erred on the law and the facts. The UCE has filed a response to the exceptions in support of the ALJ’s decision.

Upon our review of the record and consideration of the parties’ arguments, we reverse the decision of the ALJ, and dismiss the petition for unit placement.
In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

TOWN OF NEW PALTZ,

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 United Public Service Employees Union 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.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

COUNTY OF GREENE AND SHERIFF OF GREENE
COUNTY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: All Corrections Officers and Corrections Sergeants.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
In the Matter of

SHERIFF'S EMPLOYEES ASSOCIATION OF CAYUGA COUNTY,

Petitioner,

-and-

COUNTY OF CAYUGA AND SHERIFF,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, CAYUGA COUNTY
SHERIFF'S UNIT OF CAYUGA LOCAL 806,

Incumbent/Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Sheriff's Employees Association of Cayuga
County 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: Corrections Lieutenant, Corrections Sergeant, Corrections Officer, Building Maintenance Mechanic, Cook (Jail), Janitor, Registered Professional Nurse (Jail), Cleaner, Civil Enforcement Officer, Order of Protection Unit Coordinator, Order of Protection Unit Assistant, Senior Accountant Clerk Typist, Clerk and Account Clerk Typist.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Sheriff's Employees Association of Cayuga County. 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: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

______________________________
In the Matter of

TEAMSTER LOCAL UNION NO. 529,

Petitioner,

-and-

TOWN OF HORSEHEADS,

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 No. 529 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: All full-time employees of the Town of Horseheads Highway Department.

Excluded: Highway Superintendent and Deputy Superintendent.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local Union No. 529. 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: November 1, 2006
Albany, New York

[Signature]
Michael R. Cuevas, Chairman

[Signature]
John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

LYNBROOK UNION FREE SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union 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 part-time Monitors.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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: November 1, 2006
Albany, New York

[Signature]
Michael R. Cuevas, Chairman

[Signature]
John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

HERKIMER CENTRAL SCHOOL DISTRICT,

Employer.

CASE NO. C-5626

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc.,
Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the
employees\(^1\) of the above-named public employer, in the unit agreed upon by the parties
and described below, as their exclusive representative for the purpose of collective
negotiations and the settlement of grievances.

\(^1\) The Board is in receipt of a letter dated October 13, 2006, signed by eight members of
the agreed-upon unit stating their opposition to the petition and to CSEA's certification
without an election. As CSEA has submitted evidence of majority support,
notwithstanding the eight employees who have expressed opposition to union
representation, there is no impediment to certification without an election.
Included: All full-time employees of the Herkimer Central School District in the following titles: Classroom Aide (also known as Teacher Aide, One-on-One Aide, Library Aide and Child Associate Aide).

Excluded: All other non-classroom and part-time aides already in bargaining units, and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
FACTS

The facts are fully set forth in the ALJ’s decision and are repeated here only as necessary to address FIT’s exceptions.

On April 13, 2005, UCE filed a unit clarification/unit placement petition which, as amended, sought to "represent all faculty teaching in the ‘Saturday Live’ program, ‘Summer Live’ program, ‘Middle School Live’ and all other pre-collegiate programs offered by the Fashion Institute of Technology". In its response to the petition, FIT asserted that unit clarification was not appropriate on the grounds that the composition of the bargaining unit is clear and that the collective bargaining agreement between the parties excludes the assignments of teaching in the pre-college programs at issue here. FIT also argued that unit placement was inappropriate on the grounds that all of the faculty members in the pre-college programs are members of the UCE bargaining unit and that teaching in the pre-college programs constitutes an assignment, not a separate position.

FIT is college of art and design, business, and technology in the State University of New York system that offers Associate’s and Bachelor’s degrees in more than thirty majors. FIT also offers continuing education programs and, for at least the last twenty years, pre-college programs for high school students, called Saturday Live and Summer Live. In 2003, FIT added a summer program for middle school students, called Middle Live.

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1 38 PERB ¶4019 (2005).
2 FIT’s response was not made in writing, but was placed on the record on the day of the hearing by FIT’s attorney. Transcript, pp.9-14.
3 Joint Exhibit 4.
4 Joint Exhibit 3.
School Live (hereafter, Saturday Live, Summer Live and Middle School Live are collectively referred to as the Live programs).

The Live programs are pre-college, non-credit bearing courses in which the students are graded and receive certificates upon successful completion of programs. The Saturday Live program runs for twelve weeks in both the Spring and Fall semesters and for three weeks in the summer. Each class session is three hours long. In the Spring and Fall semesters, the classes meet once each week. However, in the summer the classes meet four times per week. The Middle School Live schedule differs in that instead of one three-hour class, the faculty member teaches two classes of one and a half hour each. These schedules are different than that of FIT’s traditional college courses which meet once a week for fifteen weeks during the Fall and Spring semesters. FIT also offers “Summerim” and “Winterim” sessions of three weeks each during the winter and summer recesses during which FIT students may take college courses.

FIT faculty members choose the traditional college courses they will teach on a seniority basis, by department, for all semesters and Summerim and Winterim. For the Live programs, the seniority system is not utilized; faculty who developed the curriculum generally get to teach the course, otherwise, courses are offered to faculty who did not get to select an evening course to teach. The Department Chairperson then recommends the faculty selections to the Pre-College Program Director. Since the inception of the program, only one selection was ever disapproved. All of the instructors for the Live programs are FIT faculty and members of the UCE bargaining unit.

Full-time FIT faculty members are required to teach twelve hours per week. They are compensated for teaching additional hours as “credit overload work”. Teaching in
the Live programs is paid at the same rate as the credit overload work. During negotiations for the collective bargaining agreement that expired May 31, 2002, UCE agreed to a reduction of the faculty compensation for teaching in the Winterim and Summerim sessions, which are overload sessions, from eight per cent of annual salary to seven percent. The same reduction in compensation was thereafter applied to the Summer Live program as well.

The last collective bargaining agreement between FIT and UCE has a term of June 1, 2002 to May 31, 2005. Section 5.1 of that agreement recognizes UCE as the exclusive bargaining representative for: “…all those listed below, including those individuals employed either full or part-time...”. Sections 5.2 to 5.3 of the agreement list the titles in the unit, among them: classroom faculty, directors, non-classroom faculty and a variety of administrative staff titles. Section 5.6 of the agreement states:

> Job titles within the bargaining unit cannot be changed except by mutual agreement of the parties to the contract. Individuals employed with grant funds or in positions of limited duration not to exceed three months are not included in the bargaining unit. The parties to this contract reserve the right to petition PERB to include or exclude any positions covered by this contract.

In 2003, UCE filed three contract grievances, the first that it had ever filed concerning the Live programs. In one of these grievances, UCE sought a finding that FIT violated §4.0 of the agreement when it refused UCE’s demand to bargain over the implementation of the Middle School Live program. An arbitration award was issued on September 6, 2005, dismissing the grievance based upon the language of the parties’

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5 Joint Exhibit 5.
collective bargaining agreement. The arbitrator stated in the final paragraph of his decision:

Moreover, the only change identified by the Union during the hearing was a possible increase in the number of students with whom a teacher of 11 – 14 year olds assigned to two ninety minute segments might experience is a matter already covered by the contract.

**DISCUSSION**

As the ALJ correctly observed, 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." In a unit placement petition, an unrepresented position is sought to be placed in a specific unit as the most appropriate placement pursuant to the statutory uniting criteria.

In *Nassau Community College and County of Nassau,* the Board stated that unit clarification and unit placement procedures apply to situations in which a position exists, as opposed to a situation in which employees in existing titles, already included in bargaining units, are given specific work assignments.

As in *Nassau Community College and County of Nassau,* the record here demonstrates that there is no separate position of Instructor for the Live programs and that only members of the UCE bargaining unit are assigned the work of teaching classes in the Live programs.

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6 Joint Exhibit 1.


8 Act. §207.

9 31 PERB ¶3059 (1998).
Instead of relying upon the rationale in *Nassau Community College and County of Nassau*, the ALJ felt constrained to defer to the finding of the contract grievance award that "...teachers assigned to work in Summer Live serve for less than three months (in fact, they work for only three weeks) and are therefore clearly excluded from the bargaining unit pursuant to Section 5.6 of the contract". We are not, and do not choose to be, so constrained.

In the final paragraph of his opinion and award, the arbitrator stated, "moreover, the only change identified by the Union during the hearing was a possible increase in the number of students with whom a teacher of 11 – 14 year olds assigned to two ninety minute segments might experience [and] is a matter already covered by the contract". It is reasonable to read the award, then, as a holding by the arbitrator that FIT satisfied its duty to bargain over the subject at issue, which would more directly address the issue he was asked to decide.\(^\text{10}\)

The Act\(^\text{11}\) places issues of unit clarification and unit placement under PERB’s non-delegable jurisdiction. If that were not sufficient, §5.6 of the parties’ agreement reserves the right for either of them "to petition PERB to include or exclude any positions covered by this contract". Therefore, to the extent that the parties interpret the arbitrators’ decision as making a unit clarification or placement determination, we are not bound by such a determination.

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\(^\text{10}\) In the introductory paragraph of his opinion and award, the arbitrator states that UCE asked to bargain the impact of the implementation of the Middle School Live program. Later, he states that the parties’ stipulated to the question presented to him as, "Did FIT violate the Agreement when it failed to negotiate the creation of the Middle School Live program?" While the stipulated question appears to pose a decisional issue, as opposed to an impact issue, from the final paragraph it appears that the arbitrator treated the case as involving an impact issue.

\(^\text{11}\) Act, §207.
Whatever confusion might have arisen as to the unit status of faculty teaching in the Live programs as a result of the arbitrator’s decision seems to have been resolved by FIT’s answer placed on the record by its attorney. FIT admitted the allegations contained in paragraphs numbered 2, 3, 4, 6 and 7 of the petition. It is in paragraph 6 of the petition that UCE states that it is seeking to represent all faculty teaching in the Live programs and that the Live programs are taught by full and part-time faculty of FIT.

As part of our investigation of a unit clarification petition, we must examine the recognition provision of the collective bargaining agreement. While §§ 5.0 through 5.6 of the parties’ agreement describes the composition of the UCE unit, there is no separate position listed for Instructor in the Live programs.\textsuperscript{12} Section 5.1 states that FIT recognizes UCE as the exclusive bargaining agent “for all those listed below, including individuals employed either full or part-time”. Sections 5.2, 5.3, 5.4 and 5.5 list Classroom Faculty, Non-Classroom Faculty, Classroom Assistant and Staff (including the Coordinator of Pre-College Programs), respectively.

FIT argues what UCE has already alleged, and we agree, that teaching in the Live programs has always been, and still is an assignment for FIT faculty who are already members of the UCE bargaining unit. However, we do not accept the interpretation of the arbitrator’s decision that since these assignments are for less than three months, they are specifically excluded from the bargaining agreement. Section 5.6 is part of the recognition section of the collective bargaining agreement and as such properly speaks of “positions of limited duration”, not assignments of limited duration.

There is no record evidence that any of the faculty in the Live programs were in

\textsuperscript{12} In fact, UCE’s petition, as amended, does not identify any such title. It only seeks to represent “all faculty teaching in the Saturday Live program, Summer Live program, Middle School Live and all other pre collegiate programs offered by the Fashion Institute of Technology”.
positions of limited duration. To the contrary, it is undisputed that all of the Live programs' faculty were regular full or part-time FIT faculty. If there were positions of limited duration, then we could properly entertain UCE petition to add them to its bargaining unit.

As there is no separate position of instructor in the Live programs and since full and part-time faculty, who are providing the instruction in the Live programs, are already in the UCE bargaining unit, the unit placement petition, must be dismissed. We have held that for purposes of §201.2(b) of our Rules a “position” refers to that for which there is a title with a duties description and a specification of qualifications as generally required, for example, for positions under the Civil Service Law”.

Based on the foregoing, we grant FIT’s exceptions and reverse the decision of the ALJ.

The petition is, hereby, dismissed in its entirety.

DATED: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

13 Nassau Community College and County of Nassau, supra, note 12 at 3130.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL 282,

Petitioner,

- and -

REGIONAL TRANSIT SERVICE, INC.,

Employer.

CHAMBERLAIN, D’AMANDA, OPPENHEIMER & GREENFIELD, LLP (MATTHEW J. FUSCO of counsel) for Petitioner

HARRIS BEACH, PLLC (ROY R. GALEWSKI of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Regional Transit Service Inc. (RTS) to the decision of the Administrative Law Judge (ALJ) granting the unit placement petition filed by the Amalgamated Transit Union, Local 282 (ATU), placing the titles of Supervisor of Scheduling and Operations Software, Manager of Transportation Analysis, Project Assistant, Secretary of Transportation and Analysis, Schedule Maker, Schedules Clerk, and Checker Clerk into the ATU unit.

EXCEPTIONS

The RTS filed numerous exceptions alleging the ALJ erred on the law and the facts. The ATU has filed a response to the exceptions in support of the ALJ’s decisions.
Upon our review of the record and consideration of the parties' arguments, including those made at oral argument, we affirm the decision of the ALJ.

FACTS

The facts are fully set forth in the ALJ's decision¹ and are repeated here only as necessary to address RTS's exceptions.

On August 17, 2005, ATU filed a unit placement petition which, as amended, sought to place the titles of Supervisor of Scheduling and Operations Software, Manager of Transportation Analysis, Project Assistant, Secretary of Transportation and Analysis, Schedule Maker, Schedules Clerk, and Checker Clerk² into its bargaining unit. The existing ATU bargaining unit consists of approximately 450 RTS bus operators, maintenance employees, and clerical employees who all work in, or are based out of, the operations building. The at-issue titles are in the Scheduling Department which is also located in the operations building.

Each person currently occupying the petitioned-for titles testified regarding their duties at RTS. Ryan Gallivan, the Manager of Transportation Analysis, is responsible for the monitoring and evaluation of various types of data that are used to determine the efficiency of each route and customer need. Gallivan presents this information and his recommended route adjustments to his supervisor Charles Switzer, who is currently Vice President of Transportation Analysis. Switzer passes Gallivan's recommendations on to the Chief Executive Officer (CEO) and the Chief Operating Officer (COO) for RTS.

¹ 39 PERB ¶4010 (2006).
² There is one employee encumbering each of the petitioned-for titles except for the Checker Clerk, a title held by two RTS employees.
Gallivan sits on the Route Evaluation Committee, which evaluates recommendations of the Scheduling Department and decides whether to accept or reject them. Switzer, the Director of Operations, a dispatcher, a radio controller, the Director of Customer Services, and the Director of Marketing also sit on the Route Evaluation Committee. Gallivan also sits on the Timetables Committee along with Switzer, the CEO, the Director of Marketing and two individuals, a designer and a printer, not employed by RTS.

The Manager of Transportation Analysis position requires a bachelor’s degree, which Gallivan possess in Statistics. He also has a Master’s degree in Mathematics Education, both of which prove useful in his work with large volumes of data and the statistical analysis that are part of his job duties.

Gallivan’s disciplinary role at RTS has been limited to providing information to George Todd, the Director of Safety, which was used against a driver who was subsequently terminated, firing a Checker Clerk who was employed by a temporary employment agency, and giving a warning to two scheduling department employees whom he supervises. Finally, he has the responsibility of hiring for the incumbent in the Checker Clerk title.

Jeffrey Rogers, Supervisor of Scheduling and Operations Software, ensures the operation of the Orbital bus radio communication system and the Trapeze transportation scheduling software. He is the only Scheduling Department employee who collects the Orbital data used to create daily reports for the Director of Operations and the COO. While he is on-call in case the radio system does not work as it should, radio technicians, who are bargaining unit employees, fix those problems that are a result of
hardware issues. Additionally, even though Rogers is the only employee who actually creates the report, radio technicians also work with the orbital software and do reporting. Finally, he shares the responsibility of entering detour information into the Orbital system with Radio Controllers.

Rogers interacts with the bus operators frequently for various purposes. He receives calls from drivers and sends text messages via the Orbital system to correct errors as well as to remind drivers to log on. Rogers also testified to participating in the shuttle services operated by RTS. Additionally, he and Gallivan meet with the drivers several times a year prior to preparing schedule changes.

Robert Wiesner, the Project Assistant, works on various projects for RTS including the bus stop installation plan. For this project, Wiesner works with Jim Stolar, a bargaining unit employee in the Maintenance Department. Wiesner’s interaction with bargaining unit employees also consists of receiving complaints from drivers about scheduling that he conveys to Gallivan.

Yolanda Dorsey, the Secretary of Transportation and Analysis, reports to Switzer and acts as his secretary and has the additional responsibility of acting as school coordinator with the Rochester School District on behalf of RTS. She prepares Notices to Operators with information about school trips as well as Emergency Change in Service Orders on snow days. In addition, she is directly contacted by the parents of school children regarding bus issues and by operators when they believe there is overcrowding or a route needs correction. She also receives reports when an operator is having problems with students and contacts the school district regarding those issues. Finally, Dorsey has also participated in the shuttle services operated by RTS.
Switzer supervises June Melville, the Schedule Maker, whose main duties include preparing paperwork related to the schedules and the general picks, as well as Notices to Operators that are posted and delivered to operators.

Phyllis Jiles and Ramon Torres are Checkers Clerks who report directly to Gallivan. They spend approximately 90% of their time on buses recording information for evaluation by other Scheduling Department employees. They also collect data by observing buses from bus stops and by distributing surveys to passengers. Finally, they perform monthly rider checks during which they record information about the driver and conditions on the bus. However, they are not involved in the use of such information.

Delores Ussery, the Schedule Clerk, was out of work on Workers’ Compensation at the time she testified before the ALJ. Her usual work duties primarily include typing and answering phones although she, on occasions when Ussery was involved in the shuttle services, collected fares and counted passengers. Her interaction with bargaining unit employees included posting notices in the drivers’ room and receiving comments from drivers that she relayed to either Rogers, Melville or Dorsey.

Gallivan, Rogers and Wiesner sit in the Drivers’ Room on at least a quarterly basis to solicit input from drivers, attend other meetings with unit members and receive information from unit members on other occasions; Checkers ride the buses with drivers on a regular basis; the Schedule Maker seeks drivers’ input in creating schedules, generates new route books or changes for drivers’ use and produces Notices to Operators, detailing route changes, which are posted in the Drivers’ Room by the Scheduling Clerk; Scheduling Department employees prepare all the necessary paperwork for special events, hand out work and instructions to drivers and assist them
with passengers; and Scheduling calls drivers for Job Access and Reverse Commute Program information.

With regard to pay rates, Frank J. Falzone, ATU’s Business Agent, Financial Secretary and Treasurer, testified that technicians in the bargaining unit who perform towing from November 1 through April 1 each year earn $33.00 per hour and up without overtime. He also testified that one fare box technician in the bargaining unit earns approximately $24.00 per hour. The remainder of the bargaining unit earns from $11.30 per hour to $22.08 per hour. The Manager of Transportation Analysis earns $30.11 per hour and the rest of the Scheduling Department earns from $11.85 per hour through $23.11 per hour.

In terms of vacation, bargaining unit employees earn one week after one year, two weeks after two years, and three weeks after six years. Scheduling Department employees earn two weeks after one year and both groups accrue the same vacation time after six years. Although bargaining unit members may not carry over vacation days, Scheduling Department employees may carry over up to ten.

Scheduling Department employees earn one sick day per month and may accumulate up to 180 days, receive three personal days per year and may convert two sick days to personal days each year. They are also vested in the pension plan after two years without contribution. Bargaining unit employees with the company for less than three years accrue one-quarter sick day monthly and may accumulate a maximum of 120 days; those with more seniority accrue one half day monthly with a maximum accumulation of 120 days. Unit members also receive two personal days on their first
two anniversaries and another two days after three years. These employees work ten years before vesting in the pension plan and contribute 3.5 percent of salary.

Finally, non-union employees (including Scheduling Department employees) hired after April 15, 2005 contribute ten percent of the cost for the Value Plan health insurance coverage, while those hired before April 15, 2005 are covered by the Value plan but do not contribute. Employees in the ATU unit hired after January 1, 2004, have Select Plan coverage or Value Plan coverage at no cost. Non-union employees also have a flex spending option for medical and dependent care but ATU members do not. Both groups have life insurance provided by RTS as well as accidental death and dismemberment coverage. The life and accidental death plans cover ATU employees up to $40,000 while unrepresented employees are covered up to $150,000.

DISCUSSION

A unit placement petition places the appropriateness of the unit at issue in what is actually a mini representation proceeding. "The Act does not envisage that the appropriate unit be determined solely by the desire of the public employees; rather, the Act mandates specific criteria to be utilized in the determination of the appropriate unit."4


4 Section 207.1 of the Act requires the Board "to define the appropriate employer-employee negotiating unit taking into account the following standards: (a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit; (b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate; and (c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public." Central School District No. 1, Towns of Bangor, Brandon et al., 1 PERB ¶399.89 at 3239-40 (1968).
In deciding whether placement within a unit is appropriate, our interpretation of §207.1 of the Act places most importance on the community of interest standard. In applying this standard we must determine, *inter alia*, whether the petitioned for titles have a similar work environment, salary, and/or benefit structure with the bargaining unit and determine whether a conflict of interest exists amongst the members of the proposed unit.

The second standard, the power to reach agreement, is applicable to multi-employer units; therefore, it is not relevant to the issues before us.

Finally, the administrative convenience of the employer must be considered. This standard intends to preserve the employer's interest against unnecessary fragmentation of units. As a result, we have long held that "the most appropriate unit is the largest one permitting for effective and meaningful negotiations" unless there is a conflict of interests.

In its exceptions, RTS contends that the ALJ misapplied the law to the facts of this case in finding a community of interest and the non-existence of a conflict of interest in placing the seven at-issue titles in the existing unit.

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5 *Board of Educ of the City of Sch Dist of the City of Buffalo*, 14 PERB ¶3051, at 3083 (1981).

6 *Id.* at 3083.

7 *Id.* at 3084 [citing *Rensselaer County*, 3 PERB ¶3100 (1970) and *Orange County*, 14 PERB ¶3012 (1981)].

8 *Id.* at 3083.

RTS argues that the ALJ gave undue weight to the shared work environment and interaction between the at-issue titles and bargaining unit employees. We find that the ALJ’s decision properly works from the premise that if a general community of interest is found to exist, i.e., if terms and conditions of employment are sufficiently similar and no actual or apparent conflict exists that would effect the conduct of meaningful and effective negotiations, the absence of other community of interest factors will not defeat the placement of the titles.

Most significant is the fact that unit employees and the employees in the at-issue titles share very similar pay ranges and benefit levels. Unit employees are paid on an hourly basis and the range of hourly wages paid unit employees of $11.30 per hour to $24.00 per hour, and occasionally $33.00, is not significantly different from the range for the at-issue titles of $11.85 to $30.11 per hour. The other terms and conditions of employment (absence check in, return to work physical, holidays, vacation leave, sick days, deferred compensation, jury duty, vision care and bereavement leave) are also very similar, with the exception of dental, accidental death and life insurance, pension and health insurance plans which differ to some degree. Unit members contribute 3.5% of salary and are vested in the pension plan after ten years; employees in the at-issue titles do not contribute and are vested in the plan after two years. While the at-issue titles appear to have the better pension plan, unit employees hired prior to 1/1/04 are in

10 The ALJ noted that although the wage rate for Manager of Transportation Analysis is generally the highest, there are technicians in the bargaining unit who surpass that rate by at least $3 per hour from November to April when they perform towing. The difference between the Manager’s regular hourly rate of $30.11 and highest regular hourly rate in the bargaining unit of $24.00 does not dictate that the Manager be excluded from the bargaining unit.
the Select Plan for health insurance and those hired after that date are in the Value Plan, none of the unit employees pay towards their health insurance premiums. However, employees in the at-issue titles are only enrolled in the Value Plan, with those hired after April 14, 2005, contributing 10% of the premium cost and the others having no contribution. The difference in dental coverage is that unit employees pay $10.12 per week and the other titles do not. With respect to life insurance and accidental death, unit employees are covered for $40,000 and the at-issue employees $150,000. The nature and extent of differences in terms and conditions of employment is not such as to create a barrier to effective negotiations for all unit members should the at-issue titles be added to the unit.

While the at-issue titles do, in fact, currently work in the same building as the bargaining unit employees, that fact is mentioned only once in the ALJ’s eight pages of discussion – hardly an indication of undue weight, as alleged by RTS. Still, it is an indication of common, shared work location, another term and condition of employment.

RTS’ argument that the ALJ gave undue weight to the interaction between Scheduling Department employees and ATU bargaining unit members is also without merit. As would be expected in a properly function transit system, the Scheduling Department works in association with bargaining unit employees, and with the Bus Operators in particular, to achieve the employer’s mission objectives of providing safe and efficient transportation services to residents in its region. The record is replete with examples of how the two groups of employees interact. It cannot be concluded that the ALJ gave undue weight to these facts.
RTS also contends that the dissimilarity of work duties and lines of supervision makes unit placement inappropriate. In support of its contention, RTS has erroneously relied upon our decision in *New York City Transit Authority*.\(^{11}\) That case dealt with the appropriate placement of computer titles in the bargaining unit of one of two petitioning organizations, both of which represented similar titles to the at-issue titles. Here, the work duties of the at-issue titles are different from those of most unit employees so the examination of specific job duties is but one factor to consider. As to lines of supervision, while the Scheduling Department employees and the unit employees have different lines of supervision, we have found that lack of common supervision is, by itself, insufficient to defeat a finding of community of interest.\(^{12}\)

RTS argues that the traditional differences between blue-collar and white-collar employees are present in this case since the scheduling department employees work in an office environment making unit placement inappropriate. However, the unit is already a mix of blue and white collar employees as ATU already represents three clerical titles in the existing bargaining unit whose work is done in an office environment. Additionally, the Checker Clerks that ATU seeks to add to its unit work primarily in the field with the bus operators who are already in the unit. These facts present an

\(^{11}\) 36 PERB ¶3038 (2003). We distinguished this case in *Regional Transit Service, Inc.*, 39 PERB ¶3001 (2006), which involved a petition filed by only one employee organization.

\(^{12}\) *Regional Transit Service, Inc.*, *supra* note 11.
example of how the “traditional differences between the two types of work,” that ordinarily necessitate separate units, “can be blurred.”

RTS also submits that the Manager of Transportation Analysis, Ryan Gallivan, is a supervisor who presents a conflict of interest and should be excluded from the bargaining unit. We have never adopted a per se rule excluding supervisors from membership in a bargaining unit with their subordinates. In Bath Municipal Utility Commission, we excluded high level supervisors whose duties, as laid out in contractual language, directly “affect the rank and file employees’ terms and conditions of employment.” Gallivan does not qualify as a high level supervisor as he is not the equivalent of a department head. While Gallivan has the ability to hire Checker Clerks, the record does not demonstrate how that responsibility affects the terms and conditions of employment of existing rank and file employees. As to RTS’ claim that he has disciplinary authority, the record does not clarify whether he has the authority to discipline anyone employed by RTS. Furthermore, his execution of performance evaluations is not grounds for exclusion.

In the alternative, RTS contends that the Manager of Transportation Analysis is a managerial employee within the meaning of the Act and, therefore, is not eligible to be

13 Id.


15 County of Genesee, 29 PERB ¶3068 at 3162 (1996).
placed in any bargaining unit. There are four criteria, which must be met for an employee to be designated as managerial under the Act.\textsuperscript{16}

The first basis for a managerial designation is "policy formulation". That basis is not met when an employee, such as Gallivan, participates in policy discussions only as a resource person. As Manager of Transportation Analysis, Gallivan’s primary role is to inform the decision makers of his evaluation of the data provided by other Scheduling Department employees. Gallivan presents this information to his supervisor who then relays it to the CEO and COO for RTS who are the policymakers.

Participation in two decision-making committees does not qualify Gallivan as managerial due to the nature of his responsibilities within those committees. Neither the fact that he sits on the Route Evaluation Committee, which decides whether to change or alter a route, nor his membership on the Timetables Committee, which requires him to confirm the accuracy of timetables, is policy determination. There are few facts as to the nature of his participation on those committees, the frequency of their meetings and the extent to which management relies on Gallivan’s or the committees’ input. Therefore, Gallivan’s role can hardly be seen as anything more than a valued resource person and trusted supervisor.

The second possible basis for designation is direct participation in collective negotiations and there is no evidence in the record that Gallivan has a role in collective negotiations. The third possible basis for designation requires a major role in

\textsuperscript{16} City of Binghamton, 12 PERB ¶4022 at 4035 (1979).
administration of collective bargaining agreements and again, there is no evidence in the record that Gallivan has a role in administration of agreements.

The fourth possible basis for designation requires a major role in personnel administration, including authority to exercise independent judgment. Gallivan’s role in personnel administration is limited to hiring for the Checker Clerk title since there is no clear evidence that Gallivan has the independent authority to impose discipline. Therefore, his role would not satisfy the criterion.

Finally, we affirm the ALJ’s decision to reject RTS’ uniting preference based upon administrative convenience. There is no evidence that the at-issue titles would be served more effectively in another unit or that placement in a separate unit would be administratively more convenient. In fact, the only preference expressed by RTS is that the titles be excluded from the ATU unit.

Based on the record before us, we find no evidence of a conflict of interest between the titles at issue and the bargaining unit employees which would warrant exclusion of the at-issue titles from the unit. Although there are some differences in benefits, there are more similarities than differences, and there is evidence of a shared pay range. There is also a shared work environment and regular interaction between existing unit members and the titles sought to be placed, to effectuate a shared mission. We find, therefore, it would be appropriate to add the Supervisor of Scheduling and Operations Software, Manager of Transportation Analysis, Project Assistant, Secretary of Transportation and Analysis, Schedule Maker, Schedules Clerk, and Checker Clerk to the ATU unit.
Based on the foregoing, we deny RTS' exceptions and affirm the decision of the ALJ.

NOW, THEREFORE, WE ORDER that the petition is hereby granted and the titles of Supervisor of Scheduling and Operations Software, Manager of Transportation Analysis, Project Assistant, Secretary of Transportation and Analysis, Schedule Maker, Schedules Clerk, and Checker Clerk are placed into the unit of RTS employees represented by ATU.\(^{17}\)

DATED: November 1, 2006
Albany, New York

\[\text{Signature}\]
Michael R. Cuevas, Chairman

\[\text{Signature}\]
John T. Mitchell, Member

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\(^{17}\) The number of employees being added to the unit is insufficient to affect the petitioner's majority status. *New York Convention Center Operating Corp*, 27 PERB 3034 (1994).
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RYE BROOK PROFESSIONAL FIRE FIGHTERS
ASSOCIATION, LOCAL 4041, IAFF, AFL-CIO,

Charging Party,

CASE NO. U-25651

- and -

VILLAGE OF RYE BROOK,

Respondent.

MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD S. CORENTHAL and
ROBERT MARINOVIC of counsel), for the Charging Party

LITTLER MENDELSON, P.C. (CRAIG R. BENSON and GEORGE B. PAUTA of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Rye Brook Professional Fire
Fighters Association, Local 4041, IAFF, AFL-CIO (Association) to a decision of an
Administrative Law Judge (ALJ) dismissing, in part, its improper practice charge against
the Village of Rye Brook (Village). The Association alleged that the Village violated
§§209-a.1 (a) and (d) of the Public Employees’ Fair Employment Act (Act) when it
staffed the Village firehouse during the 7:00 p.m. to 7:00 a.m. shift with a firefighter
employed by the Village of Port Chester (Port Chester), thereby subcontracting exclusive bargaining unit work. The charge also alleged that the Village refused to engage in impact bargaining regarding the assignment.

The ALJ found that the work in question was not exclusively bargaining unit work and dismissed that aspect of the charge. However, the Village was found to have violated §209-a.1(d) of the Act by refusing to negotiate the impact of its decision to assign unit work to the Port Chester firefighter.

EXCEPTIONS

The Association excepts to the ALJ’s decision to dismiss that aspect of the charge alleging that the unilateral reassignment of exclusive bargaining unit work violated the Act, arguing that the ALJ erred on the facts and the law.¹ The Village supports the ALJ’s decision.

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

¹ The Association alleges in its exceptions that the ALJ copied portions of her decision from the Village’s brief and therefore failed to properly discharge her duties. The Association urges the Board to remand the case to another ALJ, in the interest of fundamental fairness. After a careful review of the ALJ’s decision, the record and the parties’ arguments to the ALJ, we find the Association’s allegations to be baseless. Any similarities between the ALJ’s decision and the Village’s brief can be explained by the fact that both the ALJ and the Village cited to the same transcript testimony and the same Board precedent.
FACTS

The facts are fully set forth in the ALJ’s decision ² and are repeated here only as necessary to address the exceptions.

The parties stipulated to most of the relevant facts. The Village employs eight full-time paid firefighters. They work from 7:00 a.m. to 7:00 p.m., seven days a week, in groups of four firefighters on and four firefighters off for each shift.³ During this day shift, Village firefighters receive and respond to calls for assistance, perform building inspections, deliver fire safety lectures at schools, and assist the public. Within the confines of the Village firehouse, Village firefighters check and maintain vehicle apparatus, inspect gear, and check equipment.

The Village created a paid fire department and recognized the Association in 2000 as the exclusive bargaining agent for its paid firefighters. Since 1998, the Village has been a party to a succession of fire protection agreements with Port Chester. Under the terms of the various fire protection agreements, Port Chester has shared the daily responsibility for the fire protection of the Village with Village firefighters.⁴ Port Chester has also provided the fire protection for the Village for the hours of 7:00 p.m. to 7:00 a.m.

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³ Transcript, p. 28.
⁴ ALJ Exhibit 16, Stipulation of Fact.
On occasion, Village firefighters have been called upon to work all or part of the 7:00 p.m. to 7:00 a.m. shift and have been paid overtime for such work. For example, there were 32 occasions from January 1, 2004 to January 31, 2005, when Village firefighters were assigned to work at the Village firehouse from 7:00 p.m. to 7:00 a.m. because of snow storms, blackouts, severe rain or thunder storms, or lack of coverage available from Port Chester because of equipment failure or incidents that required Port Chester to cover the Village of Port Chester.\(^5\) All of the instances may properly be characterized as emergencies or unforeseen circumstances; no Village firefighters have ever been regularly scheduled to work at the Village firehouse on the 7:00 p.m. to 7:00 a.m. shift.\(^6\)

At all times relevant to the charge, a single Port Chester firefighter has been assigned to respond to fire calls in the Village from 7:00 p.m. to 7:00 a.m. each evening, from a Port Chester firehouse, utilizing Port Chester equipment. Since February 1, 2005, a single Port Chester firefighter has been assigned by the Village to work in the Village firehouse each evening from 7:00 p.m. to 7:00 a.m. The record does not reflect that the Port Chester firefighter’s responsibilities have changed since being assigned to the Village firehouse; there is no evidence that the firefighter is performing any duties beyond responding to calls for assistance.

\(^5\) Association Exhibit 10; Transcript, pp.29, 31, 53-4, 70 and 87.

\(^6\) The Village relocated the firehouse to a newly constructed structure in October 2004. Transcript, p. 33-4.
By a letter received by the Village on December 21, 2004, the Association requested information and demanded bargaining about the Village’s plan to assign a Port Chester firefighter to the Village firehouse for the 7:00 p.m. to 7:00 a.m. shift and also demanded impact bargaining about the Village’s plan. The Association also forwarded to the Village an alternative staffing proposal. By letter dated January 7, 2005, the Village refused the Association’s demand to bargain its decision. By letter dated February 18, the Village rejected the Association’s alternative plan.

**DISCUSSION**

As is the case in most decisions dealing with the issue of the unilateral reassignment of bargaining unit work, we turn to the seminal Board decision in *Niagara Frontier Transportation Authority.*\(^7\) There the Board stated that:

> With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those previously performed by unit employees. (citations omitted)

Central to the determination of exclusivity, is the definition of unit work.\(^8\) Here, the Association argues that the correct definition of unit work is firehouse staffing. The Association points to the variety of tasks performed on a daily basis by Village

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\(^7\) 18 PERB ¶3083, at 3182 (1985).

firefighters while assigned to the Village firehouse on the 7:00 a.m. to 7:00 p.m. shift and argues that those tasks are exclusive to the unit and can be performed only in the Village's firehouse. The Association is, therefore, attempting to define unit work by task and geographic location. The Village argues that the definition of the work performed by unit members is broader and consists of the provision of fire protective services, which, it further argues, has never been exclusively performed by Village firefighters.

We find that the definition of the work performed by Village firefighters is the provision of fire protective services; receiving and responding to call for assistance. While the Village firefighters perform a variety of tasks at the Village firehouse during the 7:00 a.m. to 7:00 p.m. shift, there is no record evidence that those tasks are anything more than incidental to their primary job duties: receiving and responding to calls for assistance.

Such work is not tied to a geographic location. Port Chester firefighters have performed the same work for several years pursuant to the fire protection agreements between the Village and Port Chester and have done so from Port Chester firehouses. In October 2004, the Village moved to a new firehouse that is staffed by Village firefighters on the day shift. That change in the location of the Village firehouse has not altered the definition of the primary work of the Village firefighters. For a geographic location to set the discernible boundary for unit work, it is necessary "to identify a reasonable relationship between the components of the discernible boundary and the
duties of unit employees." In cases where geographic location was found to be a component part of the definition of unit work, there was a relationship between the work location and the duties of the job as performed at those locations.

Nor can the work be defined as the provision of fire protective services on the 7:00 p.m. to 7:00 a.m. shift. That work is primarily performed by Port Chester firefighters pursuant to the fire protection agreements between the Village and Port Chester. It is not disputed that Village firefighters have been assigned on several occasions to work the 7:00 p.m. to 7:00 a.m. shift and have done so from the Village firehouse. But those assignments cannot be characterized as regular assignments; they have always occurred in an emergency or unusual situation. It is clear from the record, therefore, that Village firefighters have no exclusivity over the provision of fire protective services on the 7:00 p.m. to 7:00 a.m. shift.

Based on the foregoing, we conclude that there has been no unilateral reassignment of exclusive Association bargaining unit work to Port Chester firefighters. We, therefore, deny the Association’s exceptions and affirm the ALJ’s decision.

As no exceptions were filed to the ALJ’s determination that the Village violated §209-a.1(d) of the Act by failing to negotiate upon demand the impact of its February 1, 2005 assignment of a Port Chester firefighter to the Village firehouse, we do not reach

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9 Union-Endicott Cent Sch Dist, 26 PERB ¶3075, at 3145 (1993).

10 See City of Buffalo, 24 PERB ¶3043 (1991); Hudson City School Dist, 24 PERB ¶3039 (1991); City of Rochester, supra.
that aspect of the ALJ’s decision, beyond reiterating the finding of a violation and the order to negotiate. In all other respects, the charge is dismissed.

IT IS, THEREFORE, ORDERED that the Village of Rye Brook:

1. Bargain in good faith with the Association over the impact of the Village’s decision to assign a firefighter employed by the Village of Port Chester to work at the Village of Rye Brook fire house from 7 p.m. to 7 a.m.; and

2. Forthwith sign and post the attached notice at all locations customarily used by it to post notices to unit employees.

DATED: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

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 Village of Rye Brook (Village) in the unit represented by the Rye Brook Professional Fire Fighters Association, Local 4041, IAFF, AFL-CIO (Association) that the Village will:

1. Bargain in good faith with the Association over the impact of the Village’s decision to assign a firefighter employed by the Village of Port Chester to work at the Village of Rye Brook fire house from 7 p.m. to 7 a.m.

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

Village of Rye Brook

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

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

BUFFALO TEACHERS FEDERATION,

Charging Party,

-and-

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF BUFFALO,

Respondent.

________________________________________

ROBERT W. KLINGENSMITH, JR., ESQ., for Charging Party

DAMON & MOREY, LLP (JAMES N. SCHMIT of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Buffalo Teachers Federation
(Federation) to a decision of an Administrative Law Judge (ALJ) on an improper practice
charge filed by the Federation alleging that the Board of Education of the City School
District of the City of Buffalo (District) violated §§209-a.1(a), (d) and (e) of the Public
Employees’ Fair Employment Act (Act) when it unilaterally changed the health
insurance available to Federation unit members. The ALJ deferred the charge to the
grievance arbitration procedure set forth in the parties’ collective bargaining agreement.
EXCEPTIONS

The Federation excepts to the ALJ’s decision arguing that the ALJ erred in deferring the improper practice charge to arbitration. The District supports the ALJ’s decision.

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

FACTS

The Federation and the District are parties to a collective bargaining agreement with the term of July 1, 1999, through June 30, 2004. At all times relevant to this charge, the parties have been engaged in collective negotiations for a successor agreement. The collective bargaining agreement contains the following language relative to health insurance:

Article XXVI (2)
Employee Benefits
(Effective October 1, 2000)

A. Health and Hospitalization
   (1) Health Care Coverage: Effective December 1, 1996, the District will provide and pay 100% of the costs of indemnity health insurance coverage with Blue Cross/Blue Shield Plan of Western New York serving as the Third Party Administrator. Employees covered under this agreement will have the option of participating in one of the three Health Maintenance Organizations, Independent Health (Encompass/Gold Plan), Community Blue I or Universal-Choice Care.
During negotiations for a successor agreement, the District proposed changes in health insurance coverage. On May 11, 2005, the District’s Board of Education, pointing to serious financial problems facing the District, adopted a resolution selecting Blue Cross Blue Shield as the single health insurance carrier, effective July 1, 2005. In a letter to employees dated May 12, 2005, the District stated that “Blue Cross Blue Shield will provide all the same plans of benefits, which are currently available from Community Blue, Independent Health and Universa, as well as the District Plan and the various Blue Cross Blue Shield plans of benefits that are subscribed to by many retirees.”

On May 19, 2005, the Federation filed a grievance complaining that the District had unilaterally changed health care carriers and the provisions of Article XXVI (2) of the contract and, thereafter, on June 15, 2005, sought arbitration, pursuant to the terms of the parties’ collective bargaining agreement. The Federation filed the instant improper practice charge on August 11, 2005, arguing that the District violated the Act when it unilaterally changed the health insurance available to unit members from a choice of three providers to a single provider. The District admitted to the change but argued that the same plans were available to unit employees as required by the contract, albeit under one provider, and sought deferral of the charge to the parties’ contractual grievance procedure.

The ALJ deferred the instant charge to arbitration because a decision on the improper practice charge turns on construction of the collective bargaining agreement.
DISCUSSION

The Federation argues in its exceptions that the improper practice charge alleges a violation of §209-a.1(d) of the Act in that the District unilaterally implemented the very change in health insurance it was seeking to negotiate at the bargaining table; that the District changed the status quo in violation of §209-a.1(e); and that the District’s conduct evidences a repudiation of the contract in violation of §209-a.1(a) of the Act.

The Federation correctly asserts that an employer has the obligation under the Act to maintain all terms of the expired agreement until a new agreement is negotiated; that an employer must bargain changes in mandatory subjects of negotiations and, generally, may not unilaterally implement changes in such subjects during negotiations. Further, an employer may not repudiate the collective bargaining agreement by engaging in acts in total disregard of the contract’s terms without any colorable claim of right.

Here, the Federation asserts that the District’s unilateral decision to select Blue Cross Blue Shield as the sole provider for its health insurance plans was in violation of its duty to negotiate in good faith, altered the status quo as defined by the terms of the parties’ contract and repudiated the parties’ collective bargaining agreement. The

1 Act, §209-a.1(e).

2 Act, §209-a.1(d).

3 New York City Transit Auth, 35 PERB ¶3008 (2002).
District admits to the change in provider, but argues that its action was consistent with the terms of the parties' collective bargaining agreement. A decision on the merits of the parties' arguments in this case, therefore, clearly hinges upon the meaning of Article XXVI (2) of the parties' 1999-2004 collective bargaining agreement.

In *Herkimer County BOCES*, we determined that it is appropriate for us to defer ruling on questions of our jurisdiction to allow the parties to follow their contractual grievance procedure when there is a pending grievance and the grievance procedure ends in binding arbitration. While it would appear clear that PERB has jurisdiction over this matter in light of the expiration of the parties' collective bargaining agreement, applying the rationale we articulated in *Town of Carmel*, it is nonetheless appropriate to defer rendering a determination on the improper practice charge when a determination under the contractual grievance procedure is likely to be dispositive. Any determination in this case necessitates an interpretation of Article XXVI (2); an arbitration award is, therefore, potentially dispositive of the charge.

A repudiation charge may only be sustained when a party denies the existence of an agreement or acts without any colorable claim of right in total disregard of the contract's terms. As the District does not disavow the existence of an agreement, the

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4 20 PERB ¶3050 (1987).
5 29 PERB ¶3073 (1996).
6 *Supra*, note 3.
remaining basis for finding repudiation, no contractual claim of right, requires an interpretation of the relevant contractual language to determine the District's contractual obligations regarding the provision of health insurance coverage to unit employees. It is, therefore, appropriate that this aspect of the charge also be deferred.

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

Accordingly, the charge is conditionally dismissed, subject to a motion to reopen should the District interpose an objection to arbitrability or should the award not satisfy the criteria set forth in New York City Transit Authority (Bordansky).\(^7\)

SO ORDERED.

DATED: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

\(^7\) 4 PERB ¶3031 (1974).
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Charging Party,

- and -

CITY OF NEW YORK,

Respondent.

RICHARD J. MERRITT, ESQ., for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Law Enforcement Employees Benevolent Association (Association) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, its improper practice charge alleging, as amended, that the City of New York (City) violated §§209-a.1(a), (b), (d) and (f) and §209-a.2(c) of the Public Employees’ Fair Employment Act (Act).

The Association filed its original improper practice charge on July 3, 2006. The Director advised the Association that its submission was deficient in that it appeared that PERB lacked jurisdiction, that the submission did not contain the requisite four copies required by PERB’s Rules of Procedure (Rules)\(^1\), that there were no supporting

\(^1\) Rules of Procedure, §204.1(a)(1).
facts, and the conduct alleged to constitute the violation was not clearly and concisely identified. Thereafter, the Association filed an original and four copies of an amended charge. The Director determined that the amendment did not cure the deficiencies in the charge and issued a decision dismissing the charge.

EXCEPTIONS

The Association excepts to the Director’s decision, arguing that the Director erred in his findings. The City has not responded to the exceptions.

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

FACTS

The Association represents a unit of Environmental Police Officers (EPO) employed by the City’s Department of Environmental Protection. By virtue of CPL §1.20(34)(o), the EPOs were added to the definition of “police officers” in 1983.

Section 209.2 of the Act provides that interest arbitration is available to “officers or members of any...police force or police department of any county, city, town, village...or police district”. Section 212.3 specifies that the provisions of §209 are applicable “to any organized fire department, police force or police department of any government....” Apart from these employees, jurisdiction over impasses in negotiations and arbitration for employees of the City is vested in the Board of Collective Bargaining of the City of New York (BCB).

The Association’s original submission to the Director was entitled “A Petition to Resolve Impasse, For Injunctive Relief and Mandatory Arbitration”. The Association
argues that it represents police officers employed by the City who are entitled to invoke the provisions of the Act for the resolution of impasses in collective negotiations. The Association further alleges that the City has failed to negotiate in good faith, that the City entered into a successor agreement with the employee organization that represents the unit that previously included the EPOs while BCB was conducting hearings on the Association’s representation petition for the EPOs and has refused to negotiate a “police officer” contract with the Association, all in violation of the City’s Collective Bargaining Law.

The Director dismissed as deficient the Association’s improper practice charge. He did not reach a determination on whether the EPO’s constituted a “police force” within the meaning of the Act because he determined that even if they could be considered as police officers subject to the provisions of §§209 and 212 of the Act, the Association had not filed a declaration of impasse with PERB. Further, the Director found that the charge did not clearly and concisely identify the conduct alleged to be violative of the various subsections of §209-a.1 of the Act alleged to be violated. Finally, the Director dismissed the alleged §209-a.2(c) violation as the City is not an employee organization.

DISCUSSION

We affirm the decision of the Director for the reasons stated in his decision. While we do not need to decide the issue, we note that the Association has submitted no evidence that it represents “officers or members of any...police force or police department” of the City. It appears, therefore, that the provisions of §§209 and 212 of
the Act are not applicable to the EPOs and PERB does not have jurisdiction over this
group of employees. That the EPOs are included within the CPL’s definition of “police
officer” would not be sufficient by itself to confer jurisdiction with PERB or to give the
EPOs eligibility for coverage under the Act’s compulsory interest arbitration or scope of
negotiations provisions.2

Additionally, to the extent that the Association’s pleading contain scope of
negotiations issues, PERB has not determined an impasse to exist.3 Its filing in July
2006 of a packet of forms, including a “Demand for Arbitration” form does not constitute
a declaration of impasse, especially since the form used was for Voluntary Grievance
Arbitration, and not for interest arbitration.4

As to the alleged violation of §§209-a.1(b) and (f) of the Act, no facts were pled
which, if proven, would establish that the City is dominating or interfering with the
formation or administration of the Association or that State funds have been
impermissably used to discourage union organizing or to discourage employees from
participating in such organizing. Finally, only an employee organization can be charged
with violating §209-a.2(c) of the Act.

2 As we first stated in Erie County Sheriff and Erie County, 7 PERB ¶3057 (1974), the
fact that certain employees are “police officers” does not mean that they constitute a
“police force” and gain entitlement to the impasse resolution procedures of §209 of the
Act. See also County of Erie and Erie County Sheriff, 22 PERB ¶3055 (1989) and
County of Oneida and Oneida County Sheriff, 20 PERB ¶3044 (1987).

3 Act, §212. See also Patrolmen’s Benevolent Association of the City of New York, Inc.,

4 Rules, §205.
Based on the foregoing, we deny the Association's exceptions and we affirm the
decision of the Director.

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

DATED: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
This case comes to us on exceptions filed by Velma Davis to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her improper practice charge that alleges that the Westchester County Health Care Corporation (Corporation) violated §§209-a.1(a), (b) and 2(b) of the Public Employees’ Fair Employment Act (Act) by humiliating her and terminating her employment. The Director found that the charge was deficient and dismissed the charge in its entirety.

EXCEPTIONS

Davis filed exceptions with the Board but failed to file proof of service of the exceptions upon the Corporation. Although advised of this failure and given the
opportunity to submit to the Board proof of timely service of her exceptions upon the Corporation, Davis failed to do so.

FACTS

On or about July 31, 2006, Davis filed an improper practice charge against the Corporation. By letter dated August 2, 2006, the Director advised Davis that the charge was deficient, but that an amendment to cure the deficiency could be filed by August 16, 2006. Davis filed an amendment on August 16, 2006. By a decision, dated August 22, 2006, the Director determined that the amendment did not cure the deficiencies and dismissed the charge.

PERB’s Rules of Procedure are published in the New York Compilation of Codes, Rules and Regulations (NYCRR), Title 4, Chapter VII and are available on-line at www.perb.state.ny.us. In addition, with her copy of the Director’s decision, Davis received an extract of PERB’s Rules of Procedure.\(^1\) The extract contains those parts of the Rules which describe how exceptions to a decision of the Director are to be filed with the Board. Specifically, the extract contains the instruction that a party filing exceptions must also file “proof of service of copies of such exceptions and brief upon each party”. The extract also contains the definition of the term “party” to include “any person, organization or public employer named in a charge”.

DISCUSSION

Section 213.2(a) of PERB’s Rules of Procedure, which was included in the extract from the Rules provided to Davis, requires a party filing exceptions to also serve

\(^{1}\) The extract does not contain the Rule section numbers, but contains the text of §§200.5, 200.9, 200.10, 213.2, 213.3, 213.4, 213.5, and 213.6.
those exceptions on all other parties within the same fifteen working day period for the filing of exceptions and, in addition, to file proof of such service with the Board. A charging party is charged with knowledge of the Rules, particularly in light of their public availability. Davis’s exceptions were not served upon the Corporation within the requisite time period and no proof of service has been filed with the Board.

Timely service upon other parties is a component of timely filing and we will dismiss exceptions that have not been timely served.\(^2\)

The exceptions are, therefore, dismissed and the decision of the Director dismissing the improper practice charge is affirmed.

SO ORDERED.

DATED: November 1, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member