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# State of New York Public Employment Relations Board Decisions from August 18, 1987

New York State Public Employment Relations Board

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**Keywords**
NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

WAPPINGERS CENTRAL SCHOOL DISTRICT,

Employer/Petitioner,

-and- CASE NO. C-3194

WAPPINGERS FEDERATION OF TRANSIT, CUSTODIAL AND MAINTENANCE WORKERS,

Intervenor.

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KRUSE & McNAMARA, ESQS., for Employer/Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Wappingers Central School District (District) from a decision of the Director of Public Employment Practices and Representation (Director), which dismissed as untimely its petition seeking to remove certain positions from a unit represented by the Wappingers Federation of Transit, Custodial and Maintenance Workers (Federation).

The District argues that, in the absence of any objection by the employee organization representing the at-issue bargaining unit, PERB should accept jurisdiction and process the petition on its merits, regardless of whether the timeliness requirements for filing, contained in its Rules of Procedure (Rules), have been met.

It is uncontroverted that the appropriate period for filing the District's decertification petition occurred in November 1985, pursuant to PERB's Rules, §201.3(d), and that a new period for filing will occur in November 1987. In view of the fact that the petition was filed on January 29, 1987, it was filed, according to PERB's Rules, either approximately 14 months late or 10 months early. Since, at the time of filing of this petition, no provision existed for the acceptance of untimely filed petitions, the District's argument for acceptance of the petition is identical, whether it is treated as late or premature,[1/] that is, PERB should waive its Rules concerning the timeliness of filing of a petition upon the consent of the parties.

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[1/]Following the filing of the instant petition, PERB amended its Rules, effective May 8, 1987, to provide, at Rule 201.2(d), that if a petition is filed prematurely, objection to its processing may be made, but that "[s]uch objection to the processing of the petition, if not duly raised, may be deemed waived." This amendment, however, permits the Director to process a premature petition to conclusion if its untimeliness is neither discovered by the Director nor raised by any party at or prior to the commencement of the proceedings. It is not intended to compel the Director to accept jurisdiction over untimely petitions by reason of the parties' waiver of the timeliness rules. This new Rule would, accordingly, have no application to the instant case, even if the petition had been filed subsequent to its enactment.

The District argues that the Director's insistence upon compliance with PERB's Rules with respect to the filing period is arbitrary and capricious. However, good and legitimate reasons exist for insistence upon compliance with the filing procedures. As we stated in City of Long Beach, 1 PERB ¶399.02, at 3119 (1968):

> The time limitations contained in the Rules create some degree of order and stability in the complex world of labor relations in public employment, and, thus, a failure to comply with them should not be easily condoned.

This is particularly true in light of Rule ¶201.3(g), which provides:

> No petition may be filed for a unit which includes job titles that were within a unit for which, during the preceding twelve-month period, a petition was filed and processed to completion.

It might well be argued that acceptance of a decertification petition out of time could delay or eliminate the window period which would otherwise exist. While periods of unchallenged representation status are required by the Act (§208.2), window periods, during which changes in the bargaining unit and representation status may occur, are similarly required. Agreement by the parties to alter or eliminate these window periods would be violative of the Act. The filing of an untimely decertification petition, even upon consent, which would or could produce the same result, would also be improper.

IT IS THEREFORE ORDERED that the decision of the Director be, and it hereby is, affirmed, and the petition is dismissed in its entirety.

DATED: August 18, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

GENEVIEVE E. MAC LEAN,

Charging Party,

-and- CASE NO. U-6930

LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES,

Respondent.

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GENEVIEVE E. MAC LEAN, pro se

GOLDSTEIN & RUBINTON, P.C., Attorneys for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Local 342, Long Island Public Service Employees (Local 342) from a decision of the Administrative Law Judge (ALJ) which found that Local 342 violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) by refusing to process Genevieve MacLean's (MacLean) grievance. In its exceptions, Local 342 asserts, in essence, that the ALJ decision was not supported by a preponderance of the evidence; that the ALJ erred in determining the proper measure of damages; that the claim against it should have been dismissed upon the grounds of res judicata; that the ALJ improperly denied its motion for a new hearing due to an alleged conflict of interest of MacLean's counsel; and that the ALJ evidenced bias in the conduct of the hearing.

The charging party filed no cross exceptions to the ALJ decision.

## FACTS

MacLean was appointed to a Deputy Village Clerk position with the Village of Valley Stream in 1979. In April 1980, she was appointed full-time Village Clerk. Thereafter, in the fall of 1980, her Village Clerk position was reduced to part-time and MacLean was appointed full-time to the position of Principal Clerk. None of these titles was in a bargaining unit. Effective May 19, 1983, MacLean's Principal Clerk position was reclassified to the title of Senior Clerk, a title within a bargaining unit represented by Local 342. Several weeks later, on June 6, 1983, MacLean was terminated by the Village from her employment as a Senior Clerk, retaining, however, her part-time position as Village Clerk until that appointment expired in April 1984.

Immediately after her termination from her Senior Clerk position, MacLean filed a grievance with Local 342 and the Village regarding her termination. On June 15, 1983, Murphy, Local 342's business agent, sent the following response to MacLean:

> We have received your grievance and after consultation with our union attorney, we have been advised that, although we normally do represent the title of Senior Clerk, due to the fact that you are still a Village Clerk and as such hold a confidential and exempt position, we are unable to represent you as a member of the bargaining unit . . . .

The agency shop fee monies which had been withheld from MacLean's paycheck for two pay periods, during her tenure as a Senior Clerk, were simultaneously returned to her by Local 342.

In her charge, MacLean claimed, among other things,[1/] that Local 342 denied her bargaining unit status and refused to process her grievance because she was politically unpopular. MacLean based her claim of improper motivation on a statement made at a meeting in March 1983 between herself, the Village attorney, and Galvin Murphy, Local 342 business agent, concerning another matter. At the meeting, MacLean informed Murphy that she had applied for membership in Local 342. When asked why by Murphy, she responded that she was seeking protection. MacLean testified that Murphy responded that he "thought it was not a membership that the Union wanted to take because they might find themselves squeezed (sic) politically by my problems and I withdraw the application."

Murphy testified that, prior to the meeting, he was not aware that MacLean held not only the Village Clerk title but held the title of Principal Clerk also. He testified that

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[1/] A charge filed by MacLean against the Village of Valley Stream arising out of the same events was dismissed by interim decision of the Director at 17 PERB ¶4554 (1984). Additionally, an allegation by MacLean that §209-a.2(b) of the Act had been violated was withdrawn prior to hearing.

MacLean sought to have the Principal Clerk title added to a Local 342 unit, and that MacLean and the Village Attorney, in his presence, discussed it and decided that at that time it would be difficult for Murphy to seek to add the title, since MacLean intended to retain her position as Village Clerk.

Aside from the March statement of Murphy, MacLean presented no other affirmative evidence in support of her claim that the refusal to process her grievance filed approximately two months later was improperly motivated. However, the ALJ found that the reasons presented by Local 342 were not credible and/or were inconsistent, and thus pretextual in nature, and that MacLean therefore met her burden of proving that the refusal to represent her was improperly motivated, in violation of Local 342's duty of fair representation under the Act.

DISCUSSION

Local 342 asserts that MacLean failed to meet her burden of proving that its refusal to represent her was improperly motivated and thus violative of the Act. However, the ALJ made certain credibility determinations in the course of the hearing, from which her conclusions were drawn. First, she found that Local 342 did not want her membership because it might be politically squeezed by her problems, a statement which the ALJ appropriately construed as establishing both knowledge of MacLean's political unpopularity, and that Local 342 had a concern about the impact which her political

unpopularity might have upon it if compelled to represent her. Second, the ALJ concluded that the various explanations offered by Local 342 for its rejection of MacLean's grievance and its removal of her from the bargaining unit were, for the reasons set forth in her decision, not credible. The ALJ accordingly found that the reasons for Local 342's conduct were pretextual, and that MacLean accordingly met her burden of proving that Local 342 acted upon improper motivation when it refused to represent her. It is our determination that the credibility findings made by the ALJ should not be disturbed, and that the record in this case fully supports the findings of fact made by the ALJ. Having affirmed the findings of fact, we also affirm the ALJ's conclusion that Local 342 violated §209-a.2(a) of the Act. A refusal to represent a bargaining unit member, which MacLean clearly was, because of that unit member's political unpopularity, constitutes an improper motive for the refusal to represent.

Among its other exceptions, Local 342 asserts that, because no finding was made that the underlying grievance was meritorious, an essential element of proof in a duty of fair representation case was missing, and the finding should therefore be reversed. However, in the instant case, not only did Local 342 refuse to process MacLean's grievance but it also ejected her from the bargaining unit represented by Local 342, compelling her to retain an attorney and proceed

in court against the Village. According to the record evidence, the court proceeding reached a successful resolution from MacLean's point of view, since she was reinstated to employment with the Village in 1985, in settlement of the litigation. Accordingly, we conclude that the removal of MacLean from the bargaining unit for improper reasons does not require a finding that her grievance was meritorious and, in any event, her claims against the Village, while not actually adjudicated to be meritorious, were clearly sufficient to achieve a settlement favorable to MacLean.

Local 342 also asserts, in its exceptions, that this charge should have been dismissed upon the ground of res judicata, because a Federal District Court Judge, in a decision dated May 21, 1984, dismissed a claim made by MacLean against Local 342 alleging breach of the duty of fair representation. In that case, however, U.S. District Court Judge Frank X. Altimari found that although MacLean's complaint before him was couched in terms of 42 U.S.C. §1983, in fact, the claim alleged a breach of the duty of fair representation. Judge Altimari stated: "While the cause of action pled against the Union purports to be one for violation of civil rights under 42 U.S.C. §1983, it simply and singly alleges that the Union failed to fairly represent plaintiff. However, under the circumstances of this case, the Union had no such duty. See Wheeler v. Town of

Huntington, No. CV-83-2098(E.D.N.Y. March 30, 1984)." Judge Altimari accordingly dismissed MacLean's complaint against Local 342.

From the language of the decision itself, it might well be argued that the District Court's dismissal of the complaint was on its merits, giving rise to an appropriate claim that the doctrine of res judicata applies. However, the Wheeler case, cited by the District Court, sheds further light on the basis upon which Judge Altimari dismissed MacLean's complaint. The Wheeler case, which also alleged a claim of violation of 42 U.S.C. §1983, was brought by other plaintiffs, but against Local 342. In that case, U.S. District Court Judge Jacob Mishler dismissed the plaintiffs' §1983 claims upon the ground that they in fact set forth a duty of fair representation claim only. Judge Mishler's ground for dismissing the complaint was not that no breach of the duty of fair representation had been alleged, but that because political subdivisions are not subject to the National Labor Relations Act, from whence the Federal duty of fair representation derives, no Federal cause of action for the breach of duty of fair representation exists for political subdivision employees. Judge Mishler stated the following:

> Local 342 represented plaintiffs during their dispute with the Town of Huntington, a political subdivision of the State of New York. Consequently, Local 342 had no implied Federal duty of fair representation. See

> Nelson v. Southeastern Pa. Trans. Auth., 420 F.Supp. 1374, 1384 (e.d. Pa. 1976). Any such duty must be based on state law. Id.

Judge Mishler accordingly found, in Wheeler, that plaintiffs' claim must be based on State law rather than on Federal law, and that the Federal Court was accordingly without jurisdiction of the claim.

The reliance of Judge Altimari on the Wheeler decision indicates quite clearly that his dismissal of MacLean's complaint against Local 342 was based upon the same conclusion, that is, that the plaintiff had failed to set forth a Federal claim for relief. We accordingly find that the Federal Court claim was not dismissed upon its merits, but rather upon jurisdictional grounds, and that the doctrine of res judicata therefore has no applicability to the case before us. Local 342's exception in this regard is dismissed.

In others of its exceptions, Local 342 alleges that because of an alleged conflict of interest of MacLean's counsel,[2/] its motion for a new hearing should have been granted, and the awarding of legal fees as a remedy is inappropriate. As stated by the ALJ at the time Local 342's motion for a new hearing was made, this agency is not the

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2/MacLean was represented by counsel during the first four days of hearing in this matter, but appeared pro se on the final day of hearing and on this appeal.

appropriate forum for determining whether a breach of the Code of Professional Responsibility has occurred. In any event, no evidence of misconduct was offered by Local 342 in support of its opinion that the Code had been violated. Furthermore, with respect to the remedy ordered by the ALJ of compensation to MacLean in the form of reasonable attorney's fees, the remedy applies to MacLean's legal expenses incurred in connection with pursuing her claims against the Village, and not the legal expenses incurred in processing the instant charge. Since the attorneys representing MacLean in her action against the Village are not the same attorneys as referenced in Local 342's exception, its argument concerning the award of attorney's fees is inapposite.

We have reviewed the remaining exceptions presented by Local 342. They are unsupported by any references to the record and we find no basis for them in the record or Local 342's brief. They are therefore dismissed as being without merit.

Based upon the foregoing, the decision of the Administrative Law Judge is hereby affirmed and it is

ORDERED THAT Local 342, Long Island Public Service Employees reimburse Genevieve MacLean for any reasonable and previously unreimbursed legal fees and related expenses which she has actually incurred in connection with her processing of her claim against the Incorporated Village of Valley

Stream for unlawful discharge without Local 342's representation.[3/]

IT IS FURTHER ORDERED that Local 342, Long Island Public Service Employees cease and desist from refusing to represent employees consistent with its duty of fair representation under the Public Employees' Fair Employment Act, and that it sign and post notice in the form attached at all locations ordinarily used to post written communications to unit employees.

DATED: August 18, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

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[3/]The award of attorney's fees is an appropriate remedy here. See Local 418, CSEA (Diaz), 18 PERB ¶3047 (1985). Because the record is silent concerning whether, and to what extent, attorney's fees have been previously reimbursed, the recommended order of the Administrative Law Judge is hereby modified to limit the award of the attorney's fees to those which have not previously been reimbursed.

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 within the units represented by Local 342, Long Island Public Service Employees that Local 342, Long Island Public Service Employees:

1. Will reimburse Genevieve MacLean for any reasonable and previously unreimbursed legal fees and related expenses which she has actually incurred in connection with her processing of her claim against the Incorporated Village of Valley Stream for unlawful discharge without Local 342's representation.

2. Will not refuse to represent employees consistent with its duty of fair representation under the Public Employees' Fair Employment Act.

Local 342, Long Island Public Service Employees

**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.*

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

ONEIDA COUNTY DEPUTY SHERIFF'S BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. M86-542

COUNTY OF ONEIDA and ONEIDA COUNTY SHERIFF,

Joint Employer.

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JAMES M. KERNAN, ESQ., for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Oneida County Deputy Sheriff's Benevolent Association (Association) to a decision of the Director of Conciliation (Director) dated May 27, 1987. In that decision, the Director rejected a demand for the assignment of an arbitrator for the purpose of conducting compulsory interest arbitration between the Association and the County of Oneida and Oneida County Sheriff, upon the ground that "Deputy Sheriffs are not eligible for compulsory interest arbitration under the statute".[1/]

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1/Section 209.4 of the Public Employees' Fair Employment Act (Act).

The Association argues that deputy sheriffs are police officers pursuant to the provisions of §1.20 of the Criminal Procedure Law of the State of New York. In support of its contention that deputy sheriffs are police officers, the Association provides, together with its exceptions, a decision issued by the Honorable Norman E. Joslin, Justice of the Supreme Court, Erie County, which held that deputy sheriffs are in fact police officers. Arguing, as it does, that deputy sheriffs represented by it in Oneida County are police officers, the Association contends that §209.4 of the Act entitles them to the procedures of compulsory interest arbitration.

Section 209.4 applies to "officers or members of any organized fire department, police force or police department of any county, city, except the city of New York, town, village or fire or police district . . . ."

The argument that because deputy sheriffs are police officers, they are entitled to coverage under §209.4 of the Act is not new. The issue was first addressed in 1974, in Erie County Sheriff and Erie County, 7 PERB ¶3057, by this Board. In that case, it was acknowledged that deputy sheriffs are police officers, but the Board nevertheless held that a sheriff's department is not a police force or police department within the meaning of §209.4 of the Act. In so doing, the Board cited various provisions of State law and

the New York State Constitution as bases for determining that a distinction exists in law between a sheriff's department and a police force or police department.

Since the Erie case, the issue of entitlement of deputy sheriffs to compulsory interest arbitration has been reargued on numerous occasions. In County of Rockland, 11 PERB ¶3050 (1978), the Board again considered the question, and for the reasons set forth in Erie, supra, held, at 3078, that "deputy sheriffs in the Patrol Division are not covered by the interest arbitration provision [of the Act] . . . ." This decision was confirmed, without opinion, by the Appellate Division, Second Department, 67 A.D.2d 1109, 12 PERB ¶7004 (1979).

Thereafter, a demand for interest arbitration was made on behalf of deputy sheriffs in Yates County. In Yates County, 16 PERB ¶8001, at 8001 (1982), the argument was again rejected, upon the ground that a "sheriff's department is not an 'organized police force or police department' within the meaning of Civil Service Law §209.4 as amended by Chapter 725 of the Laws of 1974." Again, the Board's decision in that matter was affirmed by the New York State Supreme Court, Ontario County, in a February 25, 1983 decision (16 PERB ¶7006). The Court there found, at 7007, "that respondent [PERB] has a rational basis for its determination and that its interpretation of the statute in question is entitled to

great weight. The court may not substitute its judgment for the judgment of respondent where that judgment is neither arbitrary nor capricious." The petition to annul PERB's determination was accordingly dismissed.

This long-standing and oft-challenged interpretation of §209.4 of the Act will not be disturbed. The status of deputy sheriffs as police officers has not in the past, and is not now, dispositive. What is dispositive is that sheriffs' departments are not police departments within the meaning of the Act. As we stated in Erie County, supra, at 3093: "This conclusion is based upon our reading of the language of the statute and our understanding of the legislative intent; it does not involve any judgment as to whether or not arbitration should be mandated to resolve negotiations disputes involving sheriffs' departments."

Based upon the foregoing, the decision of the Director is affirmed, and the petition is dismissed in its entirety.

DATED: August 18, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

LOCAL 445, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CASE NO. C-3228

COUNTY OF SULLIVAN,

Employer,

-and-

LOCAL 750, COUNCIL 66, AFSCME,

Intervenor.

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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 Local 445, International Brotherhood of Teamsters 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 probationary, provisional and permanent employees in the Department of Public Works.

Excluded: Appointed Officials, Commissioner, Director of Operations, Road Maintenance Superintendent, Secretary to Commissioner of Public Works (Sr. Stenographer), Office Manager, Garage Superintendent, Senior Civil Engineer, temporary, part-time, and seasonal employees, Supervisory Unit employees, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 445, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 18, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

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#3B-8/18/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

CASE NO. C-3246

TOWN OF ORCHARD PARK,

Employer.

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

Unit: Included: All regular full-time mechanics, heavy equipment operators, light equipment operators, truck drivers and laborers employed in the Employer's Highway and Water & Sewer Departments.

Excluded: Foremen, deputy highway superintendent, highway superintendent, all other employees, guards, management officials and supervisors.

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

DATED: August 18, 1987
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member