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State of New York Public Employment Relations Board Decisions from June 21, 1979

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from June 21, 1979

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2A-6/21/79
TOWN OF BABYLON HIGHWAY DEPARTMENT	:	<u>BOARD DECISION AND ORDER</u>
upon the Application for Designation of Persons as Managerial or Confidential.	:	<u>CASE NO. E-0479</u>

KAUFMAN, BANNON & KAUFMAN (JOSEPH L. KAUFMAN, ESQ.,
of Counsel) for Employer

LESTER B. LIPKIND, ESQ., (STUART I. LIPKIND, ESQ.,
of Counsel) for CSEA

This matter comes to us on the exceptions of the Town of Babylon Highway Department (applicant) to a decision of the Director of Public Employment Practices and Representation (Director) denying its application for the designation of Rosemary Horan as a confidential employee in accordance with §201.7(a) of the Public Employees' Fair Employment Act (Taylor Law). Rosemary Horan is a principal clerk who reports to Deputy Highway Superintendent Edward Waldman.


Waldman has never been designated managerial. An employee may be designated managerial by this Board if the employer has made application for such designation and the employee either (i) formulates policy or (ii) participates in the preparation for and conduct of collective negotiations on behalf of the employer or has a major role in contract or personnel administration. In order to be designated as confidential, an employee must assist and act in a confidential capacity to a person who is managerial by virtue of responsibilities specified in (ii) above. The Director determined that Waldman's involvement in these matters was "casual and superficial". He ruled,

"Because of the lack of proof that Waldman meets the criteria of 'clause(ii)' it follows, a fortiori, that Horan cannot be designated as confidential...."

In its exceptions, the applicant asserts that the Director erred because the record demonstrates that Waldman has a direct involvement in labor relations on behalf of the employer. We do not agree. The only testimony introduced by the applicant in support of its application was given by Horan. We find her testimony to be incomplete and inclusive. Waldman was not called to testify. The evidence submitted by the applicant is simply not sufficient to prove that Waldman participated substantially in the activities specified in §201.7 (a)(ii) of the Taylor Law. The applicant would have us evaluate the record by surmise and conjecture. We may not do so.

NOW, THEREFORE, WE ORDER that the application for the designation of Rosemary Horan as confidential be, and it hereby is, dismissed.

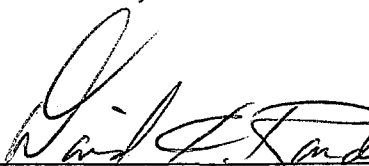
DATED: Albany, New York
June 22, 1979



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2B-6/21/79
BRENTWOOD UNION FREE SCHOOL DISTRICT,	:	
	:	
Employer,	:	<u>BOARD DECISION AND ORDER</u>
-and-	:	
BRENTWOOD CLERICAL SOCIAL EDUCATION & WELFARE ASSOCIATION, INDEPENDENT EMPLOYEES ASSOCIATION,	:	<u>CASE NO. C-1783</u>
	:	
Petitioner,	:	
-and-	:	
CIVIL SERVICE EMPLOYEES ASSOCIATION, BRENTWOOD CHAPTER,	:	
	:	
Intervenor.	:	

BERNARD T. CALLAN, ESQ., for Employer
KAPLOWITZ & GALINSON (DANIEL GALINSON, ESQ.,
of Counsel) for Petitioner
LESTER B. LIPKIND, ESQ., for Intervenor

This matter comes to us on the exceptions of the Brentwood Chapter of the Civil Service Employees Association (Intervenor) to a decision of the Director of Public Employment Practices and Representation (Director) ordering an election in a unit comprising the clerical employees of the Brentwood Union Free School District (employer). The Brentwood Clerical Social Education and Welfare Association, Independent Employees Association (petitioner), seeks certification in such a unit.

The employer has approximately 165 clerical employees. At present they are in a negotiating unit, represented by the intervenor, that also includes about 355 teacher aides. The employer has taken no position as to whether the existing unit should be maintained, as urged by intervenor, or separated into two units, one for the clerical employees, as requested by petitioner, and the other for the teacher aides. The Director agreed with petitioner that the

clerical employees and the teacher aides do not have a sufficient community of interest for the continuation of the existing unit.

In its exceptions, the intervenor contends that the Director was in error when he concluded that there was no community of interest between the clerical employees and the teacher aides. It also contends that there is no evidence in the record that it provided inadequate representation to either the clerical employees or the teacher aides.

We conclude that the record supports the determination of the Director. Since 1972, the clerical employees and teacher aides have, in fact, constituted two separate units, with only the appearance of a single unit by virtue of the fact that the agreements of both groups were executed in the name of the intervenor. The two groups became structurally and functionally separated in 1972. Each group elected its own officers; maintained separate treasuries and bank accounts; developed their negotiating proposals independently; selected separate negotiating teams; negotiated with the employer in separate meetings; and ratified their agreements independently. These circumstances are sufficient to establish that for about seven years there have, in fact, been two separate negotiating units, both of which were represented separately by the intervenor. Under these circumstances, the question of the adequacy of the representation by the intervenor of the two groups is not relevant to a resolution of the unit issue before us as we are not confronted with the question of carving out one group or the other from an actual single unit.¹ Questions as to the adequacy of current representation are thus for the voters to decide in the election ordered by the Director.

NOW, THEREFORE, WE AFFIRM the decision of the Director, and

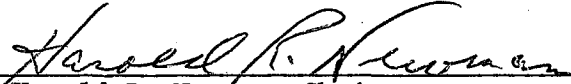
WE ORDER that an election by secret ballot be held under his supervision among the employees in the unit determined to be appropriate, who were employed on the

¹ See, e.g. Matter of Town of Smithtown, 8 PERB ¶3015 (1975).


payroll date immediately preceding the date of this decision.

WE FURTHER ORDER that the employer submit to the Director, the petitioner and the intervenor, within ten days from the date of this decision, an alphabetized list of all employees within the above described unit who were employed on the payroll date immediately preceding the date of this decision.


DATED: Albany, New York
June 22, 1979



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2C-6/21/79

In the Matter of :
YONKERS NON-TEACHING UNIT, LOCAL 860, :
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., : BOARD DECISION
Respondent. : AND ORDER
upon the Charge of Violation of Section : Case No. D-0169
210.1 of the Civil Service Law. :

On August 10, 1978, the Chief Legal Officer of the Yonkers City School District (District) filed a charge alleging, as amended, that the Yonkers Non-Teaching Unit, Local 860, Civil Service Employees Association, Inc. (respondent) had violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a strike against the District on April 11, 12, 13 and 14, 1978. The charge further alleged that approximately 98 percent of the 1100 member negotiating unit participated in the strike.

Respondent filed an answer which, inter alia, denied the material allegations of the charge. However, it thereafter agreed to withdraw its answer and thus admit to all of the allegations of the charge, upon the understanding that the charging party would recommend, and this Board would accept, a penalty of forfeiture of the respondent's dues and agency shop fee deduction privileges to the extent of forty percent (40%) of the amount that would otherwise be deducted during a year.^{1/}

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^{1/} This is intended to be the approximate equivalent of a five month suspension of such privileges. Since the deductions are not made uniformly throughout the year, the penalty is expressed as a percentage of the annual deductions.

The charging party has so recommended.


On the basis of the unanswered charge, we find that the respondent violated CSL §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one.

WE ORDER that the deduction privileges of the Yonkers Non-Teaching Unit, Local 860, Civil Service Employees Association, Inc., be suspended commencing on September 1, 1979 and continuing for such period of time during which forty percent (40%) of its annual dues, and agency shop fees, if any, would otherwise be deducted. Thereafter, no dues or agency shop fees shall be deducted on its behalf by the Yonkers City School District until the Yonkers Non-Teaching Unit, Local 860, Civil Service Employees Association, Inc., affirms that it no longer asserts the right to strike against any government, as required by the provisions of CSL §210.3(g).

DATED: Albany, New York
June 21, 1979


HAROLD R. NEWMAN
Chairman


IDA KLAUS, Member


DAVID C. RANGLES, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2D-6/21/79
BUFFALO SEWER AUTHORITY, :
Respondent, : BOARD DECISION ON MOTION
- and - :
BUFFALO SEWER AUTHORITY EMPLOYEES, : CASE NO. U-3975
AFSCME, LOCAL 1047, :
Charging Party. :


The Buffalo Sewer Authority, respondent herein, has made a motion for an order reversing the decision of a hearing officer which denied its request for particularization of the charge herein.

It is the practice of this Board to refuse to entertain motions to review rulings made during the course of a proceeding until the hearing is completed and the case is submitted to us for decision on the record. Sufficient reason has not been shown why we should depart from this practice and consider an appeal from the ruling of the hearing officer in this case.

Accordingly, the motion is denied.

DATED: Albany, New York
June 22, 1979


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the matter of	:	#2E-6/21/79
	:	
MANHASSET UNION FREE SCHOOL DISTRICT,	:	<u>BOARD DECISION AND ORDER</u>
	:	
Employer,	:	
	:	
-and-	:	<u>CASE NO. C-1690</u>
	:	
LOCAL 854, INTERNATIONAL BROTHERHOOD	:	
OF TEAMSTERS,	:	
	:	
Petitioner.	:	
	:	

RAINS, POGREBIN & SCHER (BERTRAND B. POGREBIN, ESQ. and
BRUCE R. MILLMAN, ESQ., of Counsel), for Employer

IMMERMAN & PERLMAN, ESQS., for Petitioner

This matter comes to us on the exceptions of both the Manhasset Union Free School District (employer) and Local 854, IBT (petitioner) to a decision of the Director of Public Employment Practices and Representation (Director) setting aside an election conducted on October 31, 1978 in a stipulated unit and directing that a new election be held in that unit.

FACTS

The petitioner originally sought to represent the blue-collar employees of the employer. The employer disputed the appropriateness of a unit of blue-collar employees and urged that an all-inclusive non-instructional unit be established. That unit would include both blue-collar and non-instructional white-collar employees. A hearing was scheduled to consider the unit question. On the date of the scheduled hearing, the employer and the petitioner entered into a consent agreement stipulating a negotiating unit consisting of both blue-collar and white-collar personnel. The sole choice to be presented to the employees was whether or not they wished to be represented by petitioner.

During the campaign preceding the election, petitioner entered into an arrangement with the Manhasset Educators Association (MEA). The arrangement

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provided for a so-called coalition of MEA and petitioner pursuant to which white-collar personnel would be permitted to join MEA while blue-collar employees would be authorized to join petitioner; together, the two organizations would negotiate on behalf of the non-instructional staff of the employer. Additional details concerning the nature of the coalition are not found in the record and, indeed, they may not have been worked out by the date of the election, October 31, 1978.

One week before the election, on October 24, 1978, MEA wrote to the white-collar employees about an agreement between petitioner and MEA which "enables" white-collar employees "to affiliate with MEA" while blue-collar employees would "belong" to petitioner. MEA urged the white-collar employees to vote for petitioner because, if petitioner were successful in the election, "we will both represent all non-teaching personnel in contract negotiations." Two days later, petitioner and MEA jointly wrote to all unit members advising them that, because the election was set before the formation of the coalition, only petitioner's name would appear on the ballot but, "[i]n spite of this, rest assured we will both work together at the negotiating table." This joint letter also stressed the right of the white-collar workers to join MEA.

On October 27, 1978, the employer wrote to all unit employees advising them that the letters from MEA and the petitioner were misleading in that only petitioner was on the ballot and, therefore, only petitioner could be certified; hence

"NO OTHER UNION will gain any rights from the election nor could the District recognize nor negotiate with any other union no matter what private deal these two unions make."

The election was held as scheduled. Of the 138 eligible voters, all but ten participated in the election. Of these, 66 voted for the petitioner and 58 voted against representation. Four challenged ballots were not opened because the votes would not have been sufficient to affect the results of the election. Thereafter, the employer filed an objection to conduct affecting the results of the election, stating that petitioner

"falsely represented to employees that, in the event they voted for the Teamsters, the bargaining unit would in effect be divided, with blue collar employees being represented by the Teamsters and white collar employees being represented by the Manhasset Educators Association...."

The Director conducted an investigation. As part of the investigation, he received two sworn affidavits that were submitted by the employer. These affidavits were not shown to the petitioner. One of the affidavits is by a unit employee stating that she, personally, thought that the white-collar employees would be represented by MEA if the petitioner won the election. The Director did not rely upon this affidavit. He ruled that the appropriate test is not whether individual voters did or did not believe that white-collar employees would be represented by MEA, but

"whether a reasonable voter could have believed that a vote for the Local was something other than precisely that. Under this test then, it is clearly immaterial whether one or more employees were, in fact, misled or confused; if the objective reasonable voter could have been, the election must be set aside."

The second affidavit merely introduced the letters of October 24 and October 26, 1978 that had been sent by MEA and the petitioner.

On the basis of the contents of these two letters, the Director determined that,

"the circumstances surrounding this election are such that a reasonable voter could have cast his ballot on the basis that the MEA, as an organization, would be a separate and independent representative of the white-collar employees and that the Local would represent only the blue-collar employees."

He further found that the time between Friday, October 27, 1978, when the employer responded to the information contained in the letters of October 24 and 26, and Tuesday, October 31, 1978, when the election was held, was not sufficient for the confusion generated by the coalition to be clarified. Accordingly, the Director set aside the election and ordered that there be a new election that might more accurately reflect the informed choice of the employees.

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EXCEPTIONS

In its exceptions, the employer argues that the Director should have dismissed the petition, rather than ordering a new election, because, by its agreement with MEA, petitioner relinquished its interest in representing all the employees in the negotiating unit that it had agreed to¹.

In its exceptions, petitioner argues that it should be certified as the representative of the employees in the negotiating unit in accordance with the results of the election because it made no material misrepresentation in its election campaign and issued no confusing or misleading statements. It further asserts that the employer, in any event, had ample time to respond to the campaign material distributed by it and on its behalf. Finally, it contends that the Director committed reversible error when he declined to show the employer's affidavits to the petitioner.

DISCUSSION

The contention of the employer that the petition should be dismissed has merit. By agreeing with the employer upon a negotiating unit consisting of both blue-collar and white-collar personnel, petitioner consented to stand for election as the exclusive bargaining representative in that unit. It thus agreed to present to all the employees in the unit the proposition that it -- and it alone -- would represent them. Following the so-called coalition agreement, however, petitioner and MEA advised the unit employees to disregard the fact that petitioner alone had its name on the ballot and that it alone was seeking certification and informed them that it had agreed to delegate to MEA a substantial part of the statutory responsibilities it was seeking. Such a

¹ It further argues that the Director erred in excluding a document describing events that transpired after the election. According to the employer, the excluded affidavits would illuminate the pre-election arrangements between petitioner and MEA so as to make more clear the intent of the two unions to divide the unit into two distinct units, one of which would be relinquished by the petitioner. In view of our determination herein, it is not necessary to consider this argument.

delegation not only negated the petitioner's ostensible intent to represent the unit it had agreed upon, but also constituted an abandonment of part of that negotiating unit. Just as it would be a ground for revocation of petitioner's certification if it were to abandon part of the negotiating unit for which it was certified, so is such abandonment a ground for the dismissal of the petition² prior to certification.

Having concluded that the Director should have dismissed the petition, it is unnecessary for us to consider the petitioner's exceptions.

NOW, THEREFORE, WE AFFIRM the determination of the Director setting aside the election, and

WE ORDER that the petition herein be, and it hereby is, dismissed.

DATED: Albany, New York
June 22, 1979

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

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² In Automatic Heating and Service Co., 199 NLRB No. 177 (1972), 79 LRRM 1162, the NLRB dismissed a joint petition when it determined that the two unions did not intend to represent the employees jointly, each of the two intending "to bargain solely for the employees within its jurisdiction as if they constituted separate units." See also Wyckoff Heights Hospital, 27 SLRB 75, at p. 79 (1954). "The failure of a certified union to represent all the employees in the appropriate bargaining unit has been ground for revocation of its certification. No useful purpose would be served by conducting an election predicated on an agreement which, if the unions abided by it, well might result in a revocation of any certification which may issue."

DISSENTING OPINION OF HAROLD R. NEWMAN

I dissent from the conclusion of my colleagues that the coalition agreement between petitioner and MEA requires the dismissal of the petition. My colleagues understand the agreement between petitioner and MEA as constituting an abandonment by petitioner of part of the unit in which it is seeking certification. I do not agree. I am persuaded by the employer's own interpretation of the coalition agreement and the campaign letters that this was not the implication of the coalition agreement.³

In my understanding of them, the coalition agreement and the campaign letters issued by petitioner and MEA constitute a material misrepresentation, the consequence of which should be the setting aside of the results of the election and the holding of a new election.⁴ I find that petitioner and MEA misrepresented the role of MEA in the representation of white-collar employees for which petitioner sought certification by implying that MEA would have a greater role than would actually be the case. There is no material difference in the representations made in the October 24 letter issued by MEA from those made in the October 26 letter issued jointly by MEA and petitioner. Moreover, the employer did not have ample time to respond to the campaign material distributed on behalf of petitioner because the implications of that material were not sufficiently clear to permit a reasonable response within the short time available.

Petitioner's argument that the Director committed a reversible error when he declined to show the employer's affidavits to the petitioner is not persuasive. Although I believe that the Director should have shown the

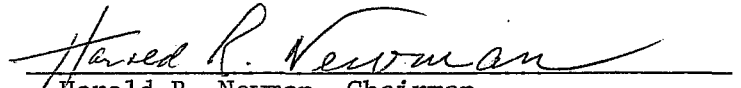
³ See the decision of the Director for the employer's complete statement regarding the implications of the coalition agreement and the campaign letters.

⁴ General Knit of Calif., 239 NLRB No. 101 (1978), 99 LRRM 1687, and Hollywood Ceramics Co., Inc., 140 NLRB 221 (1962), 51 LRRM 1600.

employer's affidavits to petitioner, I conclude that his refusal to do so was not a prejudicial error. One of the affidavits was explicitly disregarded by the Director. The other affidavit merely transmitted two letters that were known to petitioner. It had participated in the composition of one and the other had been written on its behalf.

In my judgment, the decision of the Director should be affirmed.

DATED: Albany, New York
June 22, 1979


Harold R. Newman, Chairman

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :
UTICA CITY SCHOOL DISTRICT, : #2F-6/21/79
Employer, :
-and- : Case No. C-1889
SERVICE EMPLOYEES' INTERNATIONAL UNION, :
LOCAL 200, AFL-CIO, :
Petitioner. :

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 Service Employees' International Union, Local 200, 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.

Unit: Included: All part-time and full-time bus drivers, and assistant bus drivers (aides) employed by the Utica City School District.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Service Employees' International Union, Local 200, AFL-CIO

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of June, 1979
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #wG-6/21/79
BUFFALO MUNICIPAL HOUSING AUTHORITY, :
Employer, :
-and- :
BUFFALO MUNICIPAL HOUSING AUTHORITY :
SECURITY OFFICERS BENEVOLENT ASSOCIATION, : Case No. C-1877
-and- :
Petitioner, :
INTERNATIONAL UNION OF OPERATING ENGINEERS, :
LOCAL 907, LOCAL 907-A, LOCAL 907-B, :
Intervenor. :

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Buffalo Municipal Housing Authority Security Officers Benevolent 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.

Unit: Included: All the employees in the position of
Housing Security Officers.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Buffalo Municipal Housing Authority Security Officers Benevolent Association

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of June, 1979
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :
HUDSON CITY SCHOOL DISTRICT, : #2H-6/21/79
Employer, :
-and- : Case No. C-1871
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., :
Petitioner. :

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.

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.

Unit: Included: Aides and monitors.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc.

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of June, 1979
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

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