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State of New York Public Employment Relations Board Decisions from July 8, 1987

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from July 8, 1987

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
NEW YORK CITY TRANSIT AUTHORITY,
Respondent,

-and-

CASE NO. U-8755

AMALGAMATED TRANSIT UNION, DIVISION
726, AFL-CIO,

Charging Party.

ALBERT C. COSENZA, ESQ. (GEORGE S. GRUPSMITH, ESQ. of
Counsel), for Respondent

GLADSTEIN, REIF & MEGINNISS, ESQS. (WALTER M. MEGINNISS,
JR., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions of the charging party, the Amalgamated Transit Union, Division 726, AFL-CIO (ATU), to the dismissal, after hearing, of its charge against the respondent, New York City Transit Authority (Authority). The charge, as amended, alleged that the Authority violated §209-a.1(d) of the Public Employees Fair Employment Act (Act) when it unilaterally eliminated penalty standards for minor infractions of work rules. In its answer the Authority denied the charge and raised, as an affirmative defense, the claim that disciplinary penalties are a nonmandatory subject of bargaining. A hearing was held on October 9 and 10, 1986, at which both parties were represented by counsel and following which both parties filed briefs.

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Although finding that the issue of penalty standards is a mandatory subject of bargaining, the Administrative Law Judge (ALJ) assigned nevertheless dismissed the charge upon the ground that a disciplinary procedure negotiated by the parties replaced, by implication, the disciplinary standards previously in effect. In essence, the ALJ found that the ATU waived the right to bargain penalty standards when it negotiated a new disciplinary procedure, because the penalty standards were interrelated to the previous procedure which was replaced. The ALJ concluded, therefore, that all issues related to the imposition of discipline are now covered by the collective bargaining agreement rather than the Act.

The ATU's exceptions to the ALJ's dismissal of the charge essentially assert that the ALJ was precluded from considering and deciding the case on the defense of waiver because it was not raised by respondent in its answer or at the hearing and that the record does not support a waiver defense in any event.

FACTS

Early in 1985,^{1/} the Authority and ATU negotiated a Memorandum of Agreement which, among other things, created a new disciplinary procedure. The new procedure defines a disciplinary grievance as "a complaint on the part of any

^{1/}The date of execution or ratification of the parties' Memorandum of Agreement does not appear in the record, although, based upon its language, the Agreement appears to have been negotiated before March 31, 1985.

covered employee that there has been a violation of the employee's contractual rights with respect to a disciplinary action of a warning, reprimand, fine, suspension, demotion and/or dismissal . . .", and consists of four steps culminating in arbitration. Also included in the procedure is a pre-determination suspension procedure for certain enumerated offenses and agreement that the Authority may "increase, decrease or otherwise modify the decision made at the lower level" at any step of the procedure. (Appendix annexed to ALJ decision.)

The record does not reveal which party proposed the new disciplinary procedure, nor does it contain the bargaining history of the contractual language embodying the procedure. Moreover, the parties specifically stipulated at the hearing that "Neither the Transit Authority nor the union raised any proposal or other discussion in the negotiations that led to [the parties' memorandum of agreement, containing the disciplinary procedure] regarding . . . the subject of disciplinary penalties" The Authority further asserted in its answer to the charge that "the disciplinary grievance procedure contains no standards or language regarding penalties for 'common and recurring infractions' and the Transit Authority has not negotiated such penalties with the ATU." (Answer par. 3) There is no record evidence that the issues of the disciplinary penalty applicable to a particular offense and the elimination of the previous penalties of cautions and

official cautions, and up to three days' suspensions for accumulated "minor violations" of work rules were discussed during the negotiation of the new disciplinary procedure. Additionally, it is uncontroverted that the elimination of the standards or guidelines was accomplished unilaterally by the Authority after the disciplinary procedure went into effect.

The parties' previous procedure had included a departmental hearing, at which a reprimand and/or up to three days' suspension could be imposed, and either an informal trial board hearing (at which a maximum 60-day suspension could be imposed) or a formal trial board hearing (at which the ultimate penalty of termination could be imposed). This procedure existed, apparently, pursuant to §§75 and 76 of the Civil Service Law, although it represents some variations thereon.

In conjunction with this disciplinary procedure, for many years prior to February 1, 1986, a set of penalties had applied to certain infractions of work rules.

The penalty standards at issue provided that certain specific infractions of work rules would result in the imposition of cautions and official cautions, and that accumulation of a specified number of these would result in the imposition of a reprimand or warning or up to three days' suspension. The issuance of a reprimand or suspension was apparently subject to appeal under the prior disciplinary procedure, while cautions and official cautions were not.

In particular, an employee who was late for work by less than two hours, was late in reporting for overtime work, or who was late in notifying the Authority of illness would receive a "caution". An employee would receive an "official caution" if he was late by two hours or more, failed to submit proof of claimed family illness, was late for overtime duty more than five times in one year, ran his bus ahead of schedule, was responsible for an accident, or accumulated five cautions in one year. An employee would be subject to a departmental hearing at which a reprimand or up to three days' suspension could be imposed if he accumulated three official cautions in one year (or two official cautions for the same offense). Any employee who had received three departmental hearings during his employment was thereafter precluded from departmental hearings, and proceeded directly, regardless of the offense, to an informal or formal trial board. An employee dissatisfied with the outcome of a departmental or informal trial board hearing had the right to appeal to the formal trial board. Apparently, as to other or more significant work rule infractions or misconduct, the procedure began with a departmental or trial board hearing, and the penalty sought was established on a case-by-case basis.

On or about February 1, 1986, the Authority unilaterally (by its own admission) eliminated the use of the above-described penalty guidelines or standards, and eliminated the use of cautions and official cautions for the offenses for

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which they had previously been issued. Instead, penalties are established for each offense on a case-by-case basis, and the employee, if he objects to the penalty, is entitled to file a disciplinary grievance.

The Authority contended in its answer to the charge that it was entitled to unilaterally impose different penalties than had theretofore been applied to minor offenses upon the ground that disciplinary penalties are a nonmandatory subject of bargaining. It did not contend, until submission of its post-hearing brief, that the new disciplinary procedure permitted it to impose new (and greater) penalties or that the union waived the right to bargain concerning penalties or bargained away those standards by implication when it agreed to the new procedure. The procedure is silent on the issue of penalties applicable to specific offenses.

DISCUSSION

ATU points out in its exceptions that this Board's Rules and Regulations require that the answer "shall include a specific admission, denial or explanation of each allegation of the charge . . ." and shall include "a specific detailed statement of any affirmative defense . . ." [§204.3(c) (1) and (2).] ATU further asserts that the defense of waiver (or negotiation to conclusion of a subject covered by a collective bargaining agreement) is an affirmative defense, which is required by our rules to be pleaded in the answer to a charge. ATU argues that failure of the Authority to raise this

affirmative defense in the answer or to assert it in any other manner at or before the hearing deprived it of notice of the defense and of the opportunity to present evidence in rebuttal. It therefore contends that the ALJ erred when she considered this defense and based her dismissal of the charge solely upon a finding of waiver.

It is clear that the Authority did not raise contract waiver as an affirmative defense in its answer, nor did it seek to amend its answer at any time. It is also clear from the record that the Authority at no time prior to its post-hearing memorandum argued that the parties had already bargained the entire disciplinary process (both procedure and penalties) to conclusion when they entered into their memorandum of agreement or that the ATU waived the right to bargain the issue of penalty standards. We, therefore, find that the ATU was not on notice of the defense of waiver and did not have the opportunity to present evidence in rebuttal.

We agree with ATU that contract waiver is an affirmative defense which must be pleaded in the answer to a charge. Failure to raise the defense would be likely to take a charging party by surprise and would also raise new issues of fact not appearing on the face of the prior pleadings -- criteria contained in CPLR §3018(b), which, in the interest of fairness to the parties in proceedings before this Board, ought to apply here also.

CPLR §3018(b) defines affirmative defenses as "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" We see no reason why the same terminology appearing in our Rules should not be similarly defined. In the instant case, ATU asserts both surprise and the raising of new or additional factual issues by the contract waiver defense. We agree that these assertions are supported by the evidence. This is particularly so in light of the absence of the claim of waiver and of the Authority's affirmative claim that the issue of penalties was not negotiated.

We therefore find that contract waiver is an affirmative defense and that respondent's failure to raise the defense until its post-hearing brief barred it from doing so at all. We also therefore find that the ALJ erred in considering the defense of waiver and deciding the case before her on that basis.^{2/}

Having set aside the waiver defense, we turn to the question of whether disciplinary penalty standards are a mandatory subject of bargaining. We affirm the decision of the ALJ that they are indeed a mandatory subject, in keeping with

^{2/}While we need not reach the merits of the Authority's waiver argument, we note that its failure to raise this argument until its post-hearing brief and its stipulation that the subject of disciplinary penalties was not negotiated suggest that it did not understand its negotiations as having dealt with the penalty standards for minor infractions.

the line of decisions of this Board and the courts so holding.^{3/} The Authority has, by its own admission, unilaterally changed the disciplinary penalty standard in effect prior to February 1, 1986, and we find that in doing so it violated §209-a.1(d) of the Act.

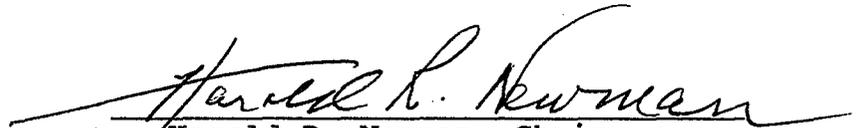
The Authority is therefore ordered to:

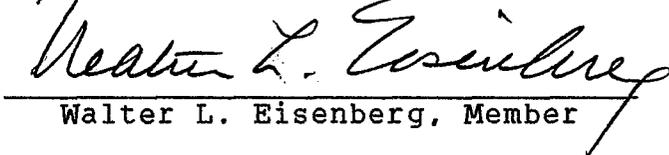
1. Restore the penalty standards in effect prior to January 31, 1986;
2. Restore to affected employees any time and/or wages lost that would not have been lost but for the elimination of said penalty standards;
3. Amend any and all records of disciplinary action taken since January 31, 1986 against any unit employee so as to delete any reference to disciplinary action that would not have been taken had the said penalty standards remained in effect and substituting therefor the disciplinary action, if any, that would have been taken;

^{3/}Binghamton Civil Service Forum v. City of Binghamton, 44 N.Y.2d 23, 11 PERB ¶7508 (1978) ("the proper penalty to be imposed" as discipline was determined to be a term and condition of employment under the Act); Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v. Helsby, 91 Misc.2d 909, 10 PERB ¶7016 (Sup. Ct. Alb. Co. 1977), aff'd, 62 A.D.2d 12, 11 PERB ¶7003 (3rd Dep't 1978), aff'd, 46 N.Y.2d 1034, 12 PERB ¶7006 (1979) (demand entitled "Discipline and Discharge," which included a provision restricting disciplinary penalties, found to be a mandatory subject of bargaining); City of Albany, 56 A.D.2d 976, 10 PERB ¶7006 (3rd Dep't 1977) (PERB's determination that a unilateral change in the penalty imposed for tardiness violated §209-a.1(d) of the Act was upheld). See also County of Orange, 19 PERB ¶4579 (1986).

4. Cease and desist from failing to negotiate in good faith with charging party; and
5. Sign and post the attached notice at all locations customarily used to communicate with unit employees.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, 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 all employees represented by the Amalgamated Transit Union, Division 726, AFL-CIO, that the New York City Transit Authority:

1. Will restore the penalty standards in effect prior to January 31, 1986.
2. Will restore to affected employees any time and/or wages lost that would not have been lost but for the elimination of said penalty standards.
3. Will amend any and all records of disciplinary action taken since January 31, 1986 against any unit employee so as to delete any reference to disciplinary action that would not have been taken had the said penalty standards remained in effect and substituting therefor the disciplinary action, if any, that would have been taken.
4. Will negotiate in good faith with the Amalgamated Transit Union, Division 726, AFL-CIO.

New York City Transit Authority

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
UNITED UNIVERSITY PROFESSIONS,
Respondent,

-and-

CASE NO. U-8347

THOMAS C. BARRY,
Charging Party.

In the Matter of
UNITED UNIVERSITY PROFESSIONS,
Respondent,

-and-

CASE NO. U-8664

MORRIS E. ESON,
Charging Party.

In the Matter of
UNITED UNIVERSITY PROFESSIONS,
Respondent,

-and-

CASE NO. U-8795

MORRIS E. ESON,
Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and-

CASE NO. U-8890

GORDON GALLUP,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and-

CASE NO. U-8859

THOMAS C. BARRY,

Charging Party.

BERNARD F. ASHE, ESQ. (IVOR MOSKOWITZ, ESQ., of Counsel), for Respondent, in Case Nos. U-8347, U-8664, U-8795, U-8890 & U-8859

THOMAS C. BARRY, pro se, in Case Nos. U-8347 & U-8859

GLENN M. TAUBMAN, ESQ., National Right to Work Legal Defense Foundation, for Charging Parties, in Case Nos. U-8664, U-8795 & U-8890

BOARD DECISION AND ORDER

These matters come to us on the exceptions of the United University Professions (UUP) and the three charging parties, Thomas C. Barry, Morris E. Eson and Gordon Gallup, to three separate decisions of Administrative Law Judges (ALJ)

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sustaining, in part, improper practice charges filed by the three charging parties.^{1/} In Case No. U-8347, the charging party alleged that UUP's agency shop fee refund procedures for 1984-85 and 1985-86 violated, in several respects, §209-a.2(a) of the Public Employees' Fair Employment Act (Act). In Case No. U-8664, the charging party alleged that UUP's agency shop fee refund procedures for 1984-85 and 1985-86 violated the same provision of the Act in several respects. In Case Nos. U-8795, U-8890 and U-8859, the respective charging parties alleged that UUP's agency shop fee refund procedure for 1986-87 violates, in several respects, the same provision of the Act.

PROCEDURES

The UUP agency shop fee refund procedures for 1984-85 and 1985-86 are substantively identical. The 1986-87 UUP agency shop fee refund procedure, however, is substantially different. These procedures are attached hereto as Appendices A, B, and C, respectively.

The 1984-85 and 1985-86 procedures provide that objections must be filed between September 1 and September 30

^{1/}An ALJ decision was issued on October 23, 1986, in Case No. U-8347 (19 PERB ¶4603). A second consolidated decision was issued by an ALJ in Case Nos. U-8664, U-8795 and U-8890 on February 19, 1987 (20 PERB ¶4515). A third decision was issued by an ALJ in Case No. U-8859 on March 12, 1987 (20 PERB ¶4523). We heard a consolidated oral argument in all five cases on June 1, 1987.

of the fiscal year for which a refund is requested. They provide that, thereafter, each such objector would receive an advance reduction in agency fees based on the latest fiscal year for which a completed audit is available. Under these procedures, the charging parties would not receive their advance reduction check until sometime in October of the fiscal year in question, as did, in fact, happen. The single payment made at that time represents UUP's reduction of the fee for the year. The procedures provide that after the end of the fiscal year, when the audit for that fiscal year has been completed, the actual proportion of agency fees spent for refundable purposes would be computed and an adjustment would be made. The objector would receive the excess over the reduction, if any, or would be liable to UUP for any excess in the advance reduction he may have received. If an objector were dissatisfied at that point, an appeal could be filed with the UUP Executive Board by registered or certified mail within 30 days of receipt of the final refund determination. If dissatisfied with the Executive Board's determination, the objector could, by notifying UUP by registered or certified mail, appeal to a neutral to be appointed by UUP from lists maintained by the American Arbitration Association (AAA).^{2/}

^{2/}Although UUP's procedure, as published, allows it to select the neutral, UUP advised those objectors who had appealed to the neutral stage that the AAA would pick the neutral, which it did.

The 1986-87 agency shop fee refund procedure differs substantially. It provides that objections must be filed by registered or certified mail between June 15 and June 30 of the year prior to the fiscal year to which the objection applies. The procedures provide that each such objector would receive, at the beginning of the new fiscal year, an advance payment equal to the amount of the reduction in agency fees determined by the union to represent the employee's pro rata share of refundable expenditures. Such advance reduction would be determined on the basis of the "latest fiscal year for which there is a completed and available audit". If an objector were dissatisfied with the amount of the advance reduction, the objector could file an appeal by registered or certified mail within 30 days of the receipt of such advance reduction payment. The procedure provides that such appeal would be submitted by the union to a neutral appointed by the AAA. This procedure does not provide for any recoupment by UUP from the objector of any excess in the advance reduction the objector may have received.

In summary, both procedures provide for an advance reduction method of payment of amounts due the agency fee payer. The earlier procedure does not provide for an appeal from the advance reduction determination. The only appeal provided for is from a final refund determination made after

the end of the fiscal year. The 1986-87 procedure, on the other hand, authorizes an appeal from the advance reduction determination but does not contemplate any avenue of review of the correctness of the amount of agency fees actually collected during the 1986-87 fiscal year after the year has closed.

ALJ DECISIONS

The ALJs concluded that UUP's agency shop fee refund procedures for the three years in question are improper in several respects. They did not, however, sustain some of the claims of impropriety made by the charging parties. In our following discussion, we shall attempt to deal with all of the issues raised by the exceptions filed by the charging parties, as well as by the UUP.^{3/}

FINDINGS

Having considered the exceptions of the charging parties and UUP in Case Nos. U-8347 and U-8664, we find that the 1984-85 and 1985-86 procedures are improper and violate §§209-a.2(a) and 208.3(a) of the Act in the following respects:

^{3/}Barry has moved to disqualify the Chairman of this Board on the grounds of bias and prejudice. The Chairman has determined that Barry's claims do not warrant his disqualification, and he has declined to recuse himself from consideration of these cases. Barry has previously been notified of this disposition of his motion.

1. There is no provision for an application for a refund until after the start of the fiscal year, which allows UUP the use of the agency fee payments prior to any advance reduction.
2. No financial information was provided to the agency fee payers prior to an opportunity to object to the advance reduction determination.
3. The advance reduction determination was not based on an outside audit of those expenditures which are deemed refundable and those which are not.
4. There is no provision for an appeal of the amount of the advance reduction.
5. The appeal procedure was not reasonably prompt and expeditious, inasmuch as no appeal was authorized from the advance reduction determination. The subsequent appeal from the end-of-year determination cannot be considered reasonably prompt. The use of intermediate steps in the appeal process, such as an appeal to the Executive Board, is unnecessary, coercive and causes undue delay.

6. The requirement that objectors notify UUP by certified or registered mail of their initial objection as well as at each step of the appellate procedure is coercive.

We also find that the 1986-87 procedure is improper and violates §§209-a.2(a) and 208.3(a) of the Act in the following respects:

1. The 15-day period in June for the filing of the initial objection to agency fees for the upcoming fiscal year is unreasonably short and occurs at a time when school is not in session. Accordingly, the objection period is found to be unreasonable and coercive.
2. The procedures do not provide for the furnishing of financial information prior to the filing of objections by agency fee payers.
3. The requirement that objectors notify UUP by certified or registered mail of their objection and at each step of the appellate procedure is coercive.
4. The advance reduction determination is not based upon an outside audit of those expenditures which are deemed refundable and those which are not.

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5. There is no provision for placing the amount of fees reasonably in dispute in an interest-bearing escrow account pending the neutral's determination.
6. Hearing as to the correctness of the advance reduction is not held within a reasonable time.
7. There is no procedure for end-of-year correction.

We have considered other claims made by the charging parties with regard to aspects of UUP's procedures, and find them without merit.

DISCUSSION

In reviewing UUP's 1984-85 and 1985-86 procedures, we are mindful of the fact that such procedures were established prior to the United States Supreme Court's decision in Chicago Teachers Union v. Hudson.^{4/} We recognize, as do the parties, that that decision is of paramount importance in evaluating all three procedures that are subject to review herein.

We have previously considered the 1984-85 procedure.^{5/} In that prior case, however, we dealt only with the claim

^{4/} ___ U.S. ___, 106 S.Ct. 1066, 19 PERB ¶7502 (1986).

^{5/} UUP (Barry and Eson), 18 PERB ¶3063 (1985).

that the U.S. Supreme Court's decision in Ellis v. Railway Clerks^{6/} requires a procedure in which 100% of the agency fee must be placed in escrow. We concluded that neither Ellis nor CSL §208.3 requires a union to place 100% of its agency fees in escrow. We held that CSL §208.3 does not foreclose the use of an advance reduction method as part of an acceptable refund procedure. Since the charges in that case did not challenge specific elements of UUP's procedure, we did not consider whether UUP's procedure was an acceptable advance reduction method. We stated (at 3131):

We would, however, note that any method selected by a union must provide reasonable assurance that the interests of the objecting nonmembers are protected. Any such procedure should be designed to avoid the "involuntary loan" to which the Supreme Court objected. Attention must, therefore, be directed to the timing of the advance reduction determination and its implementation, as well as the basis upon which the amount of the advance reduction is determined. Other aspects may also be subject to further scrutiny.

We must now review the propriety of specific elements of UUP's procedures in light of the Ellis and Hudson decisions. Those decisions currently reflect the constitutional considerations which must govern our construction of §208.3.

In Hudson, the Supreme Court restated the fundamental concern that the union refund procedure may not, even

^{6/}466 U.S. 435, 17 PERB ¶7511 (1984).

temporarily, permit objectors' funds to be used for improper purposes. The Court emphasized that procedural safeguards are necessary to minimize the infringement on objectors' First Amendment rights and that union procedures must be "carefully tailored"^{7/} to accomplish that purpose. In addition, the nonunion employees must have a "fair opportunity to identify the impact"^{8/} of the action taken by the union on their interests so as to be able to assert a meritorious claim. Accordingly, the Court required a union to provide nonmembers with adequate information about the basis for the union's determination before the nonmember exercises his option to object. In addition, the need for adequate procedural safeguards requires the union to provide an appellate procedure which will insure "a reasonably prompt decision by an impartial decision maker."^{9/}

In Hudson, the Supreme Court reviewed an agency shop fee refund procedure which incorporated an advance reduction of the agency shop fee. It is important to note, however, that the advance reduction method analyzed by the Supreme Court in Hudson is different than the advance reduction method adopted

^{7/}19 PERB at p. 7502.

^{8/}Id.

^{9/}Id. at p. 7509.

by UUP. The union in Hudson determined that the agency shop fee should be 95% of the dues paid by members and notified the employer to deduct during the year from the nonmembers' salaries only 95% of the members' dues. Each periodic deduction from salary was accordingly reduced. In contrast, UUP has chosen to collect the full amount of the fee (an amount equivalent to dues) during the year but to give the agency fee payer at or near the beginning of the year a single payment representing its estimate of the refund due the agency fee payer. Based on the method it has chosen, UUP urges that practical difficulties related to that method should be taken into consideration.

The Supreme Court, however, has articulated constitutional standards to which all procedures must adhere. While an advance reduction method is constitutionally acceptable in principle, any such method must be "carefully tailored" to minimize the infringement of First Amendment rights and provide adequate safeguards to assure that agency fees will not be used by the union in a manner which violates objecting nonmembers' rights. The application of the constitutional standards may require different procedures depending on the method chosen by the union. At the same time, no method may be any less protective of the objector's rights than any other method which the union could have chosen. Thus, for example, a procedure based on placing 100% of the agency fees in escrow

could differ substantially from the procedure required of UUP by virtue of the advance reduction method which it has chosen. Inasmuch as the 100% escrow method "eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes",^{10/} the procedures can be fashioned without concern for that risk.

If the advance reduction method chosen by UUP is to be utilized, it must provide for payment of the advance reduction before any agency fees are deducted during the fiscal year in question. Only payment at that time can avoid the risk of temporary use of objectors' money for impermissible purposes. It follows that UUP must make its determination before the fiscal year begins. The State's "lag payroll" cannot justify the possibility that some of the agency fee payers' money will be used, even temporarily, for improper purposes.

The Hudson decision makes clear that if a union chooses to use an advance reduction method, pursuant to which a determination is made regarding which expenses are chargeable to the nonmember and which are not, notice of that determination must be given to all agency fee payers. No agency fee payer is required to object until after the union has made its determination. If the union chooses to make a

^{10/}Id. at p. 7510.

single lump-sum payment of the advance reduction as part of its determination, the union must make that payment to all agency fee payers.^{11/} Such notice and payment should be made simultaneously by mail directly to each affected employee.

Inasmuch as the advance reduction method chosen by UUP requires a refund determination by UUP, UUP must furnish adequate financial information with the payment/determination. It follows that such financial information must be furnished to all agency fee payers at the same time as notice of the determination and payment is given, and by the same means. Furnishing such financial information solely through UUP's newspaper does not sufficiently protect the rights of nonmembers. As the Supreme Court stated in Hudson: "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." (Emphasis supplied)^{12/} Hudson also requires that the financial information furnished to the nonmember be based on an

^{11/}Obviously, if a union chooses to place all agency fees in an escrow account until a final determination is made, this requirement would not be necessary.

^{12/}19 PERB at pp. 7508-09.

audit by an independent auditor.^{13/}

The 1984-85 and 1985-86 procedures do not provide for an immediate appeal from the advance reduction payment/determination. The 1986-87 procedure does. Clearly, however, the Hudson decision requires that a reasonably prompt decision by a neutral decision maker must follow that determination. Agency fee payers who wish to challenge the advance reduction payment/determination must be given an opportunity at that time to file their objections. Based on the financial information furnished to them, they may then be in a position to make a reasoned decision whether to object to the determination.

The Supreme Court in Hudson stated that the objector "is entitled to have his objections addressed in an expeditious,

^{13/}Inasmuch as the financial information furnished by UUP was not audited and was not made available at the appropriate time and in the appropriate manner, the procedure followed by the UUP regarding such information must be found improper. The issue is also raised as to the sufficiency of the information actually furnished by UUP. We are of the opinion that our prior decisions setting forth with some detail what we considered to be sufficient information (see, e.g., Hampton Bays Teachers Ass'n, 14 PERB ¶3018 [1981], and Westbury Teachers Ass'n, 15 PERB ¶3100 [1982]) are not inconsistent with the decision in Hudson. Indeed, the Supreme Court's reference to the disclosure requirements of the Labor Management Reporting and Disclosure Act (Hudson at p. 7509) is similar to our reference to the State Industrial Commissioner's reporting requirements (Hampton Bays at p. 3031). We conclude that the information furnished by UUP sufficiently identified those disbursements which it determined to be refundable and those which it determined not to be refundable, and permitted objectors to gauge the propriety of UUP's fee.

fair and objective manner."^{14/} Among other things, the objections must be heard promptly by a neutral decision maker who is not selected by UUP.^{15/} The procedure must also be accomplished in a reasonably prompt manner. Inasmuch as the 1984-85 and 1985-86 procedures provide for review by the neutral only after the end of the fiscal year and after the audit of UUP's books is completed, it is manifest that such an appeal procedure cannot be considered expeditious and cannot be expected to arrive at a reasonably prompt conclusion.^{16/}

Inasmuch as UUP's earlier procedures contemplate no appeal from the advance reduction payment/determination and contemplate a "final rebate determination" after the end of

^{14/19} PERB at p. 7509.

^{15/}UUP has indicated that it has amended its 1984-85 and 1985-86 procedures to provide that the neutral shall be selected by the American Arbitration Association and not by UUP.

^{16/}UUP's reliance upon our decision in UUP (Eson), 12 PERB ¶3093 (1979) is misplaced. In that case, we considered the question of expedition in the context of a "pure rebate procedure". The Ellis decision determined that such a procedure is constitutionally improper. The earlier procedures here under review retain the appellate process applicable to a "pure rebate procedure" while engrafting the advance reduction payment/determination. The method chosen by UUP requires an entirely new look at the issue of expedition. UUP's 1986-87 procedure recognizes, in part, the need for a more expeditious procedure. Nevertheless, UUP may have acted on the basis of, and consistent with, our earlier decision. We do not intend to penalize UUP retroactively because of the later teaching in Hudson.

the fiscal year, UUP was confronted with the possibility that the "final rebate determination" may be less than the advance reduction. Its earlier procedures therefore include a provision contemplating the recoupment of any excess paid to the agency fee payer. The ALJ concluded that such a provision was not improper. The 1986-87 procedure eliminates the recoupment provision. The issue arises only because of UUP's failure to provide for a proper advance reduction procedure and escrow of an amount that might reasonably be in dispute. If a proper procedure had been adopted, there would be no occasion for a recoupment.

The earlier procedures also provide that after the "final rebate determination" is made, the union will make an adjustment in the refund amount, if necessary. The ALJ properly concluded that such a provision is violative of the Act because it suggests the real possibility that additional refunds may be made after UUP has had the use of the objector's money for a year. UUP urges that this has not happened and that therefore it is not a real possibility. Nevertheless, the Ellis and Hudson decisions require that such a provision be found violative of the Act. Furthermore, the entire question can be avoided by the establishment of a proper advance reduction and escrow procedure.

In Hudson, the Supreme Court required that an appeal follow the union's advance reduction determination. It permitted the union to justify its determination "on the

basis of its expenses during the preceding year."^{17/}
Inasmuch as the actual expenses in the year in question may differ from the preceding year, the Court required the union to place in escrow all amounts that might reasonably be in dispute while challenges are pending.

We have previously pointed out^{18/} that any advance reduction method accompanied by a partial escrow is problematic since it leaves open the possibility that, during the current year, some portion of the nonmembers' fees might be used temporarily for rebatable purposes. It appears that the Supreme Court sought to avoid this possibility by requiring the escrow of all amounts "reasonably in dispute" while challenges are pending. It would appear that the Supreme Court has recognized that absolute protection of the nonmembers from an "involuntary loan" cannot be guaranteed short of a 100% escrow method. As we previously stated, we believe the Supreme Court intends that "the procedure chosen by a union should provide reasonable assurance that agency fees will not be used by the union in a manner which violates the objecting nonmembers' rights".^{19/}

To avoid the possibility of a nonmember's overpayment during the current year, which could not be refunded until

^{17/19} PERB at p. 7509 n. 18.

^{18/}UUP (Barry and Eson), 18 PERB ¶3063 (1985).

^{19/}Id. at 3131.

the following year, the amount of the partial escrow or advance reduction must include a "cushion" or margin of safety which recognizes that the rebate portion of the union's expenditures may vary from year to year. It is also clear that if the advance reduction determination is based on an independent audit of refundable and nonrefundable expenditures, the union will be in a better position to judge what amounts may be "reasonably in dispute". The inquiry by the neutral may appropriately include an examination as to whether a prior year's expenditures are a good predictor of the current year's. In addition, a neutral may appropriately inquire as to expenditures during the current year, which could alter the result reached by reliance on a preceding year. In any event, we determine that UUP should provide a "cushion" of not less than 10 percent of the audited amount for the base year.

If the "cushion" is included in an advance reduction, UUP may not recoup it if at the end of the year it is determined that such amount would have been properly collected by the union. It may, however, recoup such monies from a partial escrow account.

While this may be all that is constitutionally required, §208.3 of the Act also requires that a union must establish and maintain "a procedure providing for the refund to any employee demanding the return [of] any part of an agency shop fee deduction which represents the employee's pro rata share

of expenditures by the organization" Section 208.3 requires, therefore, a second audit and appeal procedure -- directed to the actual expenses of UUP after the year is completed. This need not occasion any substantial additional difficulties for UUP. Such an audit and appeal procedure is required in any event so long as UUP utilizes the advance reduction method, because the audit statement of expenses for the year past (presumably to be completed about six months after the end of the fiscal year) will serve as the basis of the advance reduction for the year to come.

As we have previously indicated, the Supreme Court in Hudson required the adoption of procedures that are "carefully tailored to minimize the infringement" on the nonmembers constitutional rights. This means that affected employees must have a fair opportunity to identify the impact of the union's actions on their interests and to assert a meritorious First Amendment claim. We find that the 15-day period for filing initial objections, afforded by the 1986-87 procedure, is too short to satisfy this requirement.^{20/} The filing period must be at least 30 days long. Furthermore, we find that the procedure is flawed in that the filing period is set at a time when the State University is not in regular session

^{20/}To the extent that our decision in UUP (Eson), 11 PERB ¶3074 (1978), approved a 15-day period, we overrule that decision in that respect.

and, therefore, faculty members are likely to be away from the University and may miss this opportunity to file objections. The period must be moved back to a time when the University is in regular session.

We have previously approved UUP's requirement that objectors must file an initial objection as well as all notices of appeal by certified or registered mail.^{21/} Upon further consideration, we have concluded that such requirement is unnecessarily burdensome. Given the cost of certified mail and the availability of other reasonably reliable and less burdensome methods of filing, we find that the certified mail requirement for initial filing and appellate steps is coercive within the meaning of the Act. Accordingly, we overrule our earlier decision in this regard.

We also conclude that nothing in Hudson requires us to overrule our previous decisions finding that UUP's manner of communicating with its employees is proper, except to the extent that our decision in the instant case requires a direct mailing to each affected employee.

Finally, we affirm the ALJ's finding that the selection of the neutral by the American Arbitration Association

^{21/}UUP (Eson), supra.

pursuant to the AAA's rules for agency fee arbitrations is proper. Objections to a particular neutral's conduct must be dealt with, if at all, in a plenary court action.

REMEDY

We conclude that it would effectuate the purposes of the Act to direct full refunds to each of the charging parties for the years concerning which they filed charges. Such relief, however, should not be afforded nonmembers who have not filed charges. We cannot presume objection to the agency fee procedure by all nonmembers.

UUP established its procedures under review herein in accordance with its understanding of the Ellis and Hudson decisions and of the standards prescribed by us in prior decisions. We now determine that substantial changes in the standards are required by the Supreme Court's recent decisions. It would not be reasonable to expect UUP to have anticipated all these changes. Accordingly, our remedial order will be prospective in its application. This approach is similar to the one we followed in UUP (Eson), 11 PERB ¶3068 (1978).

We shall direct UUP promptly to establish agency shop refund procedures that are consistent with the standards set forth in this decision. We shall direct UUP to submit such revised procedures to us within 30 days for review and approval. We shall retain jurisdiction of these proceedings

for such purposes as may be necessary to effectuate the policies of the Act.

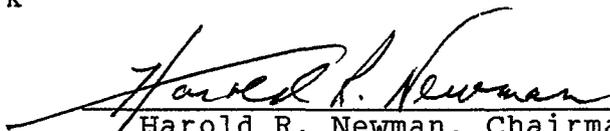
NOW, THEREFORE, WE ORDER United University Professions to do the following:

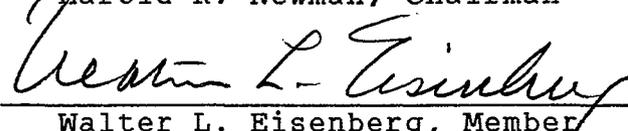
1. Forthwith refund to Barry and Eson the total amount of agency fees deducted from their salaries for the 1984-85, 1985-86 and 1986-87 fiscal years, with interest at the maximum legal rate.
2. Forthwith refund to Gallup the total amount of agency fees deducted from his salary for the 1986-87 fiscal year, with interest at the maximum legal rate.
3. Submit to this Board within 30 days of the date of this order a revised agency shop refund procedure which is in conformity with this decision, together with steps for immediate implementation thereof. Should UUP fail to do so, it shall immediately cease and desist from implementing the 1984-85, 1985-86, 1986-87 and any subsequent agency shop refund procedures, including accepting deductions from agency fee payers, and

shall forthwith refund directly to all agency fee payers any deductions that may be made from the date of receipt of this decision and order, with interest at the maximum legal rate. Pending approval by this Board of the timely submitted revised agency shop refund procedure, UUP may continue in effect its existing procedures, unless directed otherwise by this Board. This Board shall retain jurisdiction of these proceedings for such purposes as may appear to the Board to be necessary to effectuate the policies of the Act.

4. Forthwith post the attached notice in all places normally used by UUP to communicate information with bargaining unit employees and to include such notice prominently in the next available issue of UUP's newspaper, The Voice.

DATED: July 8, 1987,
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

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APPENDIX A

AGENCY FEE REBATE PROCEDURE FOR THE 1984-85 FISCAL YEAR

Any person making agency fee payments to the union under the agency shop provision in the union's collective bargaining agreement shall have the right to object to the expenditure of any part of the agency fee which represents the employee's pro-rata share of expenditures by the union or its affiliates in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

Such objections shall be made, if at all, by the objector individually notifying the Union President of his/her objection by registered or certified mail, during the period between September 1 and September 30 of each year of the fiscal year of the union to which the objection applies.

Thereafter the agency fee shall be reduced in accordance with such objections by the approximate proportion of the agency fees spent by the union for such purposes, based on the latest fiscal year for which there is a completed and available audit. After the end of the fiscal year, and after the audit of the books is completed, the union shall determine the approximate proportion of agency fees actually spent by the union for such purposes during the fiscal year. After such final rebate determination is made an adjustment, if necessary, will be made in the refund amount. Objectors will be required to refund to the union any excess refund they may have received.

If an objector is dissatisfied with the final rebate determination, made after the close of the fiscal year, on the ground that it assertedly does not accurately reflect the expenditures of the Union in the defined area, he/she may appeal that determination to the Union's Executive Board. This appeal shall be in writing and sent to the Union President by certified or registered mail within thirty (30) days following receipt of the final rebate determination.

If the objector is dissatisfied with the Executive Board's determination, the objector may appeal to a neutral by notifying the Union President by registered or certified mail within 30 days after receipt of the Executive Board's decision. The question of appropriateness of the rebate will be submitted by the union to a neutral party appointed by the union from lists to be supplied by the American Arbitration Association for hearing and resolution. The costs for any appeal to a neutral party shall be borne by the Union. Said appeal shall be heard expeditiously.

The Union, at its option, may consolidate all appeals and have them resolved at one hearing for that purpose. An objector may present his/her appeal in person.

APPENDIX B

AGENCY FEE REBATE PROCEDURE FOR THE 1985-86 FISCAL YEAR

Any person making service payments to the Union in lieu of dues, pursuant to Chapter 677, Laws of 1977, as amended by Chapter 678, Laws of 1977 and Chapter 122, Laws of 1978, shall have the right to object to the expenditure of any part of the agency fee which represents the employee's pro-rata share of expenditures by the Union or its affiliates in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

Such objections shall be made, if at all, by the objector by registered or certified mail, during the period between September 1 and September 30 of each year of the fiscal year of the Union to which the objection applies.

Thereafter the agency fee shall be reduced in accordance with such objections by the approximate proportion of the agency fees spent by the Union for such purposes, based on the latest fiscal year for which there is a completed and available audit. After the end of the fiscal year, and after the audit of the books is completed, the Union shall determine the approximate proportion of agency fees actually spent by the Union for such purposes during the fiscal year. After such final rebate determination is made an adjustment, if necessary, will be made in the refund amount. Objectors will be required to refund the Union any excess refund they may have received.

Appeals

If an objector is dissatisfied with the final rebate determination, made after the close of the fiscal year, on the ground that it assertedly does not accurately reflect the expenditures of the Union in the defined area, he/she may appeal that determination to the Union's Executive Board. This appeal shall be in writing and sent to the Union President by certified or registered mail within thirty (30) days following receipt of the final rebate determination.

If the objector is dissatisfied with the Executive Board's determination, the objector may appeal to a neutral by notifying the Union President by registered or certified mail within thirty (30) days after receipt of the Executive Board's decision. The question of appropriateness of the rebate will be submitted by the Union to a neutral party appointed by the Union from lists to be supplied by the American Arbitration Association for hearing and resolution. The costs for any appeal to a neutral party shall be borne by the Union. Said appeal shall be heard expeditiously.

The Union, at its option, may consolidate all appeals and have them resolved at one hearing for that purpose. An objector may present his/her appeal in person.

APPENDIX C

AGENCY FEE REBATE PROCEDURE FOR THE 1986-87 FISCAL YEAR

Any person making service payments to the Union in lieu of dues, pursuant to Chapter 677, Laws of 1977, as amended by Chapter 678, Laws of 1977 and Chapter 122, Laws of 1978, shall have the right to object to the expenditure of any part of the agency fee which represents the employee's pro-rata share of expenditures by the Union or its affiliates in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

Such objections shall be made, if at all, by the objector individually notifying the Union President of his/her objection by registered or certified mail, during the period between June 15 and June 30 of the year prior to the fiscal year of the Union to which the objection applies.

The agency fee of such objectors shall be reduced for the next fiscal year by the approximate proportion of the agency fees spent by the Union for such purposes, based on the latest fiscal year for which there is a completed and available audit. An

objector shall be provided at the beginning of the new fiscal year with an advance payment equal to the amount of the reduction.

If an objector is dissatisfied with the reduced fee on the ground that it allegedly does not accurately reflect the expenditures of the Union in the defined area, he/she may appeal that determination in writing and send it to the Union President by certified or registered mail within thirty (30) days following receipt of the advanced reduction. The question of appropriateness of the advance reduction will be submitted by the Union to a neutral party appointed by the American Arbitration Association for expeditious hearing and resolution in accordance with its rules for agency fee arbitrations. The costs for any appeal to a neutral party shall be borne by the Union. Said appeal shall be heard expeditiously.

The Union, at its option, may consolidate all appeals and have them resolved at one hearing for that purpose. An objector may present his/her appeal in person.

The schedule of UUP expenses may be found on Page 6 of the February/March edition of The VOICE.

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 all employees in the unit represented by the United University Professions, that it:

1. Will forthwith refund to Thomas C. Barry and Morris E. Eson the total amount of agency fees deducted from their salaries for the 1984-85, 1985-86 and 1986-87 fiscal years, with interest at the maximum legal rate.
2. Will forthwith refund to Gordon Gallup the total amount of agency fees deducted from his salary for the 1986-87 fiscal year, with interest at the maximum legal rate.
3. Will submit to this Board within 30 days of the date of this order a revised agency shop refund procedure which is in conformity with this decision, together with steps for immediate implementation thereof. Should UUP fail to do so, it shall immediately cease and desist from implementing the 1984-85,

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF NASSAU (NASSAU COMMUNITY
COLLEGE),

Respondent,

-and-

CASE NO. U-8541

ADJUNCT FACULTY ASSOCIATION OF NASSAU
COMMUNITY COLLEGE,

Charging Party.

BEE, DE ANGELIS & EISMAN (PETER A. BEE, ESQ., of
Counsel), for Respondent

PRYOR, CASHMAN, SHERMAN & FLYNN (RONALD H. SHECHTMAN,
ESQ. and RICHARD M. BETHEIL, ESQ., of Counsel), for
Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Adjunct Faculty Association of Nassau Community College (Association) to the decision of the Administrative Law Judge (ALJ) dismissing its improper practice charge against the County of Nassau (Nassau Community College) (College). The charge, as originally filed, alleged violations of §209-a.1(a), (b), (d) and (e) of the Public Employees' Fair Employment Act (Act). The ALJ determined that the charge as it relates to §209-a.1(a) (b) and (d) should be dismissed since the facts

alleged in the charge do not constitute a violation of those subdivisions.

The ALJ heard and determined the charge, as clarified by letter of February 20, 1986, that the College violated §209-a.1(e) of the Act by unilaterally implementing new qualifications for employment in breach of §10.1(e) of the parties' expired collective bargaining agreement. The ALJ found that the Association had not met its burden of proving that the College violated §10.1(e) of the parties' expired collective bargaining agreement and that, therefore, it had failed to prove the claimed violation of §209-a.1(e) of the Act. The Association takes exception to the dismissal of its charged violation of §209-a.1(e) and to the ALJ's dismissal of its claimed violations of §209-a.1(a), (b) and (d).

The College and the Association are parties to a collective bargaining agreement, effective October 1, 1982 to September 30, 1984. Although the parties' negotiations have been through the impasse procedures, no successor agreement has, to date, been reached.

Section 10.1(e) of the expired agreement, on which the Association relies, states:

Each adjunct department will maintain a list of courses for which each adjunct faculty member is academically qualified. This list will be prepared and updated annually by the department's adjunct supervising administrator in concert with the Adjunct Faculty Association.

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This section is part of §10, entitled "Seniority", pursuant to which appointments (assignments) are made to the adjunct faculty based on the number of semesters of prior adjunct service. It is conceded that the College may and does unilaterally set qualifications for employment at the time of initial hire. Section 18 of the parties' expired agreement is entitled "Probation" and provides that adjunct faculty will be on probation for one semester after "first employment". Upon satisfactory completion of such probationary period, the adjunct faculty member will be placed on a seniority list. This seniority list is not the list referred to in §10.1(e). Once an adjunct's name is on the seniority list, assignments are made pursuant to the provisions of §10 of the collective bargaining agreement. It is agreed that the lists called for by §10.1(e) have never been prepared.

On November 11, 1985, the College ordered its department chairpersons to prepare for the "adjunct hiring process for Spring 1986" by developing a list of courses which, in their judgment, each individual is qualified to teach. The chairpersons were ordered to make these determinations based solely on their department's existing minimum qualifications. By a December 22, 1985 memorandum, the faculty of the department of history and political science was notified of these communications and of the list that resulted. On that

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same day, Foster, an adjunct faculty member in said department for over 20 years, was notified by the College that he had been determined to be unqualified to teach any course at all and was invited to contact the College in order to discuss the matter. The College also determined that three other adjuncts in the history department, two in the art department and two in the communications department were not qualified. The Association received notice of such disqualification in January 1986, when adjunct employment contracts for the Spring 1986 semester were signed.

Subsequent to the filing of the instant charge, step 2 grievance decisions were issued regarding the College's determinations. Four of the individuals were found to be qualified and their grievances were upheld; the other four, including Foster, were determined to be unqualified and their grievances were denied. As to some, the issue was their qualification to teach a particular course or courses within their department; as to others, the issue related to their qualification to teach within their departments at all.

ALJ DECISION

The issue presented to the ALJ by the Association was whether §10.1(e) of the parties' expired agreement precluded the College from altering its qualifications for employment as to individuals once hired. Conceding that the College may

set initial qualifications for employment, the Association urged that §10.1(e) precluded the College from altering its qualifications thereafter. The ALJ determined that this claim failed for lack of supporting record facts. She found that the evidence "appears to indicate" that adjunct employment is not continuing but occurs pursuant to semester-long employment contracts. In that view of the relationship, she concluded that qualifications may be reset by the College with each hiring since it is agreed that §10.1(e) is not applicable to initial hiring. The ALJ also found that even assuming that the adjunct faculty status was that of continuing employment or appointment, the Association failed to meet its burden of establishing the meaning of §10.1(e). She concluded that the record evidence regarding the meaning of §10.1(e) is "equivocal at best" and that, therefore, the Association has failed to meet its burden.

EXCEPTIONS

In its exceptions, the Association urges that the ALJ erred in finding that the adjuncts' employment is not of a continuing nature; in finding that the evidence of the meaning of §10.1(e) is "equivocal"; in failing to find that the employer had always deemed an adjunct faculty member who successfully taught a course academically qualified to teach the course in the future; and in failing to find that placement of adjunct faculty members on the seniority list

after successfully completing a probationary period constituted recognition that they were academically qualified.

The Association urges that the evidence in the record supports the conclusion that the College altered the standards for academic qualification unilaterally, in violation of the adjunct faculty's contract rights.

DISCUSSION

The question presented by this case is whether the facts establish a refusal "to continue [a term] of an expired agreement until a new agreement is negotiated" in violation of §209-a.1(e) of the Act. A proper disposition of the case depends on our interpretation of the term "academically qualified" in §10.1(e) of the parties' collective bargaining contract.

The record establishes that the College did, during November and December, 1985, prepare what amounts to a list of "academically qualified" adjunct faculty members. The record also establishes that, in preparing such list, the College utilized standards of "academic qualification" which had not previously been followed. The effect was a determination that certain long-standing adjunct faculty members were not "academically qualified" to teach courses they were previously considered "academically qualified" to teach. Some, in fact, were found not academically qualified to teach any courses. The record is also clear that such

list was not prepared "in concert with the Adjunct Faculty Association."

In this case, the Association charges that the College, in preparing "a list of courses for which each adjunct faculty member is academically qualified", unilaterally applied new standards of academic qualification to long-standing adjunct faculty members who had previously been considered "academically qualified" pursuant to the procedures incorporated in the parties' collective bargaining agreement.

The meaning of §10.1(e) can only be understood by reference to other provisions of the contract. The entire section on seniority, coupled with the section relating to probation, indicates that the parties have created, through their collective bargaining, an unusual relationship. Although adjunct faculty members are employed under separate semester-long individual contracts and do not have "continuing" employment in the customary sense, their collective bargaining agreement has created a kind of "tenure". While the College undoubtedly reserves the right to determine qualifications when an adjunct is first hired, the satisfactory completion of one semester of teaching a course will accord an adjunct certain rights with regard to teaching that course in the future. The adjunct's name will

be placed on a seniority list from which the adjunct cannot be removed except for cause.

We construe §10.1(e) as requiring that the list of courses for which adjunct faculty members are academically qualified should be prepared on the basis of the procedures agreed to by the parties in the collective bargaining agreement. Contrary to the ALJ, we find that there is sufficient evidence in this record to establish that §10.1(e) precludes the College from unilaterally determining that adjunct faculty members who had previously been considered academically qualified were no longer academically qualified solely on the basis of newly-imposed standards of academic qualification.

The College urges that the Association's charge is barred by the principles of res judicata by virtue of our decision in County of Nassau (Nassau Community College), 19 PERB ¶13040 (1986). In that case, we determined that the seniority clause in the parties' expired collective bargaining contract did not make seniority the sole basis for assignment of adjunct faculty members, but subordinated seniority to the College's right to determine qualifications. To the extent that the Association reiterates its earlier contention that seniority is the sole basis for assignment, we would agree that the Association is

barred from relitigating that issue. However, the Association also claims herein that placement of adjunct faculty members on the seniority list after completing a probationary period constituted recognition that they were academically qualified. Our earlier decision did not consider or determine this issue. Consequently, the claim made by the Association in this case is not barred from consideration now. Nothing in our prior decision precludes us from now determining that §10.1(e) of the parties' contract binds the College to its earlier decisions regarding academic qualifications. Our prior decision did not authorize the College to find that adjunct faculty members who were considered academically qualified for many years were not now academically qualified.

The College also argues that, inasmuch as it is agreed that the list contemplated by §10.1(e) was never previously prepared, the College cannot now be found in violation of CSL §209-a.1(e). Conceivably, the College could offer such a defense if it were charged with a refusal to implement §10.1(e) at all. Here, however, the College chose to prepare a list of "academically qualified" adjunct faculty members. It may not do so, except in conformity with §10.1(e). The preparation of the list by the College in violation of §10.1(e) violates CSL §209-a.1(e).

We also reject the College's contention that the Association's charge was not timely. The charge was filed within four months of the actions complained of. The letter of September 12, 1985 advised that adjunct course assignments would not be made solely on the basis of seniority. It did not give the Association sufficient notice of actions subsequently taken, which are the subject of this charge.

Finally, having reviewed the charge and the record in this case, we affirm the ALJ's dismissal of that portion of the charge which alleged violations of §209-a.1(a), (b) and (d) of the Act.

Accordingly, we reverse the ALJ and we find that the College has violated §209-a.1(e) of the Act by failing to conform to the requirements of §10.1(e) of the parties' expired agreement.

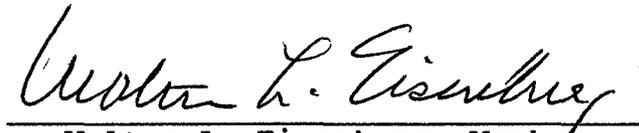
NOW, THEREFORE, WE ORDER that the County of Nassau
(Nassau Community College):

1. Forthwith rescind its determinations that adjunct faculty members who had previously been placed on the seniority list are no longer academically qualified;
2. Comply in all respects with the provisions of §10.1(e) of the parties' expired collective bargaining agreement until a new agreement is negotiated; and

3. Sign and post notice in the form attached at all locations at which any unit employees work in places ordinarily used to post notices of information to unit employees.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, 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 all employees represented by the Adjunct Faculty Association of Nassau Community College that the County of Nassau (Nassau Community College):

1. Will forthwith rescind its determinations that adjunct faculty members who had previously been placed on the seniority list are no longer academically qualified.
2. Will comply in all respects with the provisions of §10.1(e) of the parties' expired collective bargaining agreement until a new agreement is negotiated.

..... County of Nassau (Nassau Community College)

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

STATE OF NEW YORK (DIVISION OF
STATE POLICE),

Respondent,

-and-

CASE NO. U-9066

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

Charging Party.

JOSEPH M. BRESS, ESQ., General Counsel, Governor's
Office of Employee Relations (RICHARD J. DAUTNER,
Esq., of Counsel), for Respondent

HINMAN, STRAUB, PIGORS and MANNING, P.C. (WILLIAM
SHEEHAN, Esq., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Police
Benevolent Association of the New York State Troopers, Inc.
(PBA) to a decision of the Administrative Law Judge (ALJ)
dismissing, prior to hearing, its charge that the State of
New York (Division of State Police) (State) violated
§209-a.1(d) of the Taylor Law when it unilaterally
implemented drug testing^{1/} in relation to bargaining unit
employees.

^{1/}The charge did not address the negotiability of the
procedures implementing drug testing. We accordingly do
not address that issue here.

The ALJ found that this Board is without jurisdiction of the charge pursuant to Civil Service Law §205.5(d). ^{2/}

FACTS

PBA is the certified bargaining representative of three units of employees within the Division of New York State Police. The instant improper practice charge was filed on behalf of employees in all three units, relating to the implementation of drug testing applied to all three units of employees. The State raised as an affirmative defense in its answer the claim that implementation of the drug testing is covered by the parties' collective bargaining agreement, and that PERB is accordingly without jurisdiction of the charge.

Each agreement between PBA and the State for the three units of employees includes the following provision:

No member shall be ordered or asked to submit to a Polygraph (lie detector) test, blood test, a Breathalyzer test or any other test or procedure which would violate his rights under the United States or New York State Constitutions for any reason. Such test may be given if requested by the member.

^{2/}Section 205.5(d), CSL provides: "The Board shall not have authority to enforce an agreement between an employer and an employee and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice"

This language first appeared in the parties' collective bargaining agreement in 1973, as to troopers, investigators and non-commissioned officers. It first appeared in a collective bargaining agreement covering officers in a 1979 agreement. Subsequently, there apparently has been no negotiating history concerning the meaning or application of the language, which has continued in place in subsequent collective bargaining agreements, up to and including the present.

The at-issue language replaced previous language, which provided as follows:

No member shall be ordered or asked to submit to a blood test, a breathalyzer test or any other test to determine the percentage of alcohol in the blood for any reason except as may be provided otherwise by specific statutory law. Such test may be given if requested by the member.

On or about August 7, 1986, the Division of State Police issued a new policy and procedure applicable throughout the Division, which requires the testing of members of the Division in the event that a reasonable suspicion exists that the member is impaired by drugs while on duty. A detailed procedure was set forth in a memorandum dated August 7, 1986, and numbered Interim Order 86-32. The procedure was not negotiated with the bargaining agent of the affected employees prior to its implementation, and the instant improper practice charge ensued.

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DISCUSSION

In reviewing language of the previous and current collective bargaining agreements before him, the ALJ found that the current language is considerably broader in scope, covering tests and procedures of any type, and not simply tests and procedures related to determining the percentage of alcohol in the blood, as was the case in the previous agreements. The ALJ found this broadened language to be significant in determining that the parties had negotiated the issue of testing of bargaining unit members, regardless of the purpose for which the testing was conducted.

Although giving credit to the assertions of the PBA that there was no discussion of drug testing during the negotiations which led to the current collective bargaining agreements, he nevertheless found that the language of the agreements encompasses the issue of drug testing as well as testing for alcohol consumption and veracity.

Applying prior PERB case law to these facts, the ALJ concluded that the collective bargaining agreement between the parties covers the range of testing, including drug testing, "in a comprehensive manner and thus may reasonably be found to manifest the parties' intention to embrace this particular aspect of the broad subject matter negotiated."^{3/}

^{3/}County of Nassau, 16 PERB ¶13043, at 3067 (1983).

Despite the fact that the charging party makes an offer of proof that the parties at no time negotiated concerning the specific issue of drug testing and that the parties did not intend to cover the subject of drug testing when they negotiated the contract language at issue, we find that the contract language at issue so broadly covers the issue of testing, that drug testing must be deemed to be included within the broad scope of the language even in the absence of specific discussion of that particular topic. The reason for this finding is that the contract language at issue is clear and unambiguous in its reference to "any other test or procedure". The reference in the contract language to veracity as well as alcohol impairment tests and other tests indicates that the scope of the language in the current agreements goes considerably beyond the scope of the language contained in the prior agreements, which related specifically to any tests used "to determine the percentage of alcohol in the blood". This broadening of the contract language to include any other test or procedure is clear and unambiguous, in our view, and accordingly must be considered to have application to drug testing, even though that subject was not mentioned during the course of collective negotiations.

Based upon the foregoing, and upon the line of cases previously decided by this Board, finding that where the parties' agreement "covers the subject", this Board is without jurisdiction pursuant to §205.5(d) of the Taylor

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Law. ^{4/} We hereby AFFIRM the decision of the Administrative Law Judge and ORDER that the charge be, and the same hereby is, dismissed.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

^{4/}See, e.g., St. Lawrence County, 10 PERB ¶3058 (1977); County of Nassau, supra; Addison CSD, 20 PERB ¶3002 (1987).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GREENBURGH CENTRAL SCHOOL DISTRICT NO. 7,

CASE NO. E-1266

Upon the application for Designation of
Persons as Managerial or Confidential.

RUSKIN & GYORY, ESQS. (RICHARD GYORY, ESQ., of Counsel),
for Greenburgh Central School District No. 7

BOZEMAN & ROBERTS, P.C. (BRUCE L. BOZEMAN, ESQ., of
Counsel), for Greenburgh Civil Service Organization

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Greenburgh Civil Service Organization (GCSO) to the decision of the Director of Public Employment Practices and Representation (Director) granting the application of the Greenburgh Central School District No. 7 (District) to designate Elizabeth Bonnano, Secretary to Superintendent of Schools; Anna Patalano, Administrative Aide to Associate Superintendent of Schools; and Vasilike Petroff, Secretary to Assistant Superintendent of Schools, as confidential employees of the District.

The exceptions filed by GCSO relate only to the designation of Vasilike Petroff, and not to the other two positions. GCSO argues that the evidence does not establish that the person for whom Petroff works is a managerial

employee within the meaning of the Public Employees Fair Employment Act (Act), in that, contrary to the finding of the Director, Jack Glazier, as Assistant Superintendent of Schools, for whom Petroff works, does not have direct responsibility for personnel administration.

The District has filed cross-exceptions to the Director's decision, asserting that the Director should have found that Petroff's supervisor, Glazier, is entitled to managerial status based upon his direct assistance in the preparation for conduct of collective negotiations, and his major role in the administration of agreements. The District accordingly contends that the Director's determination that Glazier's managerial status rested solely upon a finding of Glazier's direct assistance in personnel administration was erroneous.

Section 201.7 (a) of the Act defines persons as managerial if they are persons

(i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

Petroff's confidential status thus hinges upon Glazier's status and duties as a managerial employee pursuant to §201.7(a) of the Act. It is not contended by GCSO that Petroff does not act in a confidential capacity to Glazier, but simply that Glazier does not act in a managerial capacity as found by the Director.

The evidence presented by the District shows that the administrative staff of the District's central office consists of three persons: Frelow, Superintendent of Schools; Corda, Associate Superintendent of Schools; and Glazier, Assistant Superintendent of Schools. The Associate and Assistant Superintendents are authorized to, and do in fact, act in the capacity of Superintendent, in the absence of the Superintendent. Corda is the primary fiscal officer of the District, and has responsibility for personnel administration with respect to nonteaching personnel. Glazier is responsible for the District's curriculum development, and is responsible for personnel administration with respect to teaching personnel, who constitute the bulk of the 350-member staff of the District. Glazier is the administrative representative on the Board of Education's personnel committee and has responsibility for dealing with the union leadership concerning possible violations of the teaching staff collective bargaining agreements. He is

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responsible for the recruitment, screening, and recommendation of teaching personnel.

DISCUSSION

Having reviewed the record, we conclude that there is sufficient evidence in it to support the conclusion that Glazier's duties in personnel administration entitle him to managerial status. For example, Superintendent of Schools Frelow testified, without contradiction:

Mr. Glazier, the Assistant Superintendent, is responsible for supervising the implementation of the District [curriculum] program In that capacity, he manages our personnel operation, particularly, our classroom teachers and all other supportive personnel. He is responsible for evaluating personnel who supervise the classroom teachers, he supervises directly the District-wide program and other administrators who have District-wide responsibility, such as our special education program and other programs that deal with District-wide features, our gifted and talented program. So, in general, Mr. Glazier is the, quote, manager, unquote, of our curriculum implementation programs and all related services thereto.

As Frelow's designee to the Board of Education's personnel committee, Glazier functions as follows:

I am the administrative representative to the Board's personnel committee [which] regularly reviews the evaluation reports, requests additional information on personnel, gives directions to administration [The] administration in turn prepares issues or policies for the personnel committee to review and then ultimately to recommend to the Board of Education.

Glazier's participation on the personnel committee of the Board of Education, in addition to his other duties, constitutes participation in personnel administration on a district-wide level.

In view of the evidence that Glazier acts as the Superintendent's designee with respect to teaching personnel matters, we share the Director's conclusion that Glazier is managerial.^{1/}

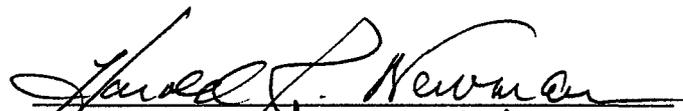
Having adopted the Director's conclusion on the basis of this area of Glazier's responsibility, it is not necessary for us to reach the cross-exceptions filed by the District to the Director's decision, which argue that Glazier derives managerial status from his assistance in the preparation for conduct of collective negotiations and his role in the administration of agreements. Since §201.7(a) provides alternative and not cumulative bases for determining whether a person is entitled to managerial status, if the person meets one of the criteria set forth in said section, it is not necessary to determine whether he would also be entitled to managerial status under any of the other criteria contained in the statute.

^{1/}Richmondville CSD, 18 PERB ¶4025 (1985), and cases cited therein.

Having so found, and in the absence of any claim that Petroff does not act in a confidential capacity to Glazier, the Director's finding that Petroff is confidential is hereby affirmed.

NOW, THEREFORE, WE ORDER that Elizabeth Bonnano, Secretary to Superintendent of Schools; Anna Patalano, Administrative Aide; and Vasilike Petroff, Secretary to Assistant Superintendent, be, and they hereby are, designated as confidential employees.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
TOWN OF ULSTER,

Employer,

-and-

CASE NO. C-3216

UNITED FEDERATION OF POLICE OFFICERS,
INC.,

Petitioner,

-and-

LOCAL UNION NO. 445, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

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 United Federation of Police Officers, 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.

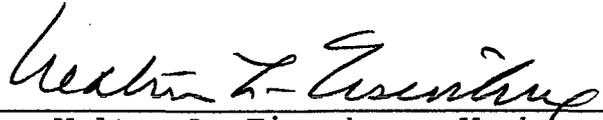
Unit: Included: All full-time and regular part-time employees in the following titles:
patrolmen, sergeants and dispatchers.

Excluded: Chief of police, captains.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Police Officers, Inc. To negotiate collectively is the performance of their 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
GLENS FALLS CITY SCHOOL DISTRICT,
Employer,

-and-

CASE NO. C-3102

SOUTHERN ADIRONDACK SUBSTITUTE TEACHER
ALLIANCE,
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 Southern Adirondack Substitute Teacher Alliance 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.

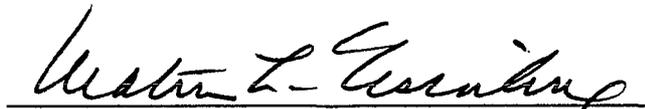
Unit: Included: All per diem substitutes who have received a reasonable assurance of continuing employment, as referenced in §201.7(d) of the Civil Service Law.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Southern Adirondack Substitute Teacher Alliance. To negotiate collectively is the performance of their 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
SOUTH GLENS FALLS CITY SCHOOL DISTRICT,
Employer,

-and-

CASE NO. C-3105

SOUTHERN ADIRONDACK SUBSTITUTE TEACHER
ALLIANCE,

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,

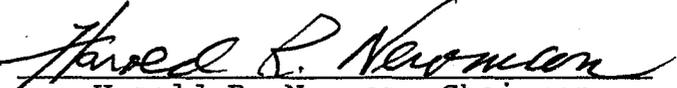
IT IS HEREBY CERTIFIED that the Southern Adirondack Substitute Teacher Alliance has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All per diem substitutes who have received a reasonable assurance of continuing employment, as referenced in §201.7(d) of the Civil Service Law.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Southern Adirondack Substitute Teacher Alliance. To negotiate collectively is the performance of their 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF OGDEN,

Employer,

-and-

CASE NO. C-3208

TOWN OF OGDEN HIGHWAY UNIT, LOCAL
1170 COMMUNICATIONS WORKERS OF
AMERICA, 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,

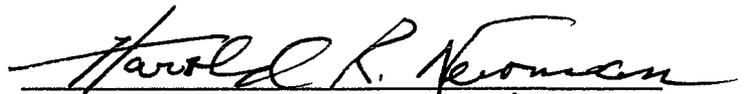
IT IS HEREBY CERTIFIED that the Town of Ogden Highway Unit, Local 1170 Communications Workers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

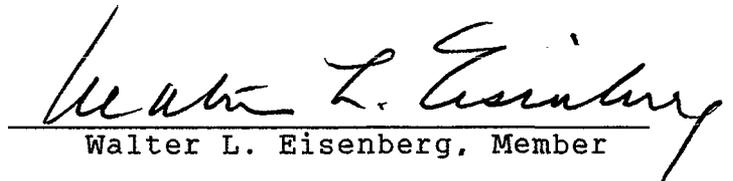
Unit: Included: All regular full-time and part-time employees of the Highway Department of the Town of Ogden employed in the following titles: laborer, motor equipment operator, mechanic, mechanic helper and foreman.

Excluded: Clerical and other employees currently covered in the OHE and ONESE bargaining units, the foreman/assistant to the highway superintendent, the highway superintendent, and temporary employees working six months or less in a calendar year.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Town of Ogden Highway Unit, Local 1170 Communications Workers of America, AFL-CIO. To negotiate collectively is the performance of their 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF HIGHLAND FALLS,

Employer,

-and-

CASE NO. C-3116

UNITED FEDERATION OF POLICE OFFICERS,

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 United Federation of Police Officers has been designated and selected by a majority of the employees of the above-named public employer, in the units agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Dispatchers Unit:

Included: All full time dispatchers.

Excluded: All other employees.

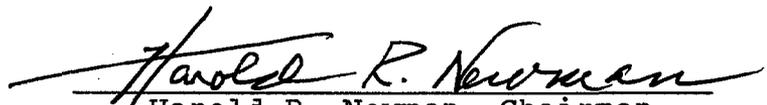
Police Officers Unit:

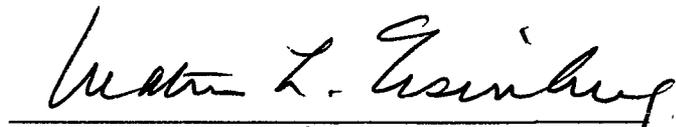
Included: All full time police officers.

Excluded: All other employees.

~~FURTHER, IT IS ORDERED~~ that the above named public employer shall negotiate collectively with the United Federation of Police Officers. To negotiate collectively is the performance of their 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: July 8, 1987
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

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