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State of New York Public Employment Relations Board Decisions from January 24, 2012

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from January 24, 2012

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In the Matter of:

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

Petitioner,

- and -

COUNTY OF ONEIDA,

Employer,

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Incumbent/Intervenor.

STEVEN A. CRAIN and DAREN J. RYLEWICZ, DEPUTY CO-COUNSEL, for Petitioner

SAUNDERS KAHLER, LLP (GREGORY J. AMBOROSO, ESQ., of Counsel), for Employer

GARY M. HICKEY, for Intervenor

BOARD DECISION AND ORDER

On July 15, 2011, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the County of Oneida (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:
Included: See attached list of titles.

Excluded: All others.

Pursuant to that agreement, a secret-ballot election was held on December 2, 2011, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
Account Clerk
Account Clerk-Typist
Accounting Administrative Officer
Accounting Supervisor
Administrative Assistant
Administrative Officer
Aging Services Aide
Assistant Director of Income Maintenance
Assistant Motor Vehicle Bureau Supervisor
Assistant Real Property System (RPS) Coordinator
Assistant Recreation Director
Assistant Youth Bureau Director
Associate Graphic Artist
Associate Nutrition Services Coordinator
Associate Planner
Associate Workforce Development Coordinator
Auditor I
Auditor II
Auditor III
Buyer
Case Manager
Case Supervisor, Grade A
Case Supervisor, Grade B
Caseworker
Central Stores Clerk
Chief Social Welfare Examiner
Chief Tax Clerk
Child Assistance Program (CAP) Coordinator
Child Support Unit Supervisor Assistant
Children & Family Services Specialist
Clerk
Community Services Aide
Community Services Worker
Computer Programmer
Computer Specialist
Computer Technical Assistant
Confidential Investigator
Confidential Support Investigator
Contract Administrator
Court Reporter
Crime Victim Advocate
Crisis Intervention Counselor
Customer Relations Supervisor
Data Processing Clerk
Data Processor I
Data Processor II
Delinquent Tax Clerk
Director of Records Management
Disbursements Officer
Engineering Aide
Engineering Technician
Environmental Health & Safety Officer
Environmental Health Inspector
Family Services Specialist
Finance Administrative Officer
Gang Intelligence Investigator
Geographic Information Systems (GIS) Analyst
Geographic Information Systems (GIS) Coordinator
Geographic Information Systems (GIS) Technician I
Geographic Information Systems (GIS) Technician II
Head Social Welfare Examiner
HIV Coordinator
Instructional Computing Specialist
Inventory Records Clerk
Investigative Financial Analyst
Job Development & Placement Manager
Junior Engineering Aide
Junior Planner
Junior Planning Aide
Law Clerk
Library Clerk
Licensed Practical Nurse
Mail and Supply Clerk
Mail Clerk
Managed Care Supervisor
Map Room Clerk
Medical Records Clerk
Medical Services Coordinator
Medical Social Work Supervisor
Medical Worker
Microfilm Operator
Motor Vehicle Bureau Supervisor
Motor Vehicle Operator
Motor Vehicle Representative
Network Administrator I
Network Administrator II
Nurse Practitioner
Office Manager
Office of Continuing Care Program Nurse
Office of Continuing Care Senior Social Worker
Office Specialist I
Office Specialist II
Offset Duplicating Machine Operator
Outreach Worker
Paralegal Assistant
Parent Aide
Parent Aide Supervisor
Payroll Clerk
Personnel Assistant
Personnel Technician I
Phlebotomist-Outreach Worker
Planner
Planning Specialist
Pre-K Special Education Specialist
WHITE COLLAR TITLES

Principal Account Clerk
Principal Accounting Supervisor
Principal Clerk
Principal Office Specialist
Principal Public Health Sanitarian
Principal Social Welfare Examiner
Printing Helper
Printing Supervisor (MVCC)
Probation Assistant
Probation Officer
Probation Supervisor
Program Analyst
Psychiatric Social Worker I
Public Health Engineer
Public Health Sanitarian
Public Health Technician I
Public Health Technician II
Real Property Administrative Officer
Real Property Systems (RPS) Coordinator
Research Analyst
Research Assistant
Resource Investigator
Secretary to Director Real Property Tax Services
Senior Account Clerk
Senior Account Clerk-Typist
Senior Administrative Assistant
Senior Buyer:
Senior Caseworker
Senior Clerk
Senior Computer Operator
Senior Computer Programmer Analyst
Senior Confidential Investigator
Senior Drafter
Senior Engineering Aide
Senior Family Services Specialist
Senior Geographic Information Systems (GIS) Analyst
Senior Medical Worker
Senior Motor Vehicle Representative
Senior Nutrition Outreach Worker
Senior Office Specialist I
Senior Office Specialist II
Senior Offset Printing Machine Operator
Senior Planner
Senior Probation Officer
Senior Public Health Engineer
Senior Public Health Sanitarian
Senior Resource Investigator
Senior Social Services Investigator
Senior Social Welfare Examiner
Senior Support Investigator
Senior Tax Map Technician
Senior Workforce Development Coordinator
Senior Workforce Development Counselor
Social Services Investigator
Social Welfare Examiner
Social Worker Assistant
Stock Clerk
Stop DWI Program Administrator
Store Clerk (MVCC)
Supervising Campus Security Officer
Supervising Office of Continuing Care Nurse
Supervising Resource Investigator
Supervising Support Investigator
Support Investigator
Systems Analyst
Tax Abstract Clerk
Tax Clerk
Tax Map Technician
Telephone Operator I
Telephone Operator II
Transportation Analyst
Transportation Coordinator
Victim/Witness Coordinator
Vocational Education Counselor
Webmaster
Welfare Management Systems Coordinator
WIC Nutrition Technician
WIC Nutritionist
Workforce Development Coordinator
Workforce Development Counselor
Workforce Development Interviewer
Workforce Development Special Project Coordinator
Youth Program Director
MVCC
UPSEU – WHITE COLLAR UNIT
CURRENT JOB TITLES

Account Clerk
Administrative Assistant
Central Stores Clerk
Data Processing Clerk
Data Processor I
Environmental Health & Safety Officer
Library Clerk
Mail Clerk
Office Specialist I
Office Specialist II
Principal Account Clerk
Senior Account Clerk
Senior Clerk
Senior Administrative Assistant
Senior Office Specialist I
Senior Offset Printing Machine Operator
On July 15, 2011, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the County of Oneida (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:
Included: See attached list of titles.

Excluded: All others.

Pursuant to that agreement, a secret-ballot election was held on December 2, 2011, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: January 24, 2012
Albany, New York

[Signature]
Jerome Lefkowitz, Chairperson

[Signature]
Sheila S. Cole, Member
BLUE COLLAR TITLES

Aircraft Service Supervisor
Aircraft Service Worker
Airport Electrician
Airport Heavy Equipment Operator
Airport Maintenance Supervisor
Airport Maintenance Worker
Assistant Chief Wastewater Treatment Plant Operator
Assistant Civil Engineer
Assistant Engineer
Associated Engineer
Automotive Mechanic
Automotive Mechanic Supervisor
Building Maintenance Helper
Building Maintenance Mechanic
Building Maintenance Supervisor
Building Maintenance Worker
Bus Dispatcher
Bus Driver
Bus Driver/Dispatcher
Campus Security Officer
Carpenter I
Carpenter II
Chief Wastewater Solids Disposal Operator
Computer Operator
District Supervisor
Electrical Technician
Electrician
Equipment Technician Expediter
Field Technician
Forester
Grounds Supervisor
Heavy Equipment Mechanic
Heavy Equipment Mechanic Supervisor
Heavy Equipment Operator
Heavy Motor Equipment Operator
Highway Maintenance Helper
Highway Maintenance Worker
Highway Radio Dispatcher
HVAC Building Superintendent
Industrial Waste Chemist
Junior Wastewater Treatment Plant Operator
Junior Wastewater Treatment Plant Operator Trainee
Labor Supervisor
Laboratory Technician (Wastewater Treatment)
Laborer
Light Motor Equipment Operator
Machinist
Mail Courier
Maintenance Mechanic-Machinist (Wastewater Treatment)
Maintenance Mechanic-Welder (Wastewater Treatment)
Painter
Parking Attendant
Security Dispatcher
Senior Building Maintenance Helper
Senior Building Maintenance Mechanic
Senior Campus Security Officer
Senior Custodian
Senior Laboratory Technician (Wastewater Treatment)
Senior Wastewater Treatment Plant Operator
Sewer Maintenance & Equipment Operator
Sewer Maintenance Supervisor
Storekeeper
Superintendent of Airport Maintenance
Supervising Building Maintenance Helper
Supervisor, Building Services
Wastewater Treatment Plant Attendant
Wastewater Treatment Plant Electrician
Wastewater Treatment Plant Maintenance Helper
Wastewater Treatment Plant Maintenance Supervisor
Wastewater Treatment Plant Maintenance Worker
Wastewater Treatment Plant Operator
Wastewater Treatment Plant Operator Trainee
Water Resources Chemist
Working Supervisor
MVCC
UPSEU BLUE COLLAR UNIT
CURRENT JOB TITLES

Assistant Building Superintendent
Building Maintenance Helper
Building Maintenance Mechanic
Building Maintenance Supervisor
Building Maintenance Worker
Campus Security Officer
HVAC Building Superintendent
Labor Supervisor
Light Motor Equipment Operator
Mail Courier
Painter
Security Dispatcher
Senior Campus Security Officer
Storekeeper
Working Supervisor
In the Matter of

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

-and-

MASTICS-MORICHES-SHIRLEY COMMUNITY LIBRARY, Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: Account Clerk, Library Clerk, Library Clerk (Spanish Speaking), Senior Library Clerk, Principal Library Clerk, Community Service Aide, Technical Coordinator I & II, Computer Technician, Custodial Worker I, II & III, Librarian I & II, Librarian I-Children's Services, Library Assistant, Librarian Trainee, Page and Guard.

Excluded: Director, Assistant Director, Business Manager II, Librarian III, Senior Account Clerk, Network & Systems Technician, Literacy Volunteer Program Coordinator, Circulation Department Head and Digital Services Department Head.

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

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the South Seneca Administrators' Association 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: Regularly appointed employees in the positions of High School Principal, Middle School Principal, Elementary School Principal and Director of Special Programs.

Excluded: Superintendent and School Bus Official.

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

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson
Sheila S. Cole, Member
In the Matter of

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

Petitioner,

-and-

COUNTY OF SUFFOLK and SUFFOLK COUNTY COMMUNITY COLLEGE,

Joint Employer,

-and-

SUFFOLK COUNTY ASSOCIATION OF MUNICIPAL EMPLOYEES, INC.,

Intervenor/Incumbent.

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,¹

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

¹ By letter dated October 28, 2011, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO notified PERB that it disclaims any interest in representing this unit.
Employment Act,

IT IS HEREBY CERTIFIED that the Suffolk County Association of Municipal Employees, Inc., has been designated and selected by a majority of the employees of the above-named joint employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All employees in the titles within Bargaining Unit No. 2 (White Collar) who are jointly employed for Taylor Law purposes by Suffolk County and Suffolk County Community College.

Excluded: All other employees.

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

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson
Sheila S. Cole, Member
In the Matter of

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

Petitioner,

-and-

COUNTY OF SUFFOLK and SUFFOLK COUNTY
COMMUNITY COLLEGE,

Joint Employer,

-and-

SUFFOLK COUNTY ASSOCIATION OF
MUNICIPAL EMPLOYEES, INC.,

Intervenor/incumbent.

BOARD DECISION, CERTIFICATION OF REPRESENTATIVE
AND ORDER TO NEGOTIATE

On November 5, 2010, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO filed a timely petition for decertification of the Suffolk County Association of Municipal Employees, Inc., as the current negotiating representative for certain employees who were within a unit of employees of the County of Suffolk and to be certified as the negotiating representative of a unit of those employees who are assigned to the Suffolk County Community College. The parties agreed to the following unit composition:

Included: All employees in the titles within Bargaining Unit No. 6 (Blue Collar) who are jointly employed for Taylor Law purposes by Suffolk County and Suffolk County Community College.

Excluded: All other employees.
Upon consent of the parties, a mail ballot election was held on December 9, 2011. The results of this election show that a majority of eligible employees in the unit who cast valid ballots still desire to be represented for purposes of collective negotiations by the Suffolk County Association of Municipal Employees, Inc. (Intervenor/Incumbent). ¹

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 Suffolk County Association of Municipal Employees, Inc., has been designated and selected by a majority of the employees of the above-named joint employer, in the unit agreed to be most appropriate, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

FURTHER, IT IS ORDERED that the above named joint employer shall negotiate collectively with the Suffolk County Association of Municipal Employees, Inc.

¹ Of the 196 ballots case, 142 were for representation and 20 against representation. There were 4 challenged ballots.
The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
This case comes to the Board on exceptions filed by Ira J. Smulyan (Smulyan) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing Smulyan's May 12, 2011 improper practice charge, as amended, alleging that the State of New York (Insurance Department Liquidation Bureau) (Liquidation Bureau) violated §§209-a.1(b) and (c) of the Public Employees' Fair Employment Act (Act) and that the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (CSEA) violated §209-a.2(c) of the Act.¹ The Director dismissed

¹ 44 PERB ¶4557 (2011).
the charge on the grounds that the allegations against the Liquidation Bureau and CSEA are untimely, and that Smulyan has failed to allege sufficient facts that, if proven, would demonstrate that the Liquidation Bureau violated §§209-a.1(b) and (c) of the Act or that CSEA violated §209-a.2(c) of the Act.

EXCEPTIONS

In his exceptions, Smulyan seeks reversal of the Director’s decision on the grounds that his charge is timely and that his charge, as amended, contains clear and concise factual allegations setting forth meritorious claims against the Liquidation Bureau and CSEA under the Act. The Liquidation Bureau and CSEA urge that we deny Smulyan’s exceptions, asserting that the Director’s decision is substantively correct and that the exceptions do not comply with the requirements of §213.2 of our Rules of Procedure (Rules).

Following our careful review of the record, Smulyan’s exceptions, and the responses from the Liquidation Bureau and CSEA, we affirm the Director’s decision.

FACTS

In considering Smulyan’s exceptions, we assume the truth of the factual allegations made in his amended charge, granting all reasonable inferences to the alleged facts.²

² Board of Educ of the City Sch Dist of the City of New York (Grassel), 43 PERB ¶3010 (2010).
Smulyan was employed by the Liquidation Bureau from 2003 to March 31, 2010. Throughout his tenure, Smulyan had disputes with the Liquidation Bureau and his immediate supervisor over written evaluations of his work performance. He received at least five consecutive negative performance evaluations, and challenged two of those evaluations through separate grievances in April 2008 and March 2009.

In November 2009, CSEA represented Smulyan at a hearing with respect to his second grievance. Although the hearing was held before a neutral hearing officer, Smulyan alleges that the hearing was unfair because of alleged collusion between the Liquidation Bureau and CSEA. In December 2009, CSEA refused Smulyan's request to file another grievance challenging an action plan relating to his performance that was developed following the hearing officer's written determination.

On March 16, 2010, Smulyan was suspended with pay after he reported to his supervisors that he had discovered an unidentified white powder, which he believed to be dangerous, in a cup in his desk drawer. His report precipitated an immediate evacuation of his workplace and a hazardous material investigation by federal agents and New York City police. Later that day, a CSEA representative informed Smulyan that investigators concluded that the white powder was salt. Smulyan was also told that the Liquidation Bureau suspected that his report had been a prank. CSEA refused, however, to file a grievance challenging Smulyan's suspension.

While under suspension with pay, Smulyan was offered a severance agreement under which the Liquidation Bureau would pay him a monetary amount in exchange for his resignation. On March 31, 2010, Smulyan accepted the settlement offer, which was
Case No. U-31050.

rescindable by April 7, 2010. Smulyan chose not to rescind the settlement agreement after learning from the Liquidation Bureau's Chief Human Resources Officer that if the settlement was rescinded, the Liquidation Bureau would suspend him without pay based upon his job performance, including his conduct surrounding the discovery of the white powder.

Following the effective date of his resignation, Smulyan filed a complaint against the Liquidation Bureau in April 2010 with the New York State Office of the Inspector General (OIG). During the pendency of that complaint, Smulyan received periodic updates from OIG staff. In October 2010, Smulyan learned that OIG had transferred the conduct of its investigation to the Liquidation Bureau's General Counsel and Assistant Special Deputy Superintendent. For the next few months, Smulyan's repeated phone calls and emails to the Liquidation Bureau's General Counsel and Assistant Special Deputy Superintendent went unanswered.

In January, 2011 Smulyan filed separate unfair labor practice charges against the Liquidation Bureau and CSEA with the National Labor Relations Board (NLRB). The NLRB's Region 2 dismissed both charges on March 31, 2011 because the NLRB lacks jurisdiction over public employers. In May 2011, the NLRB's Office of Appeals denied Smulyan's appeal of the dismissal of his charges.

3 During this period, Smulyan also had telephone conversations with CSEA attorneys about the handling of the November 2009 hearing and CSEA's failure to grieve the March 16, 2010 suspension.
Pursuant to §204.1(a)(1) of the Rules, an improper practice charge must be filed within four months from the date that a charging party has actual or constructive knowledge of the act or acts that form the basis for the charge.\footnote{New York State Thruway Auth, 40 PERB ¶3014 (2007); City of Oswego, 23 PERB ¶3007 (1990); City of Binghamton, 31 PERB ¶3088 (1998).} The time period for filing a charge is not tolled by the pendency of a related claim in another forum.\footnote{State of New York (State University of New York at Stony Brook)(Cooper), 44 PERB ¶3021 (2011) \textit{pet dismissed}, Cooper v New York State Pub Empl Rel Bd, 44 PERB ¶7012 (Sup Ct Albany County 2011); New York State Thruway Auth, 40 PERB ¶3014 (2007).}

In the present case, Smulyan's charge against the Liquidation Bureau is untimely because it was filed more than four months after he could have rescinded the severance agreement. The fact that Smulyan pursued a complaint with OIG and filed an unfair labor practice charge against the Liquidation Bureau with the NLRB did not toll the filing period under §204.1(a)(1) of the Rules. Even if we were to find the alleged failure of the Liquidation Bureau's General Counsel and Assistant Special Deputy Superintendent to respond to Smulyan's communications concerning the OIG complaint to be cognizable under §209-a.1(c) of the Act, those allegations are untimely as well.

Finally, Smulyan's allegations against CSEA are untimely because the charge was filed four months after the November 2009 hearing, and four months after CSEA refused to file grievances on his behalf. Smulyan's complaint to OIG and his unfair labor practice charge against CSEA did not toll the time period for filing a charge under the Rules.
In the alternative, we would affirm the dismissal of the amended charge on the merits. According to Smulyan's allegations, the negative evaluations and his disputes with the Liquidation Bureau over those evaluations, preceded his 2008 and 2009 grievances. While his grievances constitute protected activity under the Act, his charge fails to allege any additional facts that, if proven, would demonstrate that the Liquidation Bureau’s subsequent actions toward him concerning his job performance violated §209-a.1(c) of the Act.

We reach a similar conclusion concerning Smulyan's allegation about collusion between the Liquidation Bureau and CSEA at the November 2009 hearing. His allegations concerning CSEA's representation at that hearing, if proven, are insufficient to demonstrate that the Liquidation Bureau violated §209-a.1(b) of the Act.\(^6\)

Smulyan's allegations against the Liquidation Bureau concerning the March 2010 suspension, the severance agreement and his subsequent complaint to OIG are equally deficient. According to the amended charge, the event that triggered his suspension and resignation was the March 16, 2010 report about his discovery of a possibly toxic white powder in his work area that turned out to be salt. While a health and safety report by an employee under certain facts and circumstances may constitute protected activity for purposes of the Act,\(^7\) the amended charge does not allege any facts that

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\(^6\) In his May 24, 2011 amendment to his charge, Smulyan alleges that CSEA representatives tricked him into not submitting certain documents to the hearing officer. Attached to his May 26, 2011 amendment, however, Smulyan submitted a December 14, 2009 email he sent to the Liquidation Bureau's Chief Human Resources Officer alleging that his CSEA representatives prohibited him from speaking about certain issues at the hearing.

would demonstrate his report was related to forming, joining or participating in an employee organization.\(^8\) Furthermore, the alleged facts surrounding his resignation are insufficient to prove that the Liquidation Bureau constructively discharged him in violation of the Act.\(^9\) The facts and circumstances of Smulyan's OIG complaint following his resignation are also insufficient to state a claim of improperly motivated retaliation under the Act.

Finally, the amended charge does not allege sufficient facts that might demonstrate that CSEA violated §209-a.2(c) of the Act. The amended charge does not include sufficient factual allegations to demonstrate that CSEA's refusals to process grievances on behalf of Smulyan were discriminatory, arbitrary or in bad faith. In addition, Smulyan's dissatisfaction with the tactical decisions made by CSEA in representing him at the November 2009 hearing does not state a claim of a breach of the duty of fair representation.\(^10\)

\(^8\) *County of Tioga*, 44 PERB ¶3016 (2011). In contrast, Smulyan's report might constitute protected activity under Civ Ser Law §75-b as a necessary preliminary notification to the Liquidation Bureau of what he reasonably believed constituted a substantial and specific danger to the public health or safety. PERB, however, lacks jurisdiction over retaliation claims premised upon Civ Ser Law §75-b.

\(^9\) *Holland Patent Cent Sch Dist*, 32 PERB ¶3041 (1999); *State of New York (SUNY Oswego)*, 36 PERB ¶3015 (2003), confirmed sub nom: *CSEA v New York State Pub Empl Rel Bd*, 8 AD3d 796, 37 PERB ¶7002 (3d Dept 2004). See also, *Morris v. Schroder Capital Mgt Intl*, 7 NY3d 625, 621 (2006)("Constructive discharge occurs 'when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.'")

\(^10\) *Amalgamated Transit Union, Local 1056 (Lefevre)*, 43 PERB ¶3027 (2010).
Based upon the foregoing, we affirm the Director's decision to dismiss the charge.

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

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz
Chairperson

Sheila S. Cole, Member
This case comes to the Board on exceptions filed by the Chenango County Law Enforcement Association, Inc. (Association), to a decision of an Administrative Law Judge (ALJ)1 on an improper practice charge filed by County of Chenango and Chenango County Sheriff (Joint Employer) alleging that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting certain proposals to interest arbitration. The Association has filed exceptions limited to the ALJ's conclusion concerning Association Proposal #4 – Dues Deductions, Association Proposal #8 – Holiday, and Association Proposal #15 – Workers' Compensation.2

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1 43 PERB ¶4592 (2011).

2 The content of each proposal is fully set forth in the ALJ's decision. Supra, note 1, 43 PERB ¶4592 at 4805 and 4807.
DISCUSSION

In Orange County Deputy Sheriff's Police Benevolent Association, Inc (County of Orange), we reiterated that the applicable test for determining whether a particular demand is directly related to compensation, and therefore arbitrable under §209.4(g) of the Act, is the one first articulated in New York State Police Investigators Association (State Police):

The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent directly relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount or level of compensation by either payment from the State to or on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance copayment). [Emphasis in original.]

In the present case, Association Proposal #4 – Dues Deduction seeks to amend the parties' agreement to add the subject of an agency shop fee deduction. The ALJ concluded that the proposal was not arbitrable based upon Ulster County Deputy Sheriff's Police Benevolent Association, Inc (County of Ulster).

In County of Ulster, the Board ruled that proposals concerning membership dues and agency shop fees deductions are not arbitrable under §209.4(g) of the Act because

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3 44 PERB ¶3023 (2011).

4 30 PERB ¶3013 (1997), confirmed sub nom., New York State Police Investigators Assn v New York State Pub Empl Rel Bd, 30 PERB ¶7011 (Sup Ct Albany County 1997).

5 Supra, note 4, 30 PERB ¶3013 at 3028.

6 38 PERB ¶3033 (2005).
they did not "meet the test for compensation" due to a lack of a "nexus between the dues deduction and the unit members' relationship to the County." It is notable that the Board in County of Ulster did not rely upon the statutory language of §209.4(g) of the Act or the State Police test in reaching its conclusions.

Following careful review, we reverse County of Ulster, and find that Association Proposal #4 – Dues Deduction is arbitrable because it is directly related to compensation under §209.4(g) of the Act. By definition, a mandatory agency fee deduction decreases the level of compensation received by unit employees from the Joint Employer and places a financial obligation on an employee arising out of his or her employment. In reversing County of Ulster, we are very mindful of the importance of stare decisis in public sector labor relations. Nevertheless, we are obligated to correct erroneous interpretations of law when to do so is necessary to effectuate the policies of the Act, which are set by the Legislature.9

7 Supra, note 6, 38 PERB at 3114.

8 In reaching our decision today, we note that the at-issue agency shop fee proposal does not include precise contractual language. Therefore, we do not have to reach the question of whether an agency shop fee proposal that does not include a refund procedure equivalent to that set forth in Civ Ser Law §208.3(b) of the Act is mandatory, permissive or prohibited under the Act. See generally, Abood v Detroit Bd of Ed, 431US 209 (1977); Chicago Teachers Union, Local No 1, AFT, AFL-CIO v Hudson, 475 US 292, 19 PERB ¶7502 (1986); Lehnert v Ferris Faculty Assn, 500 US 507, 24 PERB ¶7530 (1991); Locke v Karass, 555 US 207, 42 PERB ¶7501 (2009).

9 Orange County Deputy Sheriff's PBA, Inc, supra, note 3; Manhasset Union Free Sch Dist, 41 PERB ¶3005 (2008), confirmed and mod, in part, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), on remittitur, 42 PERB ¶3016 (2009); City of Cohoes, 31 PERB ¶3020 (1998), confirmed sub nom., Uniformed Firefighters of Cohoes, Local 2562 v Cuevas, 32 PERB ¶7026 (Sup Ct Albany County 1999), affd, 276 AD2d 184, 33 PERB ¶7019 (3d Dept 2000) lv denied, 96 NY2d 711 (2001); County of Orange, 14 PERB ¶3060 (1981).
Next, we turn to the Association’s exception to the ALJ’s conclusion that Association Proposal #8 - Holiday is not arbitrable under §209.4(g) of the Act. In County of Orange, we reaffirmed that when a unitary demand contains an inseparable nonarbitrable component, it does not satisfy the arbitrability test under §209.4(g) of the Act. In the present case, we affirm the ALJ’s conclusion that Association Proposal #8 - Holiday is a unitary demand that seeks to increase the number of paid holidays and to obligate the Joint Employer to pay unit employees overtime for working those holidays.

Finally, we affirm the ALJ’s conclusion that Association Proposal #15 - Workers’ Compensation is nonmandatory and, therefore, not arbitrable because the demand would deprive the Joint Employer of its statutory right to make initial General Municipal Law §207-c eligibility determinations. Contrary to the Association’s argument, an employer’s right to make an initial determination is not limited to making “a decision upon the stated condition” of an employee. Under GML §207-c an employer may require an employee who seeks benefits to undergo a medical examination in order to determine that the alleged injury or illness occurred in the performance of duty.

IT IS THEREFORE ORDERED that the Association withdraw from interest arbitration the following: Proposal #2 - Association Business Leave; Proposal #8 - Holiday; Proposal #11 - Sick Leave, §§18.04, 18.06, and 18.07; Proposal #12 -

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10 Supra, note 3.

11 See also, Sullivan County PBA, 39 PERB ¶3034 (2006); Tompkins County Deputy Sheriff’s Assn, Inc, 44 PERB ¶3024 (2011).


13 Brief in Support of Exceptions, p. 6.
Vacation Banking Policy; Proposal #13 – Personal Leave Business; and Proposal #15 – Workers' Compensation.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO,

Charging Party,

-and-

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

Respondent.

MARY J. O'CONNELL, GENERAL COUNSEL (MEAGHEAN MURPHY ESQ.,
of counsel), for Charging Party

DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (SETH J. BLAU, of counsel), for Respondent

BOARD DECISION AND ORDER

Based upon our review of the exceptions filed by the Board of Education of the City School District of the City of New York (District) to the decision of an Administrative Law Judge (ALJ),¹ and the response filed by District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), we reverse the decision of the ALJ, which finds that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it eliminated the 5:30 a.m.-1:30 p.m. shift for employees in the title of loader and handler at its warehouse in Long Island City.

FACTS

Employees in the title of loader and handler at the District's warehouse make regular supply deliveries to District schools for approximately 8 of the 17 truck delivery routes. Prior to July 2010, the loaders and handlers worked one of two daily shifts: 5:30 a.m.-1:30 pm or 6:00 a.m.-2:00 p.m. The two shifts were necessary to ensure sufficient

¹ 44 PERB ¶4580 (2011).
Case No. U-30279

time for a seniority-based selection of assignments, with the selection process occupying approximately ½ hour of each shift. Sixty percent of the employees worked the 5:30 a.m.-1:30 p.m. shift and received an extra ½ hour of the contractual shift differential than those who started work at 6:00 a.m. In June 2010, the District decreased from two to one, the number of loaders and handlers assigned to each delivery truck for the approximate 8 routes. As a result of that decision, the District laid off 10 of the 43 loaders and handlers. In July 2010, the District eliminated the 5:30 a.m.-1:30 p.m. shift based upon its conclusion that the shift was no longer operationally necessary because there were fewer loaders and handlers to select assignments.

DISCUSSION

Under the Act, staffing and the level of services provided by an employer are managerial prerogatives, and therefore, nonmandatory subjects. In the present case, it is undisputed that the District made an operational determination to eliminate the shift commencing at 5:30 a.m. based upon the reduction in staffing and driving assignments obviating the need for two ½ hour periods for selection of assignments. Therefore, we reverse the ALJ’s decision, and dismiss the charge.

IT IS THEREFORE ORDERED THAT the charge is dismissed.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

See, City of White Plains, 5 PERB ¶3008 (1972); Town of Blooming Grove, 21 PERB ¶3032 (1989); Starpoint Cent Sch Dist, 23 PERB ¶3012 (1990).

Our decision in County of Rockland and Rockland County Sheriff, 27 PERB ¶3019 (1994) is inapposite to the present one. In that case, there was no evidence presented that the change in the starting and ending times was the result in a reduction in staffing or a modification in the services provided by the employer.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN N. SCOURAKIS,

Charging Party,

CASE NO. U-31251

- and -

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK) and PUBLIC EMPLOYEES FEDERATION,

Respondents.

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STEPHEN D. HANS, P.C., for Charging Party

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by John N. Scourakis (Scourakis) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing as untimely an amended improper practice charge originally filed on August 2, 2011, which alleges that the State of New York (State University of New York) (State) violated §209-a.1(c) of the Public Employees' Fair Employment Act (Act) and that the Public Employees Federation (PEF) violated §209-a.2(c) of the Act.¹

FACTUAL ALLEGATIONS

In considering Scourakis's exceptions with respect to the timeliness of his

¹ 44 PERB ¶4482 (2011). Neither PEF nor the State filed responses to the exceptions.
amended charge, we assume the truth of the factual allegations. Our decision, however, is limited to the timeliness of the particular allegations cited by Scourakis in his exceptions concerning the actions by the State and PEF in scheduling an arbitration for October 5, 2011.

On July 28, 2009, Scourakis was served with a notice of discipline by the State after he asserted a contractual right to PEF representation during an interrogation concerning a June 14, 2009 incident. Scourakis filed a grievance challenging the notice of discipline. On December 18, 2009, the State issued a second notice of discipline seeking a proposed nine-month suspension in retaliation for Scourakis' filing grievances with PEF, demanding PEF representation during an interrogation and reporting patient safety issues. Scourakis grieved this notice of discipline, as well.

On May 4, 2010, Scourakis received a third notice of discipline seeking his discharge premised upon an alleged incident on February 17, 2010. After Scourakis filed a grievance, an agency-level meeting was held on October 26, 2010, and a decision was issued on November 9, 2010. Unbeknownst to Scourakis at the time, however, PEF did not file a timely demand for arbitration. On May 19, 2011, Scourakis learned from a PEF attorney that the State intended to summarily terminate him on the ground that PEF failed to file a timely demand for arbitration with respect to the third notice of discipline. Scourakis was terminated the following day. In mid-July, 2011,

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2 Board of Educ of the City Sch Dist of the City of New York (Grassel), 43 PERB ¶3010 (2010).

3 In Case No. U-31227, which is pending before an Administrative Law Judge (ALJ), Scourakis alleges that PEF's conduct concerning the third notice of discipline violated its duty of fair representation under the Act.
Case No. U-31251

Scourakis learned that the State and PEF intended to schedule an arbitration on October 5, 2011 concerning the two 2009 notices of discipline that had remained dormant for over a year.

**DISCUSSION**

Pursuant to §204.1(a)(1) of the Rules of Procedure, an improper practice charge must be filed within four months from the date that a charging party has actual or constructive knowledge of the act or acts that form the basis for the charge. In the present case, Scourakis filed his charge within four months of learning that the State and PEF intended to schedule an arbitration concerning the two 2009 notices of discipline. Therefore, we conclude that the amended charge is timely to the extent it alleges that the State violated §209-a.1(c) of the Act and that PEF violated §209-a.2(c) of the Act by taking action in mid-July 2011 to schedule the arbitration with respect to the 2009 notices of discipline.

IT IS, THEREFORE, ORDERED that the amended charge is reinstated and the case remanded to the Director for further processing consistent with this decision.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

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*New York State Thruway Auth, 40 PERB ¶3014 (2007); City of Oswego, 23 PERB ¶3007 (1990); City of Binghamton, 31 PERB ¶3088 (1998).*
In the Matter of

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

Charging Party,

-and-

COUNTY OF ST. LAWRENCE,
Respondent.

CASE NO. U-29935

STEVEN A. CRAIN and DAREN J. RYLEWICZ, DEPUTY CO-COUNSEL
(PAUL S. BAMBERGER of counsel), for Charging Party

MICHAEL C. CROWE, COUNTY ATTORNEY, for Respondent

BOARD DECISION AND ORDER

Upon our review of the exceptions by the County of St. Lawrence (County) to the
decision of an Administrative Law Judge (ALJ), and the response by the Civil Service
Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), we affirm the
ALJ's conclusion that the County violated §209-a.1(d) of the Public Employees' Fair
Employment Act (Act) for the reasons set forth in the ALJ's decision.¹ The County
violated the Act by announcing to current employees a change in a binding past
practice by freezing the level of reimbursement of Medicare Part B premiums to current
employees and their spouses, for unit employees who retire on or before December 31,
2010, and discontinuing that benefit for unit employees who retire after December 31,
2010.²

¹ 44 PERB ¶4518 (2011).

² See, Chenango Forks Cent Sch Dist, 43 PERB ¶3017 (2010). See also, Aeneas
McDonald PBA v City of Geneva, 92 NY2d 326, 331-332, 31 PERB ¶7503 at 7505
IT IS THEREFORE ORDERED that the County:

1. Rescind its February 3, 2010 announcement freezing the level of reimbursement of Medicare Part B premiums to current employees and their spouses once they are retired and discontinuing the benefit for future retirees;

2. Reimburse, with interest at the maximum legal rate, any employee who retired on or before December 31, 2010 and who was eligible to receive Medicare Part B for the difference, if any, between the premium amount for Medicare Part B in effect on January 1, 2010 and the premium amount for which they received reimbursement after January 1, 2010;

3. Reimburse, with interest at the maximum legal rate, any employee who retired after December 31, 2010 and who was eligible to receive Medicare Part B, for the full cost of the Medicare Part B premium then in effect; and

4. Sign and post the attached notice at all locations used to communicate both in writing and electronically with unit employees.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, 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 County of St. Lawrence in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the County of St. Lawrence will:

1. Rescind its February 3, 2010 announcement freezing the level of reimbursement of Medicare Part B premiums to current employees and their spouses once they are retired and discontinuing the benefit for future retirees;

2. Reimburse, with interest at the maximum legal rate, any employee who retired on or before December 31, 2010 and who was eligible to receive Medicare Part B for the difference, if any, between the premium amount for Medicare Part B in effect on January 1, 2010 and the premium amount for which they received reimbursement after January 1, 2010; and

3. Reimburse, with interest at the maximum legal rate, any employee who retired after December 31, 2010 and who was eligible to receive Medicare Part B, for the full cost of the Medicare Part B premium then in effect.

Dated  

By  

on behalf of County of St. Lawrence

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

LANCASTER STEWART,

Charging Party,

- and -

PUBLIC EMPLOYEES FEDERATION,
AFL-CIO,

Respondent,

- and -

STATE OF NEW YORK (STATE INSURANCE
DEPARTMENT),

Employer.

LANCASTER STEWART, pro se

WILLIAM P. SEAMON, GENERAL COUNSEL (EDWARD J. ALUCK of
counsel), for Respondent

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (RONALD S.
EHRLICH of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Lancaster Stewart (Stewart) to
a determination, dated May 10, 2011, by the Director of Public Employment Practices and
Representation (Director) denying Stewart's efforts to rescind his April 29, 2011 request to
withdraw an improper practice charge he filed alleging that the Public Employees
Federation, AFL-CIO (PEF) violated §209-a.2(c) of the Public Employees' Fair Employment
Act (Act) when it denied his request to seek the vacatur of an arbitration award pursuant to
CPLR Article 75. The State of New York (State Insurance Department) (State) is a statutory
party to the charge pursuant to § 209-a.3 of the Act.
EXCEPTIONS

In his exceptions, Stewart asserts that he should have been permitted to rescind his withdrawal request before the Director accepted the withdrawal because: he signed the withdrawal request form in error; he sought to rescind the withdrawal one business day after he signed the form and before the withdrawal request was received by the Director; he had an unfettered right to rescind the withdrawal request; and the collateral estoppel defense plead in PEF's answer is without merit.

Both PEF and the State oppose the exceptions on the ground that the Director acted properly in denying the rescission request. In addition, PEF contends that the Director's actions concerning the withdrawal request are not subject to exceptions under §213.2 of the Rules of Procedure (Rules) and that Stewart cannot demonstrate that PEF violated the duty of fair representation. ¹

PROCEDURAL BACKGROUND

On or about January 5, 2011, Stewart filed an improper practice charge, Case No. U-30693, alleging PEF violated §209-a.2(c) of the Act when a PEF attorney, during an arbitration in April, June and July, 2010, failed to contact certain witnesses identified by Stewart and made tactical decisions that Stewart disagreed with. In addition, the charge alleged that PEF violated the duty of fair representation by refusing to commence a special proceeding pursuant CPLR §7511 to vacate an October 14, 2010 arbitration award, which was allegedly based upon perjured testimony and fraudulent documents.

During the initial processing of Stewart's charge the Director conducted a facial

¹ On January 23, 2012, Stewart faxed a letter to the Board seeking an “adjournment” of the case. Our Rules are silent concerning a party requesting to adjourn a case scheduled for consideration by the Board, and Stewart has failed to present any reason why the Board should delay deciding his exceptions. Accordingly, we deny Stewart's request.
examination of the allegations consistent with §204.1(a) of the Rules. On January 13, 2011, the Director sent Stewart a letter stating that his charge would not be processed due to deficiencies outlined in an attached deficiency notice and providing Stewart with an opportunity to correct those deficiencies through an amendment. On January 26, 2011, Stewart filed an unsworn amendment asserting additional allegations in support of his charge. Following a review of the amendment, the Director issued a decision on February 4, 2011 dismissing the charge on the ground that the charge remained deficient. In his decision, the Director concluded that the allegations concerning PEF’s representation during the arbitration was time-barred, and that the allegation concerning PEF’s failure to commence litigation to vacate the arbitration award was deficient because Stewart failed to plead that PEF had commenced similar litigation on behalf of others.

Stewart did not file exceptions to the Director’s decision. Instead, on or about February 21, 2011, he filed the present charge alleging that PEF’s representation during the arbitration violated §209-a.2(c) of the Act, and that PEF violated the duty of fair representation by refusing to commence a judicial proceeding seeking to vacate the arbitration award. In support of the latter claim, Stewart attached excerpts from two court decisions in which it appears that PEF was a party in litigation concerning the vacatur of arbitration awards with respect to others. Following his review, the Director processed the new charge but only to the extent it alleged that PEF violated §209-a.2(c) of the Act by failing to commence litigation to vacate the arbitration award with respect to Stewart. PEF filed an answer that denied that it breached the duty of fair representation and

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2 44 PERB ¶4516 (2011).

3 The Director found that the Stewart’s allegations concerning PEF’s representation at the arbitration were untimely.
asserted various defenses including collateral estoppel, premised upon the Director’s dismissal of Stewart’s earlier charge in Case No. U-30693. In its answer, the State also asserted that Stewart was collaterally estopped from pursuing his charge based upon the Director’s prior decision.

A pre-hearing conference was held before an Administrative Law Judge (ALJ) on April 29, 2011. At the pre-hearing conference, Stewart appeared pro se and PEF and the State were represented by counsel. It is undisputed that during the pre-hearing conference before the ALJ, Stewart signed PERB’s form requesting that his charge be withdrawn. On May 2, 2011, Stewart faxed a letter to the ALJ to rescind his withdrawal request. Two days later, Stewart faxed a letter directly to the Director rescinding the withdrawal. In his letter to the Director, Stewart stated that the April 29, 2011 withdrawal request resulted from discussions at the conference that led him to mistakenly believe that he would be unable to prevail in his charge in light of PEF’s collateral estoppel defense. He further explained that he wanted to proceed with his charge because his subsequent research convinced him that his charge had merit. PEF submitted a letter objecting to Stewart’s rescission request.

On May 10, 2011, the Director issued a letter denying Stewart’s requests to rescind his April 29, 2011 request to withdraw the charge, and approved that withdrawal request.

DISCUSSION

We begin with PEF’s contention that Stewart does not have a right to file exceptions to the Director’s May 10, 2011 letter pursuant to §213.2 of the Rules. Contrary to PEF’s

There are conflicting allegations made by the parties concerning the discussions that took place at the pre-hearing conference. It is unnecessary, however, for us to resolve those conflicts in reaching our decision.
argument, the rulings contained in the Director's letter are clearly reviewable under §213.2 of the Rules, which permits parties to file timely exceptions with the Board, to "a decision, report, order, ruling or other appealable findings or conclusions."

Next, we turn to the merits of Stewart's exceptions. Section 204.1(d) of the Rules states, in relevant part:

The charge may be withdrawn by the charging party before the issuance of the dispositive decision and recommended order based thereon upon approval by the director. Thereafter, the improper practice proceeding may be discontinued only with the approval of the board. Requests to the director to withdraw an improper practice charge or to the board to discontinue an improper practice proceeding will be approved unless to do so would be inconsistent with the purposes and policies of the act or due process of law. Whenever the director approves the withdrawal of a charge, or the board approves the discontinuation of a proceeding, the case will be closed without consideration or review of any of the issues raised by the charge.

Based upon its explicit terms, §204.1(d) of the Rules limits the right of a charging party to unilaterally withdraw a charge. Under the Rule, all withdrawal requests are subject to approval and will not be approved if it is determined that the withdrawal would be inconsistent with the policies of the Act or due process. In contrast, the Rule does not dictate when a charging party must request to withdraw a charge nor does it prohibit a charging party from changing his or her mind prior to a withdrawal request being approved. Following approval of a withdrawal request, however, rescission of a withdrawal will be granted only in extremely limited circumstances.

In the present case, Stewart's withdrawal was not connected with a settlement.

See, PEF (Leemhuis), 17 PERB ¶3037 (1984).

PEF (Farkas) 15 PERB ¶3020 (1982); UFT (Fearon), 33 PERB ¶3003 (2000).
agreement under which he would receive consideration for his withdrawal. In addition, his written rescission was submitted within one business day of signing the withdrawal request and before the Director received the signed withdrawal request from the ALJ. Under these facts and circumstances, we conclude that the Director erred in rejecting Stewart's timely rescission, which rendered the withdrawal request null and void.

Therefore, we grant Stewart's exceptions, in part, by reopening the case and remanding it to the Director for further processing consistent with our decision. 7 Nothing in this decision shall preclude the Director or an ALJ from applying his or her discretion to require the parties to submit offers of proof aimed at clarifying any facts in dispute concerning the merits of the charge.

IT IS, THEREFORE, ORDERED that the charge is hereby reopened, and the case remanded to the Director for further processing.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

7 Upon remand, PEF's collateral estoppel defense should be evaluated based upon our decision in MaBSTOA, 40 PERB ¶3023 (2007).
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PROFESSIONAL, CLERICAL, TECHNICAL
EMPLOYEES ASSOCIATION,

Charging Party, CASE NO. U-27860 - and -

BUFFALO CITY SCHOOL DISTRICT,

Respondent.

BARTLO, HETTLER & WEISS (PAUL D. WEISS of counsel),
for Charging Party

KELLY GALE EISENRIED, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Buffalo City School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Professional, Clerical, Technical Employees Association (Association) finding that the District violated §209-a.1(d) of the Public Employees’ Fair Employment Act (Act) when it unilaterally subcontracted exclusively performed on-site computer help desk services.¹

FACTS

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

The record reveals that in December 2004, the District entered into a contract

¹ 43 PERB ¶4627 (2011).
with Administrative Assistants Limited (AAL) for the licensing, implementation and service of eSIS, which is a web-based software system for the processing of data, including grades, schedules and admissions/withdrawals. Prior to implementation of eSIS, the District used a BOCES educational computer system known as Student Information System (SIS) for similar purposes. While the District was using SIS, BOCES provided an off-site help desk for District employees, as well as for employees of other school districts, to answer questions concerning the use of that software. It is undisputed that Association unit members never worked at BOCES' SIS help desk.

Under the terms of the District-AAL contract, the District is responsible for maintaining an on-site help desk to answer routine questions from District employees concerning the day-to-day operations of the eSIS system. When a question is more technical or complicated in nature, the District help desk is authorized to seek assistance from an off-site help desk staffed by AAL employees. After the District failed to establish an on-site help desk by January 2006, it entered into a temporary services contract with AAL to staff the help desk for the period January-June 2006.

In June 2006, the District reassigned Association unit member Minnie Bell (Bell) to work at the on-site eSIS help desk in City Hall. Upon her reassignment, Bell engaged in self-study concerning eSIS, and she received on-the-job training from an on-site AAL implementation specialist by observing that AAL employee answering eSIS questions from District employees.

All District secondary schools began utilizing the eSIS system at the beginning of the 2006-07 school year. In September 2006, Bell started receiving, answering and
documenting eSIS questions at the on-site help desk. These inquiries concerned routine issues like logging-in and scheduling. She also began communicating with the AAL off-site help desk concerning more complicated questions.

The AAL implementation specialist worked with Bell at the on-site help desk until October 2006. On occasion, the AAL implementation specialist would answer calls in addition to Bell. Thereafter, Bell became solely responsible for responding to eSIS questions. In November 2006, the District moved the eSIS help desk into the City Hall room where it maintained a similar help desk, staffed by Association unit members, who were exclusively responsible for answering questions from District employees concerning computer-related problems unrelated to eSIS. As part of her duties, Bell was responsible for documenting questions received and her responsive actions on the same District system used by the Association unit members who work at the other District help desk. In July 2007, Bell stopped exclusively performing the duties of the eSIS help desk when the District reassigned the duties to employees of a private contractor.

DISCUSSION

The District's exceptions are limited to assertions that the ALJ erred in defining the at-issue work, and in concluding that the Association's exclusive performance of the work for nine months is in sufficient to establish exclusivity under the Act.

Under Niagara Frontier Transportation Authority (Niagara Frontier), there are two essential initial questions that must be determined in deciding whether the transfer

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2 18 PERB ¶3083 (1985).
of unit work violates §209-a.1(d) of the Act: a) was the at-issue work exclusively performed by unit employees for a sufficient period of time to have become binding; and b) was the work assigned to nonunit personnel substantially similar to that exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there is a significant change in job qualifications.

In *Manhasset Union Free School District*, we held that in determining the scope of unit work and the exclusivity of that work under the Act, the following past practice test is applicable: the "practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue." In addition, we identified the following criteria, discerned from prior precedent, as providing guidance for determining whether a discernible boundary exists in transfer of unit work cases:

- the nature and frequency of the work performed,
- the geographic location where the work is performed,
- the employer's explicit or implicit rationale for the practice, and
- other facts establishing that the at-issue work has been treated as distinct from work performed by nonunit personnel.

Following our review of the record and the parties' arguments, we affirm the

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5 *Supra*, note 3, 41 PERB ¶3005 at 3025.
ALJ’s definition of the at-issue work as the duties associated with on-site help desks concerning computer questions from District employees. This definition is supported by placement of the eSIS help desk in the same location as the other help desk, where Association unit members provided very similar computer-related services to District employees. It is also supported by the fact that the Association unit members assigned to both help desks documented the computer-based inquiries received and their responses on the same District system.

In City of New Rochelle,\(^6\) we noted that the Board has never identified a specific period that is required to establish exclusivity “because the sufficiency of the duration depends upon the circumstances of each particular fact pattern.”\(^7\) In that case, we found that the exclusive performance of the at-issue duties for one year was sufficient to have become binding under the facts and circumstances.

In the present case, we conclude that Bell’s sole performance of the duties of the on-site eSIS help desk over the nine-month period is sufficient to demonstrate a binding past practice to establish exclusivity under the Act. Under the facts presented, there is sufficient evidence that a reasonable expectation was created that the practice of Association members performing the work exclusively would continue.

Under the District-AAL contract, the District is obligated to maintain an on-site help desk to respond to routine inquiries concerning the eSIS system, and it reassigned Bell in June 2006 for that purpose. Following Bell’s reassignment, the activities of AAL

\(^6\) 44 PERB ¶3002 (2011).

\(^7\) Supra, note 6, 44 PERB ¶3002 at 3027.
employees at the help desk were transitional in nature, and primarily devoted to providing the necessary training for implementation of the system. After the eSIS system became operational for all District secondary schools in September 2006, Bell was responsible for performing the help desk duties. The AAL implementation specialist was present at the help desk until October 2006 chiefly to provide Bell with training and support. In addition, the District took specific actions aimed at integrating the eSIS help desk with the other help desk where Association unit members provided computer help desk services to District employees.

IT IS THEREFORE ORDERED that the District:

1. Cease and desist from unilaterally transferring the exclusive bargaining unit work of providing on-site computer help desk services;

2. Forthwith restore such work to the Association's bargaining unit;

3. Forthwith reinstate Minnie Bell to her former position and make her whole for any wages and benefits lost as a result of the unilateral transfer of unit work with interest at the currently prevailing maximum legal rate;

4. Sign and post the attached notice in all locations normally used to communicate both in writing and electronically with unit employees.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson
Sheila S. Cole, 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 Buffalo City School District in the unit represented by the Professional, Clerical, Technical Employees Association (Association) that the Buffalo City School District will:

1. Not unilaterally transfer the exclusive bargaining unit work of providing on-site computer help desk services from the bargaining unit represented by the Association;

2. Forthwith reinstate Minnie Bell to her former position;

3. Make Minnie Bell whole for any wages and benefits lost as a result of the unilateral transfer of unit work defined in paragraph one, above, with interest at the currently prevailing maximum legal rate; and

4. Forthwith restore such work to the Association's bargaining unit.

Dated .......... By .............................................
on behalf of Buffalo City School District

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.
INTERIM BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Springs School Unit (CSEA) to a decision by an Administrative Law Judge (ALJ) dismissing a charge alleging that the Springs Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally transferring certain duties in the pre-kindergarten program previously performed exclusively by CSEA unit employees to a private contractor, and by mandating that certain unit employees remain on duty until dismissal time on the last day of the school year.¹

¹ 44 PERB ¶4574 (2011).
CSEA excepts to the ALJ’s conclusion that the reassignment of pre-kindergarten program services to nonunit employees is a nonmandatory subject pursuant to Education Law §3602-e. CSEA also excepts to the ALJ’s sustainment of the District’s contract reversion defense concerning the discontinuance of a past practice permitting unit employees to leave early from work on the last day of school. The District supports the ALJ’s decision.

New York State United Teachers (NYSUT) has moved for leave to file an amicus curiae brief limited to the first issue raised in CSEA’s exceptions: whether the provisions of Education Law §3602-e demonstrate a clear legislative intent that the transfer of pre-kindergarten program duties is a nonmandatory subject of negotiations. In support of its motion, NYSUT states that a determination with respect to this legal issue will affect the collective negotiation rights of its members working in other pre-kindergarten programs throughout New York. In addition, NYSUT asserts that its proposed brief, submitted in support of its motion, presents supplemental legal authority and arguments concerning CSEA’s charge.

While CSEA supports NYSUT’s motion, the District does not. The District opposes the motion on the ground that a NYSUT affiliate, which allegedly represents District teachers, could have filed its own timely improper practice charge alleging that the at-issue transfer of work violated §209-a.1(d) of the Act because a pre-kindergarten teacher was also displaced by the District’s unilateral action.
DISCUSSION

Although our Rules of Procedure (Rules) are silent regarding motions for leave to file *amicus curiae* briefs, we have granted many such motions,\(^2\) and in some cases have invited *amicus curiae* briefs.\(^3\)

Participation by an *amicus* can enhance our deliberations by highlighting particular issues and presenting an alternative or supplemental legal analysis. The legal issue in the present case, whether Education Law §3602-e affects the mandatory negotiability of one of the subjects of CSEA's charge, has statewide importance for both employers and employees, and NYSUT's participation as an *amicus* might aid our deliberations.

Contrary to the District's argument, NYSUT is not disqualified from participating as an *amicus* because one of its affiliates might have had standing to file its own charge against the District. The fact that such a charge was not filed is irrelevant to whether NYSUT should be granted *amicus* status but it is relevant to the scope of our remedial order under §205.5(d) of the Act, if we find merit to CSEA's exceptions. Based upon the foregoing, the motion by NYSUT for *amicus* status is granted.

IT IS, THEREFORE, ORDERED that NYSUT may file an original and four copies of an *amicus* brief with the Board on or before February 7, 2012 with proof of service upon the CSEA and the District. CSEA and the District may file supplemental briefs, if


\(^3\) *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, 44 PERB ¶3001 (2011); *Highland Falls PBA*, 42 PERB ¶3030 (2009); *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), confirmed and mod, in part, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), on remittitur, 42 PERB ¶3016 (2009).
necessary with the Board on or before March 7, 2012 in response to the arguments raised by NYSUT.

DATED: January 24, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member
This case comes to the Board on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an amended improper practice charge, originally filed on June 21, 2007, alleging that the Nanuet Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally installed and utilized a surveillance camera to monitor the conduct and work performance of a unit employee.

Following a hearing, the ALJ issued a decision dismissing the charge on the ground that the District's action did not violate §209-a.1(d) of the Act because the subject of the charge was nonmandatory. The ALJ rejected the District's timeliness and
waiver defenses.¹

EXCEPTIONS

CSEA excepts to the ALJ’s conclusion that the District’s installation and use of a surveillance camera to monitor a unit employee’s conduct and work performance did not violate §209-a.1(d) of the Act because the subject is nonmandatory. The District supports the ALJ’s decision on the merits, but cross-excepts to the ALJ’s rejection of its timeliness and waiver defenses. CSEA opposes the District’s cross-exceptions.

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

FACTS

In 2005, the District decided to install a camera surveillance system inside and outside of its buildings to address security and safety issues. The decision was announced by Superintendent of Schools McNeill (McNeill) at a public meeting held in September 2005. The subject of interior and exterior cameras was briefly mentioned in a multi-page attachment to the minutes of that public meeting.

In Fall 2005, Ronald Longo (Longo), the District’s labor counsel, told CSEA Labor Relations Specialist Steve Chanowski (Chanowski) of the District’s decision to install the surveillance system. Longo explained to Chanowski that the surveillance cameras would be placed only in public locations inside and outside of District buildings. Longo assured Chanowski that, in order to protect employee privacy, no cameras would be installed inside break rooms or lunch rooms. Longo also told Chanowski that images captured by the surveillance cameras might lead to the District’s pursuit of disciplinary charges against unit employees. Chanowski shared the substance of this conversation

¹ 43 PERB ¶14591 (2010).
with his supervisor, CSEA Region Director James Farina (Farina), and also informed Farina that he did not plan to request impact negotiations with the District concerning the subject.

Installation of the necessary wiring and equipment for the camera surveillance system began in November 2005, with the knowledge of CSEA unit officers. During that month, CSEA unit officers began discussing various issues associated with the District's decision to install surveillance cameras, including the type of cameras the District would be utilizing, where the cameras would be placed, and what rights unit employees had concerning the surveillance. Among the CSEA officers who participated in the discussions were Head Custodians Joseph Zippilli (Zippilli), Thomas Magalars (Magalars) and Michael Scofield (Scofield).

During a conversation between CSEA Region Director Farina and District attorney Longo in late November or early December 2005, Longo reiterated the District's intent to conduct camera surveillance only in public locations and to take appropriate action against unit employees based on any incriminating evidence gathered from the surveillance. Farina testified that he did not recall whether Longo had discussed the District's use of a camera to observe a specific unit employee.

On February 16, 2006, the District and CSEA representatives again discussed the planned camera surveillance during a meeting in the office of Assistant Superintendent for Business Philip Sions (Sions). At the meeting, the District refused a demand from CSEA Southern Region 3 President Billy Riccaldo (Riccaldo) that it identify the specific locations where the cameras would be placed but District representatives reiterated that the cameras would not be located in break rooms or
bathrooms. After Farina learned about Riccaldo's information demand, Farina told Longo that he did not believe that the District was obligated to provide CSEA with information about the specific locations of the cameras. It is undisputed that the District never provided CSEA with the information sought by Riccaldo.

On or about May 2006, installation of the District's camera surveillance system was completed. According to Superintendent Mark McNeill (McNeill) the surveillance system was building-based with the cameras networked to a central computer located in a room in each building. Each camera captures images for up to 15 days and those recorded images are viewable by individuals with access to the surveillance network computer. The interior cameras are inside softball-size black bubbles located in hallways and other public areas in District buildings including Highview Elementary School (Highview) where Zippilli works as Head Custodian. Although they were aware that the each black bubble may contain at least one surveillance camera, Zippilli and Magalars did not know the direction the cameras faced, the scope of the images captured or the periods of the cameras' operation.

During a May 2006 conversation about the status of the installation of the surveillance cameras, Longo informed CSEA representative Chanowski that it was probable that one camera would be placed in Highview to monitor Head Custodian Zippilli's work performance. The District's decision to utilize a surveillance camera for the purpose of monitoring Zippilli's performance was part of an ongoing District investigation of Zippilli dating back to 2005. The investigation was undertaken after

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2 To reach our decision today, it is unnecessary for us resolve certain conflicts in the testimony of District and CSEA witnesses concerning whether the District stated at the meeting that it intended to utilize the surveillance cameras for disciplinary purposes. It is undisputed that the District had previously expressed that intent to CSEA representatives Farina and Chanowski.
Highview's principal received complaints that the school was not being kept clean because Zippilli was spending too much time in the school's custodial office located in the basement, instead of performing his job duties.

The District hired a private investigator from Cobra Security to conduct the investigation of Zippilli. At the District's request, in May 2006, the private investigator placed a narrow concealed motion-activated camera in a pipe with the lens facing the common area of the hallway outside the custodial room in Highview's basement. The custodial room is utilized by Zippilli and other CSEA unit employees. The purpose of the surveillance was to determine how much time Zippilli spent in the custodial room during his shift. The camera installed in that area was not part of the District's surveillance network system. Unlike the black bubbles covering the District's networked cameras, the camera installed by the investigator was not readily visible. The private investigator periodically manually accessed images from that camera and had them converted to DVD format for the District's use.

The District's planned use of surveillance cameras continued to be the subject of discussions at CSEA unit meetings in May and June 2006. At these meetings, it was reported that the cameras would be located in hallways and not in break rooms.³

The surveillance camera installed by the investigator captured Zippilli and another unit employee, Dila Vucinaj (Vucinaj), entering and leaving the custodial room on 39 occasions between May 22, 2006 and December 1, 2006. Vucinaj was a custodial employee assigned to another District building. The presence of that camera was not known to CSEA until the fruit of the surveillance was offered into evidence during separate disciplinary arbitrations in March 2007 involving Zippilli and Vucinaj.

³ Respondent Exhibits 5 and 6.
The District utilized the surveillance images during the arbitrations to demonstrate that Zippilli and Vucinaj spent excessive amounts of time in the custodial room during their respective shifts instead of performing their job duties.

DISCUSSION

In *Town of Orangetown*, we left open the question "whether and to what extent the intrusiveness of overt or covert audio or video taping outside or inside the workplace renders it a mandatory subject of bargaining" under the Act. In the present case, CSEA's exceptions urge us to resolve that issue by concluding that the District's decision to install and continuously utilize a surveillance camera in a work area of a District building is a mandatory subject, "including the circumstances under which the cameras will be activated, the general areas in which they may be placed, and how affected employees will be disciplined if improper conduct is observed."

Rapid advances in technology over the decades have resulted in the proliferation of various forms of digital and electronic surveillance equipment and software available to employers for monitoring workplaces and their employees. While the decision to implement such technologies in the workplace may have a relationship to an employer's mission, frequently the scope of the data collected, analyzed and distributed can intrude

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4 40 PERB ¶3008 at 3023 (2007), confirmed, *Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Sup Ct Albany County 2007). In *Niagara Frontier Transit Metro System, Inc*, 36 PERB ¶3036 (2003), we affirmed a decision that found an employer's failure to negotiate, upon demand, the impact its decision to utilize videotape surveillance images during a disciplinary proceeding violated §209-a.1(d) of the Act. The negotiability of the employer's decision to engage in videotape surveillance in the workplace was not before us.

5 40 PERB ¶3008 at 3023.

into protected employee interests.\textsuperscript{7} In fact, the architectural designs of surveillance technologies are not generally tailored to balance the respective workplace interests of employers and employees. Some products require that a third party service provider receive, store and possess the data on its own equipment for later use by the employer.

We conclude that, in general, the decision by an employer to engage in videotape surveillance of a workplace for monitoring and investigating employees is mandatorily negotiable under the Act because it "bears a direct and significant relationship to working conditions,"\textsuperscript{8} it requires employees to be video-surveillance participants, and it intrudes upon employee interests including job security, privacy and personal reputation.\textsuperscript{9} The data collected and stored can form the basis for counseling, discipline or demotion. It can also reveal protected concerted activities under the Act, and aspects of an employee's personal life such as a workplace romance or embarrassing personal habits, even when the videotaping is limited to the internal public areas of a workplace.\textsuperscript{10} Finally, we are mindful that videotape images that can be

\textsuperscript{7} See, \textit{City of Albany}, 42 PERB ¶3005 (2009)(an employer can unilaterally impose a new work rule only to the extent that it does not significantly or unnecessarily intrude upon the protected interests of its employees).

\textsuperscript{8} \textit{City of Schenectady}, 21 PERB ¶3022 at 3049 (1988).

\textsuperscript{9} See, Colgate-Palmolive Co, 323 NLRB 515 (1997); National Steel Corp, 335 NLRB 747 (2001), enfd, National Steel Corp v. NLRB, 324 F3d 928 (7th Cir 2003); Anheuser-Busch, Inc, 342 NLRB 560 (2004), enfd sub nom., Brewers and Maltsters, Local Union No. 6 v NLRB, 414 F3d 36 (DC Cir 2005)(subsequent history omitted).

\textsuperscript{10} See, \textit{People v. Weaver}, 12 NY3d 433, 442-443 (2009)(describing the scope of privacy intrusions into an individual's personal life and activities resulting from the retrieval and examination of data automatically collected by a GPS device attached to a vehicle driven on public roads.) \textit{See also, US v Jones, __US__,} 2012 WL 171117 (January 23, 2012)(Sotomayer, J. concurring) (slip op at 3-4); (Alito, J. concurring) (slip op at 11-12).
obtained under the Freedom of Information Law,\textsuperscript{11} by subpoena or by other means, could be posted and distributed through the internet.

To determine whether a particular decision to utilize videotape surveillance in the workplace is mandatorily negotiable under the Act, however, requires a fact-specific examination of employer and employee interests.\textsuperscript{12} Among the factors that must be considered are the nature of the workplace, and the employer's core mission. For example, in a correctional facility, unlike a civilian workplace, videotaping may be integral to the employer's core mission, and therefore the subject might be nonmandatory if the videotaping is necessary and proportional for meeting that mission.\textsuperscript{13} In other workplaces, where videotape surveillance is not integral to the employer's mission, we will balance the respective interests of the employer and the employee to determine whether the videotaping significantly or unnecessarily intrudes upon the protected interests of unit employees. Among the factors that we will consider in applying that balance is the scope and length of the videotaping, and the availability of the images to third parties.

In the present case, the District installed a computer-based camera surveillance

\textsuperscript{11} Public Officers Law §87.

\textsuperscript{12} Board of Educ of the City Sch Dist of the City of New York v New York State Pub Empl Rel Bd, 75 NY2d 660, 23 PERB ¶7012 (1990); Arlington Cent Sch Dist, 25 PERB ¶3001 (1992)(whether an employer's decision to drug test is subject to a balancing of employer and employee interests); County of Erie and Erie Co Medical Center Corp, 39 PERB ¶3036 (2006), confirmed sub nom., Erie Co Medical Center Corp v New York State Pub Empl Rel Bd, 48 AD3d 1094, 41 PERB ¶7002 (4th Dept 2008) (whether employer decision to drug test and conduct criminal background checks is subject to a balancing of employer and employee interests). See also, County of Montgomery, 18 PERB ¶3077 (1985); State of New York (Department of Correctional Services), 38 PERB ¶3008 (2005).

\textsuperscript{13} See, Adirondack Cent Sch Dist, 44 PERB ¶3044 (2011)(unilateral decision to end practice must be necessary and proportional to meet employer's core mission).
network in its school buildings in May 2006 that permits the continuous collection and storage of digital images of hallways and other routine work areas of unit employees without any human supervision or discretion. Those stored images are viewable for any purpose by District representatives with access to the surveillance network computer located in the respective building. While the District made a conscious decision not to place surveillance cameras inside bathrooms and break rooms out of concern for employee privacy, the surveillance system clearly affects employee interests, including job security.

At the same time it installed the surveillance system, the District had a private investigator install a concealed motion-activated camera to capture images of the hallway outside the custodial room in the Highview basement. The immediate purpose

14 Lab Law §203-c prohibits an employer from videotaping an employee in a restroom, locker room or a room designated by an employer for employees to change their clothing, unless authorized by a court order. Videotaping employees in such areas within public workplaces can implicate the constitutional rights of public employees to be free from unreasonable searches and seizures. See generally, Patchogue-Medford Congress of Teachers v Bd of Educ of Patchogue, 70 NY2d 57, 20 PERB ¶7505 (1987).

15 We note that the District placed CSEA representatives on notice of its decision to institute video surveillance in the workplace and explained its potential future use against unit employees. The District, however, summarily rejected Riccaldo's request for information about the planned locations for the cameras, and CSEA representative Farina agreed with the District's refusal. In Hampton Bays Union Free Sch Dist, 41 PERB ¶3008 (2008), confirmed Hampton Bays Union Free Sch Dist v New York State Pub Empl Rel Bd, 62 AD3d 1066, 42 PERB ¶7005 (3d Dept 2009), mot denied, 42 PERB ¶7006 (3d Dept 2009), lv denied, 13 NY3d 711, 42 PERB ¶7009 (2009), we concluded that before a party may refuse to disclose information on the basis of confidentiality, it is obligated to first engage in good faith negotiations aimed at accommodating the need for the requested information. Negotiations aimed at reaching a confidentiality agreement with an employee organization over the scope and nature of video surveillance can protect confidentiality and provide the employee organization with necessary information to fulfill its obligations under the Act. See, National Steel Corp, supra, note 9 (Employer is obligated to disclose information regarding hidden cameras because it is relevant to union's discharge of its statutory duties and responsibilities, and employer's legitimate confidentiality concerns can be accommodated through collective negotiations.).
of this camera was narrow in focus: it was part of the District's ongoing investigation to
determine whether Zippilli was spending his work time performing his duties. It is
undisputed that CSEA representative Chanowski was notified in May 2006 that the
District would be monitoring Zippilli's work performance through video surveillance. The
daily camera surveillance lasted over six months, capturing Zippilli entering and leaving
the custodial room. The District did not present any evidence to the ALJ justifying the
scope and length of the video surveillance of the entrance to the custodial room.
The stored images were periodically retrieved by the third party investigator. There is
little question that the installation and utilization of this hidden camera affected the terms
and conditions of employment of Zippilli, Vucinaj, and possibly other employees utilizing
the custodial room. Notably, the length and scope of the surveillance was far broader
and more intrusive upon employee interests than the limited surveillance conducted in
Elmont Union Free School District. In that case, a bus driver was placed under video
surveillance while driving a school bus on two occasions for the limited purpose of
confirming complaints from multiple sources that she was driving through stop signs,
riding curbs and driving while students were not seated.

It is unnecessary, however, for us to determine in the present case whether the
District violated §209-a.1(d) of the Act by its actions because we find merit to the
District's cross-exception concerning the untimeliness of CSEA's charge. The four-
month time limitation under §204.1(a)(1) of our Rules of Procedure (Rules) runs from
the date that CSEA had actual or constructive knowledge of the act or acts that form the

basis for the charge.\textsuperscript{17} CSEA filed its charge more than four months after Chanowski learned that the District would be engaging in video surveillance to monitor Zippilli's job performance and after both Chanowski and Farina were notified that the District intended to use video surveillance to monitor and discipline unit employees.\textsuperscript{18} Therefore, CSEA's charge is untimely, and must be dismissed.\textsuperscript{19}

IT IS, THEREFORE, ORDERED that the charge is hereby dismissed.

DATED: January 24, 2011
Albany, New York

\textbf{Jerome Lefkowitz, Chairperson}

\textbf{Sheila S. Cole, Member}

\textsuperscript{17} \textit{New York State Thruway Auth}, 40 PERB ¶3014 (2007); \textit{City of Oswego}, 23 PERB ¶3007 (1990); \textit{City of Binghamton}, 31 PERB ¶3088 (1998).

\textsuperscript{18} \textit{Middle County Teachers Assoc}, 21 PERB ¶3012 (1988), \textit{County of Livingston}, 43 PERB ¶3018 (2010).

\textsuperscript{19} Nothing in this decision precludes CSEA, if it so chooses, from requesting impact negotiations concerning the District's decision to engage in video surveillance of unit employees. See, \textit{Niagara Frontier Transit Metro System, Inc.}, supra note 4.