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State of New York Public Employment Relations Board Decisions from September 22, 1982

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 22, 1982

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CITY OF ALBANY,

#2A-9/22/82

Respondent,

CASE NO. U-5808

-and-

LOCAL 1961, AFSCME COUNCIL 66, AFL-CIO,

Charging Party.

VINCENT J. McARDLE, JR., ESQ. (W. DENNIS DUGGAN,
ESQ., of Counsel), for Respondent

MICHAEL A. TREMONT, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Local 1961, AFSCME, Council 66, AFL-CIO (Local 1961) to a hearing officer's decision dismissing its charge that Leonard Decker was discharged by the City of Albany because he filed a grievance. The hearing officer determined that the evidence did not prove the charge.

FACTS

Decker had been an employee of the Street Department for about five years, having been promoted from laborer to sub-foreman. At about 11:30 a.m. on October 29, 1981, two members of the staff of George Nealon, the Deputy Commissioner of Public Works of the City of Albany, reported to him that Decker had used the two-way radio to complain about his supervisor, during the course of which Decker had called his supervisor a stupid imbecile. At that time

there had been strict orders that the radio not be used for any but essential messages. Nealon testified that he found Decker's radio complaints objectionable both for their content and their nonessentiality.

At about 3:00 p.m. that day Nealon spoke to Decker on the telephone. Decker told him that he had repaired a walk at the Palace Theater, which is operated by the City of Albany, but that his work had been ruined when some woman walked on the cement and that he would not repair it again. Nealon directed Decker to repair the walk again and then return to the garage. Decker returned to the garage without first repairing the walk. When he arrived, Nealon suspended him for three days.

According to Nealon's testimony he told Harry Maikles, the Commissioner of Public Works, that the reason for the suspension was Decker's misuse of the radio but there are indications in the record that the Palace Theater incident also concerned him. When Local 1961 filed a grievance on behalf of Decker contesting the suspension, it mentioned only the radio incident. Nealon's response referred to the Palace Theater incident as well.

Nealon, who was also the City official responsible for conducting grievance meetings in the Public Works Department, postponed the meeting on the grievance on two occasions at the request of the union. The meeting was finally held on December 3, 1981. Just before going into the meeting with the union, Nealon was handed a letter which Evelyn Knoll, the Director of the Palace Theater, had written to Maikles on November 20, 1981. That letter was a detailed account of the incident at the Palace Theater. It stated that Knoll had asked him to repair the walk and that Decker had responded in a rude manner, refused the request and blamed her for walking on the cement.

When the grievance meeting started, Local 1961 offered to prove that Decker's radio comments about his supervisor had not been abusive. Nealon did not let them do so. Instead, he questioned Decker and ascertained from him that he was not protected by CSL §75 and he fired Decker on the spot. Then, as required by the contract, he gave Local 1961 a written explanation of his discharge action. It stated:

Mr. Leonard Decker was terminated by me effective 3 December 81. His overall work record, including absenteeism, tardiness and attitude were the main reasons, as well as his October 29 incident that serves as a metaphor for his inability to perform as a public servant.

The record contains evidence that Nealon, acting in his capacity as the City's designee to resolve grievances in the Public Works Department, has resolved about 75 grievances, only one of which was sent to arbitration. Nealon, himself, was the object of the complaint in one of those grievances.

On these facts, Local 1961 complained that Nealon fired Decker because Decker initiated the grievance. The filing of a grievance is a protected activity for which an employee may not be disciplined.^{1/} The hearing officer determined, however, that Decker was not discharged because he filed the grievance.

DISCUSSION

In its exceptions, Local 1961 argues that the hearing officer erred in not concluding that Nealon had demonstrated animus toward Local 1961 and its leaders. In support of that exception, it points to testimony it introduced to show such animus. The hearing officer found that the evidence itself was not persuasive. Moreover, she found that its effect was diminished by the

^{1/} State of New York (State University), 12 PERB ¶3009 (1979).

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testimony of Frank Greco, an AFSCME field representative, given on cross-examination, that Nealon had been cooperative with AFSCME and had done an effective job in resolving grievances.

Local 1961 also argues that the hearing officer erred in disregarding testimony that Nealon had admitted that he was firing Decker because Decker was pursuing the grievance. Nealon denied that he made such a statement, and his testimony was corroborated by a third person who was present at the meeting when it was allegedly made. The hearing officer credited the testimony of Nealon in this regard.

Local 1961 makes several arguments in its exceptions and brief in support of its position that Nealon fired Decker because of the grievance and that the reasons given by Nealon were pretextual. It notes that Nealon's after-the-fact written explanation for his discharge of Decker differs from the one given at the time of the discharge or in Nealon's testimony. It also notes that Knoll's letter does not refer to Decker by name. We consider that these circumstances provide no more than a basis for suspicion and surmise as to improper motivation, and that they are as consistent with Nealon's explanation of the discharge as with Decker's. The collective bargaining agreement required Nealon to provide Local 1961 with an explanation of the discharge, and it is not unusual that he used that opportunity to expand upon his dissatisfaction with Decker. As to the absence of any reference to Decker by name in Knoll's letter, it is clear that the employee complained about was Decker.

Further, offsetting any possible inferences of impropriety is the testimony of Greco that Nealon had been cooperative with Local 1961 in the resolution of grievances generally and the fact that he readily granted postponements Local 1961 requested in the instant grievance. Moreover, there is no indication that Nealon developed or manifested prejudice against Decker

between the time Local 1961 filed the grievance and the time when he read Knoll's letter. We therefore conclude that there is not a sufficient basis in the circumstances relied upon by Local 1961 to conclude that Nealon discharged Decker because Decker filed a grievance. Accordingly, we affirm the decision of the hearing officer that Local 1961 did not prove its charge.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is,
dismissed.

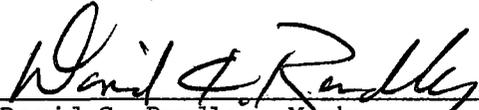
DATED: Albany, New York
September 22, 1982



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2B-9/22/82

UNITED FEDERATION OF TEACHERS,
LOCAL 2,

Respondent,

CASE NO. U-5371

-and-

DONALD BARNETT,

Charging Party.

JAMES R. SANDNER, ESQ. (NANCY E. HOFFMAN, ESQ.,
of Counsel), for Respondent

KENNETH M. AGELOFF, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of United Federation of Teachers, Local 2 (UFT) to a hearing officer's decision that it violated §209-a.2(a) of the Taylor Law by issuing descriptions of a medical expense plan which were misleading in that they indicated incorrectly that only members of UFT were covered by it. In addition to its exceptions, UFT filed a motion with the hearing officer for the reopening of the record. As the motion was filed after the hearing officer issued his decision, it was transmitted to us for action.

The matter also comes to us on the exceptions of Donald Barnett, the charging party, to so much of the hearing officer's decision as dismissed his allegation that persons who pay an agency shop fee to UFT, but are not members of it, are excluded from coverage under the plan. Barnett's exceptions further complain that the remedial order recommended by the

hearing officer is inadequate. That order directs UFT to amend the description of the plan and to post a notice of the amendment at locations where it normally posts notices to unit employees. He argues that posting is inadequate, only a direct mailing to agency shop fee payers and the inclusion of a notice in UFT's publication being sufficient. He also argues that the hearing officer erred in not awarding him attorney's fees.

FACTS

UFT represents teachers employed by the City School District of the City of New York. It has a special medical expense plan which reimburses covered persons for medical expenses that are not otherwise reimbursed under a major medical plan. The plan is financed out of its general fund, including income from agency shop fees. Describing this plan is a four-page brochure that bears the logo of UFT and the signature of Albert Shanker, its president, and Jules Kolodny, its secretary and assistant to the president. The brochure defines the term "participant" in the plan so as to identify participation with membership in UFT.^{1/} In addition, a document circulated among teachers in the New York City school system, bearing the signature of Mr. Shanker, lists benefits that accompany membership in UFT, referring, among other things, to group health insurance and free special medical insurance for catastrophic illness.

^{1/} In its exceptions, UFT argues that the brochure had been used to describe the plan in the past but that there was no evidence in the record of its continued use. Neither is there any evidence in the record that it was withdrawn and the hearing officer correctly presumed continuing use.

Barnett is in the negotiating unit represented by UFT, but he is not a member of that organization. He pays an agency shop fee.^{2/} On February 12, 1981 he filed a claim with UFT's welfare fund requesting reimbursement for certain medical expenses. The welfare fund reimbursed him for those expenses to the extent that they were covered by the fund and it transmitted the claim to UFT for determination whether he was entitled to further benefits under the UFT special medical expense plan. It informed Barnett of these actions in a letter dated March 17, 1981. In that letter, the welfare fund also told Barnett that he would receive additional payment from UFT if he were a member of UFT and meets the eligibility requirements of the special medical expense plan. Upon receipt of this letter from the welfare fund, Barnett telephoned a local office of UFT to ascertain whether he was an eligible beneficiary under the plan and he was told that only UFT members were eligible beneficiaries. He asked that this information be confirmed in writing, but he never received such a confirmation.

On March 25, 1981, Barnett wrote to Dr. Kolodny asking whether he was an eligible beneficiary under the plan. On April 24, which was after the charge herein was filed but before it had been served upon UFT, Kolodny responded to Barnett informing him that he was covered by the plan. Thereafter, Barnett filed several claims with UFT for benefits under the plan and they were all paid.

^{2/} In support of its motion to reopen the proceeding, UFT offered to prove that there were several periods of time between December 1977 and December 1981 that Barnett did not pay an agency shop fee to it. The offer of proof indicates, however, that he did pay such a fee from December 1980 through November 1981. Hence, UFT concedes that Barnett had made agency shop fee payments at all times relevant to the evidence underlying the charge herein.

DISCUSSION

The primary basis of UFT's exceptions is that Barnett was without standing to bring the charge because he was not injured by UFT's conduct, all his claims under the plan having been paid. This argument is relevant only to so much of Barnett's charge as alleged that he was not covered by the medical expense plan, and the hearing officer dismissed that part of the charge.

The allegation that agency shop fee payers were misled by UFT's description of the plan as applying to "members only" focuses on the inaccuracy of that description. It complains that the inaccurate description had the effect of coercing employees to join UFT under the misapprehension that they would suffer a deprivation of benefits if they did not do so. No actual deprivation of benefits is required to establish such a violation of §209-a.2(a) of the Taylor Law. The mere inaccuracy of the description is coercive on its face in that it is sufficient to exert improper pressure upon all agency shop fee payers and, thus, any such unit employees had standing to bring the charge. Moreover, while Barnett did ascertain that he was covered by the plan, he was required to make a special inquiry to obtain that information. Had improper pressure not been placed upon him, he would not have been required to do so.

Except for an allegation that the hearing officer considered evidence that was submitted after the closing of the record, UFT's other exceptions do not go to the merits of the hearing officer's decision. The complaint regarding the consideration of late evidence has no factual basis. It is that the Shanker letter should not have been considered by the hearing officer. That letter, however, was attached to Barnett's charge and was, therefore, part of the record.

In addition to dismissing UFT's exceptions, we also deny its motion to reopen the record. Its offer of proof contains an allegation that Barnett had been paid for several claims under the medical expense plan that he had filed at various times between September 1970 and October 1981. Proof of these allegations would, according to UFT, strengthen its claim that Barnett had no standing to present this charge because he knew of his coverage under the plan, notwithstanding UFT's description of it. The information upon which the offer of proof is based was in the possession of UFT and available to it at all times. Having failed to disclose that information between April 13, 1981 when the charge was filed and March 5, 1982 when the hearing officer issued his decision, it cannot be granted an opportunity to reopen the record and present that evidence at this late date. In any event, for the reasons stated, the evidence, even if accepted, would not affect our conclusion.

In support of his exceptions, Barnett argues that the hearing officer was confused by the fact that his claims had been paid by UFT. He contends that this does not evidence his coverage under the plan, but merely reflects UFT's willingness to pay his claims in order to avert an unfavorable decision on the charge herein. Actual coverage under the plan is, according to Barnett, correctly described in UFT's brochure and Shanker's letter. This argument is not persuasive. There is no evidence in the record of a claim filed by Barnett or any other agency shop fee payer that was not honored by UFT. We therefore affirm the decision of the hearing officer that, although the descriptions of the plan are inaccurate, the agency shop fee payers are, in fact, covered by it. We also agree with his finding that the inaccurate and misleading character of the descriptions violates the right of unit employees to refrain from becoming members of UFT.

Accordingly, we affirm his decision. We also accept his recommended remedial order.^{3/} The notice proposed by him is sufficient and appropriate and as stated by him, "the circumstances of the case do not justify an award of attorney's fees"

NOW, THEREFORE, WE ORDER that UFT:

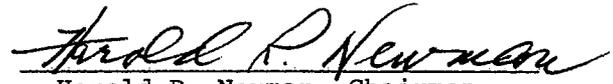
1. Immediately amend the plan brochure to incorporate prominent notice that the plan's participants include nonmembers having an agency shop fee deduction taken from their wage or salary and to incorporate this notice in any and all literature making reference to the plan which is prepared, published, or distributed hereafter;
2. Cease and desist from interfering with, restraining or coercing public employees in the exercise of their rights under the Act.
3. Post the attached notice in all facilities at which unit employees work in locations at which

^{3/} In a footnote in his decision, the hearing officer indicated that the remedy should apply only so long as UFT chose to extend medical expense plan coverage to agency shop fee payers instead of reducing the amount of the agency shop fee commensurately. Since the issuance of his decision, a ruling of the Insurance Department has removed prior doubts that the plan could cover agency shop fee payers. Accordingly, the reservation contained in the hearing officer's decision is no longer relevant and UFT must cover agency shop fee payers under the plan.

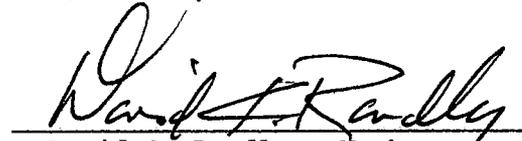
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information for unit employees is ordinarily posted and to which the UFT has access by contract, practice, or otherwise.

DATED: Albany, New York
September 22, 1982


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

APPENDIX

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 employees of the Board of Education of the City School District of the City of New York in negotiating units represented by the United Federation of Teachers, Local 2 (UFT) that the UFT will immediately amend the brochure describing the special medical expense plan (plan) to incorporate a prominent notice that the plan's participants include nonmembers of the UFT having an agency shop fee deduction taken from their wage or salary and will incorporate this notice to all literature making reference to the plan which is prepared, published, or distributed hereafter.

..... United Federation of Teachers, Local 2

Dated

By
(Representative) (Title)

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.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2C-9/22/82

WESTBURY TEACHERS ASSOCIATION,

Respondent,

CASE NO. U-5424

-and-

ALBERT HANDY,

Charging Party.

In the Matter of

WESTBURY TEACHERS ASSOCIATION,

Respondent,

CASE NO. U-5425

-and-

CATHERINE SENIUK,

Charging Party.

BOYD, HOLBROOK & SEWARD (JOHN G. LIPSETT, ESQ.,
of Counsel), for Charging Parties

JAMES R. SANDNER, ESQ. (RICHARD E. CASAGRANDE, ESQ.,
of Counsel), for Respondent

BOARD DECISION AND ORDER

On May 11, 1981, Albert Handy and Catherine Seniuk (charging parties) each filed an improper practice charge alleging that the Westbury Teachers Association (Association) violated §209-a.2(a) of the Act in relation to its 1978-79 agency shop refund because (a) the Association did not refund all monies due the charging parties and (b) the Association failed to provide adequate financial information regarding the refund. The Director dismissed

these charges on the grounds that: (1) this Board has no jurisdiction to make a determination as to the correctness of the amount of the refund (Hampton Bays Teachers Association, 14 PERB ¶3018 (1981)); (2) this Board's decision in Westbury Teachers Association, 14 PERB ¶3063 (1981), dealing with the necessity of furnishing adequate financial information and continuation of the violation by the Association raised only a question of enforcement of our prior order; and (3) the instant charges were time-barred since they were filed more than four months after the complained of refund and failure to furnish information.

In their exceptions to the Director's decision, the charging parties make two arguments, both of which were presented to and rejected by the Director. The first is that they could not have known that their cause of action ripened when they received the refund since this Board did not so hold until our decision in Hampton Bays Teachers Association, supra, on March 17, 1981, more than four months after the refund complained of by the charging parties. Their second argument is that by virtue of a statement in the Association's refund procedure, the Association is estopped from raising the "affirmative defense" of timeliness. Furthermore, since it is an "affirmative defense", the Director could not properly, as he did, raise the question on his own.

We affirm the Director's decision dismissing these charges in their entirety. We do so because the charges were not filed within four months of the alleged improper conduct as required by §204.1(a)(i) of our Rules of Procedure. Our decision in UUP (Barry), 13 PERB ¶3090 (Nov. 11, 1980), made it clear that financial information must accompany the refund and that failure to do so constitutes an improper practice. Our decision in Hampton

Bays merely restated that proposition in the context of a refund procedure without any appellate recourse. In Professional Staff Congress (Rothstein), 15 PERB ¶3012 (1982), we reiterated that unions have been on notice since our UUP (Barry) decision of their obligation to furnish financial information at the time of refund. Such notice is equally applicable to ~~agency fee payers who wish to protect their rights.~~ Since the improper practice occurs, if at all, at the time of refund, the four-month limitation of our Rules begins to run at that time.

In these cases, the Director properly exercised his authority under §204.2(a) of our Rules, which states that, "if it is determined that the facts as alleged do not, as a matter of law, constitute a violation, or that the alleged violation occurred more than four months prior to the filing of the charge, it should be dismissed by the Director" The lack of timeliness of these charges is apparent on their face. Section 204.7(1) of our Rules is intended to apply where such defect is not apparent when the Director processes a charge. That section reads:

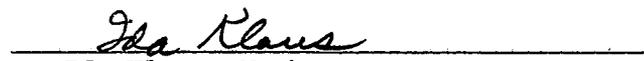
A motion may be made to dismiss a charge, or the hearing officer may do so at his own initiative on the ground that the alleged violation occurred more than four months prior to the filing of the charge, but only if the failure of timeliness was first revealed during the hearing. An objection to the timeliness of the charge, if not duly raised, shall be deemed waived.

In adopting this language, we intended to clarify that a lack of timeliness did not deprive this Board of jurisdiction over the charge. On the other hand, we did not intend timeliness to be exclusively an affirmative defense of the respondent. Our four-month rule must be strictly applied. Thus, we retained both the Director's and the hearing officer's authority to raise the issue on their own initiative.

THEREFORE, IT IS ORDERED that the charges herein be, and they hereby
are, dismissed in their entirety.

DATED: September 22, 1982
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2D-9/22/82

WESTBURY TEACHERS ASSOCIATION,

Respondent,

-and-

CASE NO. U-5570

ALBERT HANDY,

Charging Party.

In the Matter of

WESTBURY TEACHERS ASSOCIATION,

Respondent,

-and-

CASE NO. U-5573

CATHERINE SENIUK,

Charging Party.

BOYD, HOLBROOK & SEWARD (JOHN G. LIPSETT, ESQ.
of Counsel), for Charging Parties

JAMES R. SANDNER, ESQ. (RICHARD E. CASAGRANDE, ESQ.)
of Counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions of the Westbury Teachers Association (Association) to the hearing officer's decision that the Association committed an improper practice in violation of §209-a.2(a) of the Act when it failed to provide adequate financial information at the time Albert Handy and Catherine Seniuk (charging parties) were given their agency fee refund for the 1979-80 school year.

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The material facts are as follows. On September 12, 1980, the charging parties requested a refund for the 1979-80 school year. On May 15, 1981, the Association remitted a refund of \$2.13 purporting to cover refundable expenses of its affiliates, New York State United Teachers (NYSUT) and American Federation of Teachers (AFT). The Association stated that it had no refundable expenses. No financial data explaining the basis of the refund was given at that time. On June 3, 1981, the charging parties appealed the refund pursuant to the Association's refund procedure. The appeal was denied by the Association's executive board and "representative assembly" and the parties were so notified on June 23, 1981. This appears to have completed the appellate procedure.

The Association construed a sentence in the charging parties' letter of June 3, 1981 as a request for financial information. Sometime in the first two weeks of July 1981, the Association sent the charging parties the financial information described in the hearing officer's decision. The information consisted of ledger entries of disbursements by the Association, audited financial statements of NYSUT and AFT and a one-page statement by NYSUT summarizing refundable expenses. The information did not include specific identification of refundable expenses. The charges herein were filed on July 10, 1981.

The hearing officer (1) rejected the Association's contention that it was not obligated to furnish the information until requested to do so, (2) rejected its claim that the charge was mooted by the information furnished in July, and (3) agreed with the Association that he should not consider the adequacy of the July information since the charges do not raise that issue (but he indicated that he would conclude that a sufficient explanation of the refund was not given). He concluded that the Association committed an

improper practice when it failed to furnish financial information at the time when the charging parties were given their refunds for the 1979-80 school year.

As the remedy for such violation, the hearing officer (1) directed the return of all agency fees paid by the charging parties during the 1979-80 school year, together with interest from September 12, 1980 (the date the charging parties requested their refunds); (2) directed the return to them of all agency fees paid during the 1980-81 school year, together with interest from the dates of payment; (3) directed the Association to cease collecting agency fees from the charging parties until such time as the Board should deem appropriate; and (4) directed the payment of the charging parties' reasonable attorney's fees incurred in the prosecution of these proceedings. In fashioning this remedy, the hearing officer noted our previous order in Westbury Teachers Association, 14 PERB 3063 (1981).

In its exceptions, the Association argues: (1) it never refused a request for financial information and promptly complied when such request was made; (2) the entire issue is academic since sufficient information has now been furnished; (3) the hearing officer exceeded his authority in ordering the return of all agency fees paid by the charging parties in 1979-80 and 1980-81, suspending the Association's right to collect agency fees from the charging parties and awarding them attorney's fees. In their response, the charging parties urge that the hearing officer's decision be affirmed in all respects.

DISCUSSION

We have previously held that adequate financial information must be furnished at the time of refund and that failure to do so constitutes an improper practice in violation of §209-a.2(a) of the Act (UUP (Barry), 13 PERB ¶3090 (1980)). We have also held that such information must be furnished to

the objector whether or not a request for the information has been made. (Rothstein, 15 PERB ¶3012 (1982)). Where the failure to provide the required information occurred after our decision in UUP (Barry) (November 11, 1980), we have imposed as a remedy a direction to return to a charging party all agency fees paid by that party for the year in question, together with interest from the date of refund. See PEF (Raterman), 15 PERB ¶3024; Goddard (Gates-Chili Teachers Association), 15 PERB ¶3062 (1982).

The hearing officer's remedy is more extensive than any we have heretofore found necessary to effectuate the policies of the Act. He was properly concerned by the fact that the Association was found to have committed the identical improper practice in connection with a prior year (Westbury Teachers Association (Handy), 14 PERB ¶3063 (1981)). That decision was issued on August 20, 1981, after the events complained of in these cases. We there directed the Association to furnish the required information within 30 days, failing which, the Association would be required to return all agency fees for the year in question.

The Association instituted an Article 78 proceeding to review our decision and order. Another proceeding was also instituted to review our decision and order in Hampton Bays Teachers Association, 14 PERB ¶3018 (1981). Thereafter, the attorneys for the two Associations cooperated with us in an effort to comply with our requirements. Both proceedings were withdrawn after we were satisfied that adequate financial information had been supplied to the agency fee payors. We accepted as compliance with our orders the furnishing of the following information:

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1. As to Westbury Teachers Association, a financial statement signed by its treasurer setting forth its income from all sources and a breakdown of its expenses into 10 major categories, together with "budget guidelines" which explain these categories. Since the Association concluded that it had no refundable expenses, all such reported expenses were considered non-refundable expenses.
2. As to NYSUT, the agency fee payors were furnished audited statements consisting of (a) balance sheet, (b) statement of operations and net worth, (c) statement of changes in financial position, (d) notes to financial statements, (e) statement of operating expenses, (f) statement of auditor identifying the specific line items in (e) which include the refundable expenses and the amounts thereof, and (g) a memorandum by its secretary-treasurer identifying the refundable expenses and indicating how the amount of the NYSUT refund was determined.
3. As to AFT, the agency fee payors were furnished audited statements consisting of (a) balance sheet, (b) statement of income, expenses and fund balance, including general fund, defense fund and militancy fund, (c) notes to financial statements, (d) statement of expenses in general fund, (e) statement identifying specific line items in (d) which include refundable expenses and the amounts thereof, and (f) a memorandum of its secretary-treasurer based on (e), which indicates how the amount of the AFT refund was determined.

We are advised that such information in the same form has been furnished to these charging parties for the 1979-80 school year as well, and that the Association will furnish such information in such form in the future to all who request a refund.

In view of the uncertainties engendered by the timing of our decisions and the pendency of the litigation, we do not believe the hearing officer's remedy in its entirety is necessary to effectuate the purposes of the Act.

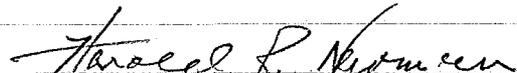
In particular, we will not now order the suspension of the Association's agency shop fee privileges as to the charging parties nor shall we order the payment of attorney's fees. The hearing officer's direction to return the agency fees paid for the 1980-81 school year is unwarranted since these charges did not allege any improprieties with regard to the refund for that year. The same remedial order previously adopted by us in the PEF (Raterman) and Goddard cases is warranted for the violation found in these cases.

NOW, THEREFORE, WE ORDER the Westbury Teachers Association:

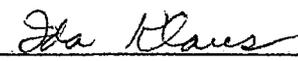
1. to refund to Albert Handy and Catherine Seniuk the total amount of agency shop fees deducted from their salaries for 1979-80, with interest at the rate of 6% per-annum on this sum from May 15, 1981, the date when they received the agency shop refund, until June 25, 1981, and at the rate of 9% per annum thereafter; and
2. at the time of any future refund or notice that a refund will not be made, to furnish to all objectors an itemized audited statement of its receipts and expenditures and those of any of its affiliates which receive, either directly or indirectly, any portion of its revenues from agency fees, together with the basis of its determination of the amount of the refund, including identification of those disbursements determined by it and its affiliates to be refundable and those determined not to be refundable. Should it fail to do so, it shall refund to objectors all agency shop fees collected from them during the year for which the refund was applicable.

3. to post a copy of the notice attached hereto on all bulletin boards regularly used by it to communicate with unit employees.

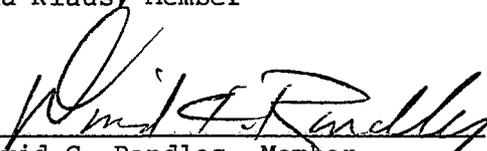
DATED: Albany, New York
September 22, 1982



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

APPENDIX

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 unit employees that:

We will, at the time of making agency shop fee refunds, furnish together with those refunds, an itemized, audited statement of our receipts and disbursements, and those of any of our affiliates receiving any portion of their revenues from agency fees or dues, such statement to indicate the basis of the determination of the amount of refund, including identification of those disbursements of the Association and its affiliates that are refundable and those that are not.

..... WESTBURY TEACHERS ASSOCIATION
Employee Organization

Dated.....

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

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.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATION BOARD

In the Matter of

#2E-9/22/82

CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 832,

Respondent,

CASE NO. U-5735

-and-

COUNTY OF NIAGARA,

Charging Party.

ROEMER & FEATHERSTONHAUGH, ESQS. (STEPHEN J. WILEY,
ESQ., of Counsel), for Respondent

EARL C. KNIGHT, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Niagara County (County) to a hearing officer's dismissal of its allegation that Civil Service Employees Association, Local 832 (CSEA) refused to negotiate in good faith in that it would not remove a tape recorder from a room in which negotiations were taking place.^{1/}

Niagara County and CSEA commenced negotiations on September 15, 1981. At that time CSEA proposed, as a ground rule, that tentative agreements be reduced to writing and be initialed by each side. The County rejected this

^{1/} The hearing officer also dismissed the other allegations contained in the County's charge, but no exception were filed with respect to that action. Similarly, no exceptions were filed by CSEA to the hearing officer's dismissal of its charge in a related case that had been consolidated for decision by the hearing officer.

proposal, and at the following session, which was held on October 2, 1981, CSEA recorded the negotiations. The tape recorder was left on the table in full view of all present, but it was not noticed by the County.

At the third negotiating session, which was held on October 6, 1981, the tape recorder was again left in full view of all the parties. It was noticed by the County representatives after about an hour had passed and they objected to it. They demanded that the recorder be physically removed from the room. As CSEA did not remove it promptly, the County's negotiators left the room.

At the next negotiating session, which was held on October 16, 1982, CSEA again came with its tape recorder. Once again, the County's negotiators demanded that it be removed from the room and when CSEA did not remove it, they started to leave. While they were leaving, CSEA offered to turn the tape recorder off, but this did not satisfy the County and its negotiators left.

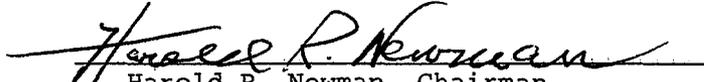
Citing Town of Shelter Island, 12 PERB ¶3112 (1979) and NLRB v. Bartlett-Collins Co., 639 F 2d 652 (10th Cir., 1981), 106 LRRM 2272, cert. den. 452 US 961, 107 LRRM 2768 (1981), the hearing officer correctly ruled that it is improper for a party to insist upon the recording of negotiations. Determining, however, that CSEA did not do so, she concluded that there was no violation. The basis of this determination was that the County left the negotiations before any such insistence could have occurred.

This overlooks the allegation in the charge that CSEA not only insisted upon tape recording the negotiating sessions, but that it also refused to remove the tape recorder. The mere fact that it brought the recorder to negotiations on October 16, after the County objected to its presence on

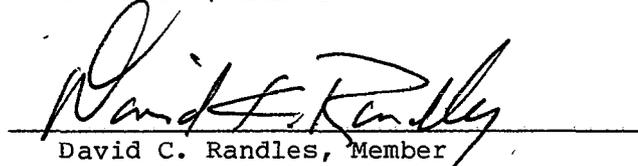
October 6, is sufficient to establish this allegation. Moreover, CSEA had sufficient opportunity on October 16 to inform the County that it was willing to turn off the tape recorder; it follows that it had sufficient opportunity to inform the County that it was willing to remove the tape recorder. It should have done so. The County's awareness of its presence could only give rise to concerns that would inhibit the negotiations.

NOW, THEREFORE, WE ORDER the Civil Service Employees Association, Local 832 to cease and desist from refusing to negotiate in good faith with the County of Niagara by bringing, without the consent of the County, a recording device into a room where negotiations with the County of Niagara are taking place.

DATED: September 22, 1982
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2F-9/22/82

DEER PARK UNION FREE SCHOOL DISTRICT,

Respondent,

CASE NO. U-5673

-and-

DEER PARK TEACHERS ASSOCIATION, NYEA/NEA,

Charging Party.

COOPER, ENGLANDER & SAPIR, P.C. (ROBERT E. SAPIR, ESQ.,
of Counsel), for Respondent

ROBERT D. CLEARFIELD, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Deer Park Teachers Association, NYEA/NEA (Teachers Association) to a hearing officer's decision dismissing its charge that the Deer Park Union Free School District (District) violated §209-a.1(d) in that it made teaching assignments to directors. Underlying the charge is an assumption of the Teachers Association that teaching is exclusively the work of the employees of the District who are in the unit represented by the Teachers Association. The District's directors are not in that unit. They are supervisory employees of the District and are in a negotiating unit comprised of department chairmen and directors.

Since 1975 the department chairmen and directors have been represented by the Deer Park Association of Chairman/Directors (Chairmen/Directors). Both the 1975-77 and 1977-78 agreements between the District and the Chairmen/Directors permitted department chairmen and directors to teach a

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limited number of classes. Throughout this period, department chairmen were assigned the maximum number of classes permitted by the contract while the directors were assigned fewer classes than were permitted by the contract. The 1978-81 contract between the District and the Chairmen/Directors continued to permit the assignment of classes to department chairmen but precluded such assignments to directors. Pursuant to that contract, no director was assigned a class for two school years. However, the 1981-82 contract between the District and the Chairmen/Directors once again authorized the assignment of a limited number of classes to directors and, acting pursuant to the contract, the District made such assignments.^{1/}

In support of its exceptions, the Teachers Association argues that a new practice came into being during the period of September 1979 through June 1981 when directors were assigned no classes, and that the new practice constituted a benefit to classroom teachers in the unit that it represented. According to the Teachers Association, that benefit had become a term and condition of employment for classroom teachers which could not be altered by the District unilaterally. We do not agree with the Teachers Association. Teaching continued to constitute appropriate work for employees of the District in the Chairmen/Directors unit as well as in the teachers unit throughout the September 1979-June 1981 period. In part, this is evidenced by the assignment of classes to department chairmen. Even without such assignments, however, we would conclude that the contractual provision relieving directors from teaching assignments was a benefit temporarily obtained by the directors which imposed no obligation upon the District with respect to the classroom teachers, although it may incidently have benefited the teachers.

NOW, THEREFORE, WE AFFIRM the decision of the hearing officer,^{2/} and
WE ORDER that the charge herein be, and it hereby is,
dismissed.

DATED: September 22, 1982
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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FOOTNOTES

- 1/ The District laid off two teachers. The hearing officer determined that the number of classroom assignments to Directors was not sufficient to affect the jobs of the teachers. The record supports his determination.
- 2/ Compare Ellenville CSD, 13 PERB ¶3062 (1980) in which we held that a school district did not change any practice when it subcontracted bus runs for the transportation of handicapped children during the summer because there was no established practice of using only unit employees to provide summer transportation for handicapped students.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2G-9/22/82

In the Matter of

AUBURN INDUSTRIAL DEVELOPMENT AUTHORITY,

Employer,

CASE NO. C-2313

-and-

TEAMSTERS LOCAL UNION 506,

Petitioner.

EDWARD A. O'HARA, III, ESQ., for Employer

ROCCO A. DE PERNO, ESQ. (GEORGE C. MURAD, ESQ.,
of Counsel), for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Auburn Industrial Development Authority (Authority) to a decision of the Acting Director of Public Employment Practices and Representation (Acting Director) that two maintenance employees whom Teamsters Local Union 506 (Teamsters) are seeking to organize are employees of the Authority. The Authority asserts that the record does not support the Acting Director's conclusion. Rather, according to the Authority, the evidence is inconclusive and does not establish whether the maintenance workers are independent contractors, employees of the Authority, employees of a private sector company called Trimbec Temps, Inc., or employees of a joint employer composed of the Authority and Trimbec. The Authority argues that the matter must therefore be remanded for the development of a more complete record.

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Having reviewed the record, we determine that there is sufficient evidence to support the conclusion of the Acting Director that the two maintenance workers are employees of the Authority.

The employment of King, the senior maintenance worker, commenced before the Authority had assumed responsibility for the operation of the industrial complex which he maintains, but that Rossman, the junior maintenance worker, was hired by the office of the mayor of Auburn, the mayor being the chairman of the Authority. King and Rossman have been given little supervision. They know the general nature of their work and they perform it. However, specific tasks are assigned to them by the mayor's office and by tenants, but never by Trimbec. Trimbec's responsibility is to pay King and Rossman, and to facilitate this, King and Rossman report their time to Trimbec. Trimbec is reimbursed for these salaries by the Authority. It is to the mayor's office, however, and not to Trimbec, that they submit a daily report on work performed. The mayor's office handles their complaints and grievances and approves their time off. King's health insurance, which is the only fringe benefit shown by the record, is paid by the mayor's office. There is no record evidence of who exercises disciplinary authority over the maintenance workers, as neither King nor Rossman has ever been disciplined.

On these facts, we affirm the decision of the Acting Director that the workers who maintain the industrial complex of the Authority are employees of the Authority. As they are the only employees of the Authority, we affirm his determination that they constitute a negotiating unit.

NOW, THEREFORE, WE ORDER that an election by secret ballot be held under the supervision of the Director of Public Employment Practices and Representation among the employees in such unit who were employed on the payroll date immediately preceding the date of this decision unless the Teamsters submit to him within 15 days from the date of receipt of this decision evidence to satisfy the requirements of §201.9(g)(1) of the Rules of this Board for certification without an election. IT IS FURTHER ORDERED that the Authority shall submit to the Director and to the Teamsters within ten days of receipt of this decision a list of all employees currently within the unit determined to be appropriate who were employed on the payroll date immediately preceding the date of this decision.

DATED: September 22, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member

STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2H-9/22/82

ALBANY COUNTY, ALBANY COUNTY SHERIFF and
ALBANY COUNTY DEPUTY SHERIFF'S ASSN., INC.,

Respondents,

CASE NO. U-5762

-and-

SECURITY AND LAW ENFORCEMENT EMPLOYEES,
DISTRICT COUNCIL 82, AFSCME, AFL-CIO AND
ALBANY COUNTY SHERIFF'S LOCAL 775, AFSCME,
AFL-CIO,

Charging Parties.

HINMAN, STRAUB, PIGORS & MANNING, P.C.
(BERNARD J. MALONE, JR., ESQ., of Counsel),
for Respondent Albany County Deputy
Sheriff's Association

ROBERT G. LYMAN, ESQ., for Respondents,
Albany County and Albany County Sheriff

ROWLEY, FORREST AND O'DONNELL, P.C.
(RONALD G. DUNN, ESQ., of Counsel),
for Charging Parties

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the charging parties to a hearing officer's decision dismissing their charge.

At the time the charge was filed, Albany County Sheriff's Local 775, AFSCME, AFL-CIO (Local 775) represented a unit of Sheriff's Department employees consisting of correction officers, matrons and deputy

sheriffs.^{1/} A petition had been filed by the Albany County Deputy Sheriff's Association, Inc. (Association) seeking a separate unit of deputy sheriffs. The petition was pending before the Director.

On November 5, 1981, a memorandum from the President of the Association addressed to the deputy sheriffs and correction officers was posted on the various employee bulletin boards. In it, he claimed that the County Attorney had agreed to sign a contract with both unions which would result in retroactive pay raises. He took credit for expediting the pay raises.

The charge, filed on November 12, 1981, against the joint employer and the Association, alleged that the joint employer had been refusing to negotiate in good faith and that it and the Association conspired to post the memorandum in order to undermine the charging parties and interfere with the rights of unit employees.

On November 30, 1981, the joint employer entered into a memorandum of agreement with the charging parties for a contract to replace the one that had expired on December 31, 1980. On December 1, 1981, the joint employer entered into a memorandum of agreement with the Association approving the agreement entered into with the charging parties.

At the pre-hearing conference, held on December 14, 1981, the attorney for the charging parties stated that the only evidence in support of the charge was the memorandum, which was attached to the charge. The hearing officer therefore decided that a hearing was not necessary and authorized the submission of briefs. The charging parties submitted a brief.

In his decision, issued on April 28, 1982, the hearing officer dismissed the charge, concluding as to the joint employers that there was no evidence

connecting them with the issuance or posting of the memorandum. With respect to the Association, the hearing officer found that the memorandum was "substantially accurate and, at worst, electioneering puffery", which Local 775 could have counteracted by posting its own notice.^{2/}

The essence of the charging parties exceptions is that the hearing officer erred in not conducting a hearing. They assert that if a hearing were held, they would have proved that at a negotiating session on November 23, 1981 (after the filing of the charge), the employer proposed to sign a separate agreement with the Association.

Having reviewed the record, we determine that it supports the hearing officer's decision. The only evidence in support of the charge was the posted memorandum. An inference cannot be drawn from this evidence that either joint employer was involved in the issuance or posting of the memorandum. The alleged later action of the employers, on November 23, 1981, cannot be evidence of their complicity in the posting of the memorandum on November 5, 1981. While it might be the basis for a separate charge or an amendment to the original charge, neither was filed. Consequently, the hearing officer committed no error in not conducting a hearing.

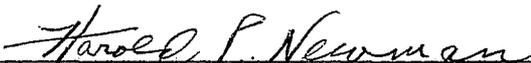
With respect to the dismissal of the charge against the Association, we conclude that the hearing officer correctly described the memorandum to be "at worst, electioneering puffery", which could have been counteracted by the charging parties.

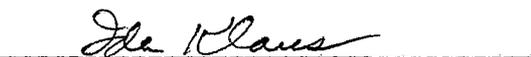
Moreover, as we read the exceptions, none of them address the dismissal of the charge against the Association.

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NOW, THEREFORE, WE AFFIRM the decision of the hearing officer, and WE ORDER that the charge herein be, and it hereby is, DISMISSED.

DATED: Albany, New York
September 22, 1982


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

FOOTNOTES

1/ While the charge alleges that Council 82 and Local 775 are joint representatives, the record indicates that only Local 775 has been recognized by the employer.

2/ The hearing officer noted in his decision that on January 27, 1982, the Board had dismissed the Association's petition. (County of Albany, 15 PERB ¶3008-[1982]).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2I-9/22/82

PORT JEFFERSON UNION FREE SCHOOL DISTRICT,

Respondent,

CASE NO. U-5713

-and-

UNITED AIDES AND ASSISTANTS ASSOCIATION OF
PORT JEFFERSON,

Charging Party.

ANTHONY P. DI ROCCO, for Respondent

RICHARD L. NEWCOMB, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the United Aides and Assistants Association of Port Jefferson (Association) to a hearing officer's decision dismissing a charge that it filed against the Port Jefferson Union Free School District (District). The charge alleges that the District committed an improper practice when Roth, an elementary school principal, sent a memorandum to Ebetino, the superintendent of schools, a copy of which was sent to Braun, the Association's president, which complains that Braun had circumvented proper procedures in handling the complaints of three unit employees. Roth's memorandum, which was written in response to an inquiry by Ebetino, recommended that a unit employee who has a complaint should first be required to raise the complaint with his

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immediate supervisor and that the Association ought not be brought in unless the immediate supervisor cannot or will not resolve the problem. Neither Roth nor anyone else in the District took any steps to effectuate Roth's recommendation.

The hearing officer ruled that Roth's memorandum to Ebetino merely constituted an expression of opinion and was not an improper practice under the Taylor Law. In its exceptions, the Association argues that every written criticism of an employee is a reprimand. Thus, according to the Association, Braun was reprimanded because she engaged in the protected activity of representing unit employees.

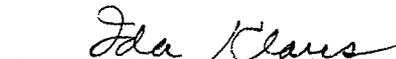
We reject the Association's thesis that every written criticism of an employee is a reprimand. Whether or not a criticism, oral or written, is a reprimand depends upon its contents and the circumstances of its issuance. In the matter before us, we conclude that Roth's internal memorandum was not a reprimand. Written in response to an inquiry from Ebetino, it was a criticism of procedures followed by Braun and a recommendation that alternative procedures be adopted.^{1/} While a copy of the memorandum was sent to Braun for her own information, it was not otherwise publicized throughout the unit. We find no indication that it constituted a reprisal or a threat of reprisal for Braun's activities on behalf of the Association. Neither do we find its tenor or content to have been designed to, nor did it interfere with or coerce Braun in her activities on behalf of the Association.

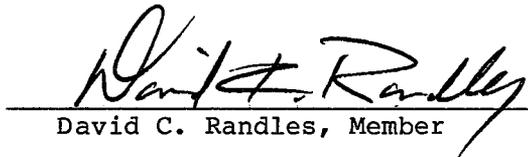
^{1/} As it was not adopted, neither the wisdom nor the propriety of the procedure proposed by Roth is placed in issue in this matter. The sole question concerns Roth's right to make such a recommendation to Ebetino and to notify Braun of her recommendation.

NOW, THEREFORE, WE AFFIRM the decision of the hearing officer, and
WE ORDER that the charge herein be, and it hereby
is, DISMISSED.

DATED: September 22, 1982
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #3A-9/22/82
: COUNTY OF FRANKLIN, :
: Employer, : Case No. C-2460
-and- :
TRUCK DRIVERS AND HELPERS, TEAMSTERS :
LOCAL UNION 687, :
: Petitioner :
-and- :
FRANKLIN COUNTY UNIT OF THE CIVIL :
SERVICE EMPLOYEES ASSOCIATION, :
: 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 Truck Drivers and Helpers, Teamsters Local Union 687 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 employees of the County of Franklin.

 Excluded: All full time and regular part time Sheriff's Department employees and the following employees: all elected officials, Clerk to the Board of Legislators, Secretary to the Board of Legislators, County Clerk, District Attorney, Assistant District Attorney, Special Assistant to District Attorney, Secretary to District Attorney, Public Defender, Assistant Public Defender, Secretary to Public Defender, Auditor, Purchasing Agent, Budget Officer, Assistant Budget Officer/Principal Account Clerk, Deputy Auditor, County Treasurer, Deputy County Treasurer, Director of Real Property Taxes, Deputy County Clerk, County Attorney, Assistant County Attorney, Secretary to County Attorney, Personnel Officer, Commissioner of the Board of Election, Deputy Commissioner of the Board of Election, Superintendent of Buildings & Grounds, Director of Data Processing, County Sheriff, Director of Probation, Probation Supervisor, Undersheriff, Fire Coordinator, Director of Civil Defense, Director of Patient Services, Assistant Supervising Public Health Nurse, Drug Abuse Coordinator, Alcoholism Services Coordinator, Director of Mental Health Administration, Commissioner of Social Services, Social Services Attorney, Principal Social Welfare Examiner, Social Services Accounting Supervisor, Case Supervisor - Grade B, Coordinator of Child Support Enforcement, Staff Development Coordinator, Senior Caseworker - Medical Unit, Superintendent Wm. W. Mansion Nursing Home, Medical Director, Physicians, Director of Nursing, Pharmacist, Coordinator of Manpower, Assistant Employment & Training Director II, Director of Veterans Services Agency, Assistant Director of Veterans Services Agency, Self Insurance Administrator, Director of Office for the Aging, Youth Bureau Director, Director of Winterization Program, Planning Assistant of Environmental & Financial Planning, Superintendent of Highway, Assistant Superintendent of Highway/Accounting Supervisor, County Sealer of Weights and Measures.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Truck Drivers and Helpers, Teamsters Local Union 687 and enter into 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.

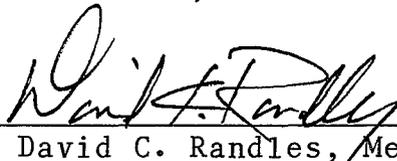
Signed on the 21st day of September, 1982
Albany, New York



Harold R. Newman, Chairman



Ida Klaus, Member



David C. Randles, Member