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Board (PERB)

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1-28-1988

# State of New York Public Employment Relations Board Decisions from January 28, 1988

New York State Public Employment Relations Board

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# State of New York Public Employment Relations Board Decisions from January 28, 1988

**Keywords**

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

**Comments**

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

HYDE PARK CENTRAL SCHOOL DISTRICT UNIT,  
DUTCHESS COUNTY EDUCATIONAL LOCAL #867,  
CIVIL SERVICE EMPLOYEES ASSOCIATION,  
AFSCME, AFL-CIO, LOCAL 1000,

Charging Party,

-and-

CASE NO. U-9058

HYDE PARK CENTRAL SCHOOL DISTRICT,

Respondent.

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MARJORIE E. KAROWE, ESQ., for Charging Party

DAVID SHAW, ESQ., for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Hyde Park Central School District (District) to the decision of the Administrative Law Judge (ALJ) finding that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it assigned certain supervisory duties of Head Maintenance Mechanic (HMM), a title within the negotiating unit represented by the charging party, Hyde Park Central School District Unit, Dutchess County Educational Local #867, Civil Service Employees Association, AFSCME, AFL-CIO, Local 1000 (CSEA), to a newly created title of Assistant Supervisor of Buildings and Grounds (ASBG), a position not in the unit.

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CSEA also filed a petition for unit clarification/unit placement seeking a determination that the position of ASBG was or should be in the unit represented by CSEA. That matter was consolidated for hearing with this case. The Director has issued a decision on the petition<sup>1/</sup> finding that the ASBG is not in the unit represented by CSEA and is not appropriately placed in that unit. No exceptions have been taken to the Director's decision. The Director's factual findings and conclusions were adopted by the ALJ for the purposes of this case.

#### FACTS

After Kilmer, the HMM, retired, the District left the unit position vacant, created the new title of ASBG, which it treated as a nonunit position, and hired Martin to fill the position. The District had previously sought through negotiations to remove the HMM from the unit but withdrew the proposal after CSEA objected. The District, at that time, believed the HMM performed sufficient supervisory duties to warrant removal.

The HMM assigned daily work to grounds and maintenance personnel and daily oversaw their work at their job sites. He performed these functions under the direct supervision of the Supervisor of Buildings and Grounds, who reviewed the daily assignments and also periodically worked alongside unit

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<sup>1/</sup>Hyde Park CSD, 20 PERB ¶4069 (1987).

employees. He had no responsibilities regarding formal evaluations nor did he initiate discipline.

Mayen, the Supervisor of Buildings and Grounds, testified that prior to Kilmer's retirement, he had asked for the creation of an Assistant Supervisor title to help him with the supervision of unit employees and with his administrative duties. The District's buildings and grounds department consists of 53 unit employees, 15 of which are grounds and maintenance personnel, the remainder being custodial titles.

The ASBG, unlike the HMM, oversees all 53 employees in the buildings and grounds department. On a daily basis, he assigns work to the grounds and maintenance personnel and visits their job sites to observe the progress of their work. He also performs similar functions for custodial employees, but on a much less frequent basis because of their more routine assignments. The ASBG can assign overtime on his own, unlike the HMM. Further, unlike the HMM, the ASBG's duties include written evaluation of all department employees and the documentation of disciplinary matters. He will also be involved in the preparation of the department's budget. In general, the ASBG has all the authority of the Supervisor and is to assist the Supervisor in all areas.

#### DIRECTOR'S DECISION

The Director found that the ASBG does not perform the same job function as the former HMM. The new position has

department-wide duties, while the HMM acted only over a limited portion of the department. Furthermore, the ASBG's supervisory role "vastly exceeds" the HMM's supervisory functions. He determined that the ASBG's duties of discipline and budget preparation, and the assumption of the Supervisor's authority do not warrant placing that position in CSEA's unit.

#### ALJ'S DECISION

The ALJ noted that the Director's decision, determining that the ASBG is not within and is not appropriately placed within CSEA's unit, does not resolve the instant charge. The issue raised by the charge is whether the assignment of work previously performed by the HMM to the ASBG violated the Act. The ALJ concluded that the assignment of daily work to the grounds and maintenance personnel and the daily oversight of their job performance at the work site were the exclusive functions of the HMM, a unit position. The Supervisor's authority and the occasional performance of work alongside unit employees does not call into question the exclusivity of the HMM's assignment and supervisory duties. The ALJ further found that these duties of the HMM are now performed by the ASBG and that such duties are substantially the same duties as were performed by the HMM. The ALJ further concluded that, insofar as the at-issue duties are concerned, there was no significant change in job qualifications. There was no change in the daily assignment and daily supervisory

functions or in the manner in which they are performed. The ALJ concluded, therefore, that no further balancing test need be applied and determined that the District violated §209-a.1(d) of the Act by unilaterally assigning unit work to a nonunit employee. The ALJ directed that the District reinstate the duties of daily assignment and daily supervision of grounds and maintenance personnel previously performed by the HMM to the unit represented by CSEA.

#### DISTRICT'S EXCEPTIONS

The District urges that it was error to find that the daily supervisory work assigned to the ASBG was exclusive unit work. In the District's view, the supervisory duties of the HMM cannot be considered exclusive unit work. It relies on job descriptions of other nonunit titles, which show that daily supervision could be performed by such employees. In addition, the District relies on the fact that the supervisory duties of the HMM were under the direct supervision and control of the Supervisor, who made a daily review of assignments.

The District also claims error in the finding that there was no significant change in the qualifications for the job of supervision. It urges that the qualifications for the HMM and ASBG positions are distinguishable and that it was inappropriate to look solely at the HMM's functions when evaluating the effect of the change in qualifications. It points out that the Director has found that the ASBG does not perform the same job function as the HMM.

Finally, the District urges that "for reasons of public policy", this Board should not hold that an employer, having once given minimal supervisory powers to unit members, cannot withdraw such supervision or redeploy the supervisory system so as to best carry out the mission of the employer.

CSEA, in response, urges that the record supports the ALJ's conclusion that the HMM's supervisory duties were exclusive unit work, now performed by the ASBG, and that a balancing test is not needed since there was no significant change in the qualifications for performing the at-issue duties. CSEA also argues that there is no basis for the District's "public policy" argument.

#### DISCUSSION

In applying the test set forth by us in Niagara Frontier Transportation Authority,<sup>2/</sup> it is ordinarily appropriate to focus on the specific job functions or duties of the unit position which are in issue, as the ALJ did in this case. However, this case is the first one presented to us in which the at-issue duties are supervisory in nature. We conclude that some weight must be accorded the public employer's right to alter or redeploy its supervisory responsibilities, at least to the extent of not considering the unit position's supervisory duties in isolation from the supervisory system established by the employer.



The duties at issue in this case are the HMM's responsibilities relating to the daily assignment and daily work site supervision of grounds and maintenance personnel, a relatively small group of employees. The District has incorporated these responsibilities in the job duties of the new position of ASBG. The ASBG position was established to assist the Supervisor in the performance of his duties. The position requires different overall qualifications than those for the HMM. The Director has found that the ASBG's department-wide supervisory role vastly exceeds the HMM's supervisory duties. He found that the ASBG is a significantly different position than the HMM, and that the position does not perform the same job functions as the HMM. His findings are not challenged.

The HMM's at-issue duties were under the direct supervision and control of the Supervisor, who made a daily review of assignments. The Supervisor often appeared at the job site to oversee the work and occasionally performed work alongside unit employees. We find that the supervisory duties of the HMM were not performed exclusively by him, but rather were part of a relatively small operation in which supervisory duties were shared by unit and nonunit employees.

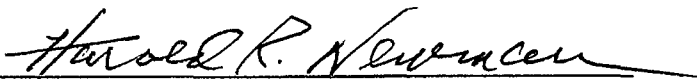
We also find that the supervisory tasks of the ASBG are not substantially similar to those previously performed by the HMM. While the ASBG makes daily assignments and oversees job site work, his responsibilities in this regard are

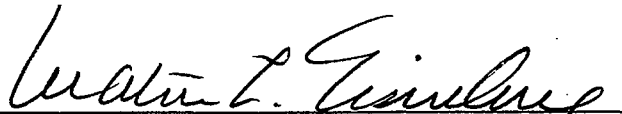
significantly different than the HMM's, since the ASBG possesses formal evaluation and disciplinary authority and can be expected to work more independently by virtue of his greater authority.

As we stated in Niagara Frontier Transportation Authority, in determining whether there has been an improper unilateral transfer of unit work, the initial essential questions are: 1) whether the at-issue work had been performed exclusively by unit employees and 2) whether the reassigned tasks are substantially similar to those previously performed by unit employees. Inasmuch as we find that both of these questions must be answered in the negative in this case, the charge that the District violated §209-a.1(d) of the Act must be dismissed.

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

DATED: January 28, 1988  
New York, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

ROBERT I. HARRIS and SEAN P. SHEA,  
Petitioner,

-and-

CASE NO. C-3272

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL,

Employer,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO.

Intervenor.

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ROBERT I. HARRIS, ESQ. and SEAN P. SHEA, ESQ., pro se

JOSEPH M. BRESS, ESQ., for Employer

ROBERT PEREZ-WILSON, ESQ. (LEONARD A. SHRIER, ESQ.,  
of Counsel), for Intervenor

BOARD DECISION AND ORDER

In this decertification<sup>1/</sup> petition, Robert I. Harris  
and Sean P. Shea (petitioners) seek to decertify District  
Council 37, AFSCME, AFL-CIO (DC-37) as the representative of

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<sup>1/</sup>The petition originally filed sought certification  
as well as decertification. However, the certification  
aspect of the petition was withdrawn upon receipt of  
information from the assigned Administrative Law Judge that  
only employee organizations, and not individuals, have  
standing to file petitions for certification pursuant to  
Rules of Procedure §201.2(a).

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a unit of approximately 536 employees of the New York State Division of Housing and Community Renewal, for the purpose of removing approximately 50 attorneys and hearing officers from that unit.

The showing of interest presented by petitioners in support of their decertification petition was drawn only from among those 50 persons the petitioners seek to remove from the overall unit. Because the decertification petition was not supported by a showing of interest of at least 30 percent of the persons in the existing unit, the Director of Public Employment Practices and Representation (Director) dismissed the petition pursuant to §201.3(d) of our Rules of Procedure.

Section 201.3(d) of our Rules provides as follows:

A petition for certification or decertification may be filed within thirty days before the expiration . . . of the period of unchallenged representation status accorded a recognized or certified employee organization. Unless filed by a public employer, such a petition shall be supported by a showing of interest of at least 30% of the employees in the unit already in existence or alleged to be appropriate by the petitioner.

In their exceptions, petitioners claim that the Director misconstrues the language of §201.3(d) of our Rules by finding that a petition for decertification may only be accompanied by a showing of interest of 30 percent of the employees in the existing unit, and may not be accompanied by

a showing of interest of at least 30 percent of the employees in the unit alleged to be appropriate by the petitioner. Petitioners contend that it is they who have the choice of determining what shall be the composition of the unit for the purpose of establishing what constitutes a 30 percent showing of interest. We disagree.

Section 201.3(d) of our Rules has, from the time of its promulgation, been interpreted and construed to mean that a petition for certification must be accompanied by a showing of interest of at least 30 percent of the employees in the unit alleged by the petitioner to be appropriate. On the other hand, a petition for decertification must be accompanied by a showing of interest of at least 30 percent of the employees in the existing unit.<sup>2/</sup>

A petitioner seeking only decertification of an existing unit does not, contrary to the contention of the petitioners in the instant case, have the opportunity to select which of two options it will exercise in order to establish the size of the showing of interest required.<sup>3/</sup> This absence of

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<sup>2/</sup>As to public employers who file decertification petitions, because no showing of interest is required, the composition of the unit is irrelevant to our inquiry here. See §201.3(d) of our Rules.

<sup>3/</sup>See, e.g., State of New York, Unified Court System, 15 PERB ¶3038 (1982).

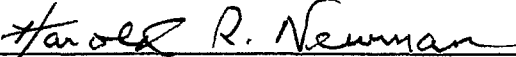
options is borne out by a review of §201.5(a) and (b) of our Rules, which enumerate the facts and information necessary to the filing of a petition for certification and decertification respectively. Section 201.5(a)(3) requires that a petition for certification be accompanied by a "description of the negotiating unit which the petitioner claims to be appropriate" and subsection (6) calls for the "number of employees in the allegedly appropriate unit", while §201.5(b)(7) requires that a petition for decertification be accompanied by a "description of the unit, including the number of employees". Clearly, only in the case of certification is the showing of interest keyed to the unit claimed to be appropriate by the petitioner. Petitions which only seek decertification focus solely on the size of the existing unit.

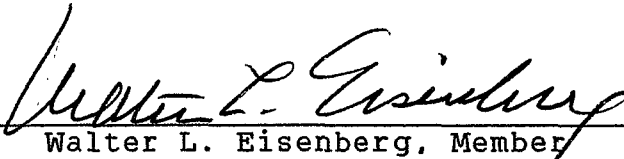
Inasmuch as the petitioners seek decertification of DC 37 as the bargaining representative of an already existing unit, a 30 percent showing of interest taken from among the employees in the entire unit is required by our Rules. It is uncontroverted that the showing of interest presented in support of the decertification petition is numerically inadequate when based upon the existing unit of approximately 536 persons. The Director, therefore, correctly dismissed the petition.

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

DATED: January 28, 1988  
New York, New York

  
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Harold R. Newman, Chairman

  
\_\_\_\_\_  
Walter L. Eisenberg, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
JOSEPH WERNER,

Charging Party,

-and-

CASE NO. U-9182

MIDDLE COUNTRY TEACHERS ASSOCIATION,  
Respondent.

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JOSEPH WERNER, pro se

JAMES R. SANDNER, ESQ. (CHRISTOPHER MEAGHER, ESQ.,  
of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Joseph Werner, charging party, to the dismissal, as untimely, of his improper practice charge against the Middle Country Teachers Association (Association). The Administrative Law Judge (ALJ) found that Werner's claim, that the Association's agency shop fee refund procedure for 1986-87 violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act), is time barred because the acts or omissions complained of in the charge occurred more than four months before its filing (§204.1(a)(1) of our Rules of Procedure).

In his charge, Werner alleges that he is an agency shop fee payer and that in June 1986, he received a copy of the



Association's agency shop fee refund procedure for the 1986-87 fiscal year.<sup>1/</sup> Pursuant to the procedure, Werner filed objections to the use of his agency shop fees for impermissible purposes under the Act and, on September 5, 1986, he received an advance reduction payment from the Association, together with financial information in justification of the amount and means of calculating the payment. Thereafter, on October 15, 1986, Werner made a lump sum agency shop fee payment for the entire 1986-87 fiscal year, and included on his check the following restrictive endorsement:

This check is to be held in escrow by [the Association] and not cashed until the release to Joseph Werner of an indepth accounting of where the [Association's] Officers Expense Account (\$21,300) and the [Association's] Representatives Expense Account (\$13,138.60) has been spent.

On December 1, 1986, the Association notified Werner that it would not send him any further financial information, and thereafter cashed his check without placing the funds in escrow. On January 8, 1987, Werner filed his improper practice charge, alleging that:

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<sup>1/</sup>Section 208.3(b) of the Act authorizes the negotiation of agency shop fees equivalent to membership dues, but requires the establishment and maintenance of a refund procedure for the return of an employee's pro rata share of expenditures by the bargaining representative "in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

1. He had not been provided with adequate audited financial disclosure in a timely manner;
2. The Association had not properly justified how its advance reduction was calculated;
3. The refund procedure compels Werner to file objections prior to receiving adequate financial information upon which objections can be based;
4. The procedure contains no provision requiring the creation of an escrow account in which agency fees in dispute are placed;
5. The procedure contains no provision for a final "end stage" decision at the conclusion of the fiscal year;
6. The procedure requires the filing of objections by certified or registered mail only.

Werner alleges that these acts or omissions on the part of the Association violate §209-a.2(a) and §208.3(b) of the Act and are in contravention of the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson, 106 S.Ct. 1066, 19 PERB ¶7502 (1986).

The ALJ found, however, that in applying the four-month limitation period applicable to the filing of improper practice charges, all of the allegations contained in the charge were untimely. In reaching this conclusion, the ALJ found that the alleged failure to provide Werner with adequate audited financial disclosure and with adequate justification of how the advance reduction was calculated occurred on September 5, 1986, when the advance reduction

determination was received by Werner. That date, September 5, was also the date of receipt of the allegedly inadequate justification, which, so the ALJ found, was the point when that act or omission complained took place. Because the charge was not filed until January 8, 1987, more than four months later, it was time barred. With respect to the remaining claims made by Werner, that the refund procedure was deficient on its face, the ALJ found that the act or omission complained of occurred when Werner was placed on notice of the existence of the procedure. Since Werner received a copy of the refund procedure in June 1986, the charge, insofar as it alleges deficiencies in the procedure itself, was found by the ALJ, on its face, to be time barred.

The question before us is what acts or omissions begin the running of the limitations period. Werner contends, first, that the limitation period should begin to run from the date of refusal by the Association to provide additional financial information rather than the date from which the allegedly inadequate financial information was given to him and, second, with respect to his claim concerning the failure to set up an escrow account, he asserts either that the failure constitutes a continuing violation, or that the limitation period began to run on or about October 15, 1986, when the Association received his agency shop fee and failed to escrow any portion of it.

The Association contends, on the other hand, that the ALJ correctly found that the appropriate period for challenging facial aspects of the procedure is within four months after a copy of the procedure is received and that claims of a failure to provide adequate information concerning the basis for an advanced reduction payment is within four months of the date when the allegedly inadequate information is received, making all aspects of Werner's charge untimely.

With reference to the aspects of the charge relating to the failure to justify adequately the advance reduction payment, we find, as urged by the Association, that the limitation period begins to run from the date of receipt of the allegedly inadequate information, and not from the date of rejection of a subsequent demand for more information. To the extent that the charge alleges, therefore, that the justification for the advance reduction payment was inadequate or not properly audited, it is time barred, having been filed more than four months from the date of receipt of the allegedly inadequate information.

With respect to that portion of the charge which alleges that certain aspects of the procedure are on their face violative of the Act, certainly the point from which the limitation period can be computed is that point at which the charging party learns of the existence of the allegedly

invalid procedure. However, the result of this computation would be that an agency fee payer who may have already decided to object as well as the one who may not yet have decided to do so, would both be compelled to file a charge within four months of receipt of the procedure, and, possibly, before even knowing whether the aspect of the procedure being challenged has any personal applicability. Additionally, to begin tolling the limitation period from the date of the receipt of the procedure would compel agency fee payers to discount the possibility that the employee organization may choose in the future to interpret the procedure in a manner which might circumvent his or her concern. On the other hand, early filing and disposition of improper practice charges affords a greater opportunity for corrective action and prospective relief, while late filing of charges may limit the scope of relief to the charging party and not to agency fee payers generally, since class charges of improper practice are not authorized by our Rules.

In our view, to run the four-month limitation period only from the date of notice of the agency shop fee procedure is unduly restrictive and narrow. In addition, it would also be appropriate to permit the filing of an improper practice charge within four months after sustaining the claimed injury.

This approach is one which this Board at one time approved. In City of Yonkers, 7 PERB ¶3007 (1974), it held:

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The Taylor Law violation, if any, was a failure to negotiate in good faith. It would have been perpetrated when the City of Yonkers unilaterally decided to withdraw an employee benefit during the course of negotiations, or when it did first actually withdraw such benefit . . . .(at 3011)

Although subsequent Board decisions have not generally followed the principle outlined in City of Yonkers,<sup>2/</sup> upon reexamination, we find the "announcement" or "time-of-injury" principle to be more reasonable and will apply it to all computations of the limitation period, for charges that involve agency shop fee refund procedure. Moreover, we now find it reasonable to extend this principle generally to charges before PERB under our Statute.

This approach, computing the period from date of notice and/or from date of actual application or injury, is a familiar one in contract law. Thus, where a party to a contract places the other party on notice of intent to repudiate the contract,

The promisee may elect to treat the repudiation of the obligation by the other party as an immediate breach and bring action at once or he may elect to await the time when the contract is to be performed according to its terms and then hold the promisor liable for all the consequences of nonperformance. The rule is that where the action for breach of contract is brought after the time fixed for performance, notwithstanding there has been an anticipatory breach, the period of limitation runs, not from the time of such breach, but from the time fixed for performance. (Carmody-Waite 2d §13:154 at p.527, citing Ga Nun v. Palmer, 202 N.Y.483.)

<sup>2/</sup>See, e.g., County of Monroe, 10 PERB ¶3104 (1977).

Similarly, with reference to the discharge of a probationary public employee, the statute of limitations for filing an Article 78 proceeding has been found to run from the effective date of the termination, and the employee is not required to bring his Article 78 proceeding within four months of the date of notice of his termination. See, e.g., Vasbinder v. Hartnett, 129 A.D.2d 894, citing DeMilio v. Borghard, 55 N.Y.2d 216, and Matter of Edelman v. Axelrod, 111 A.D.2d 468, 469.

Finally, a case recently decided by the National Labor Relations Board is noteworthy with respect to the computation of the limitation of time for filing unfair labor practices alleging a breach of the duty of fair representation. In Arvin Automotive and United Automobile, Aerospace and Agricultural Implement Workers Union, Local 759, 1987-88 CCH NLRB ¶19,044, decided December 23, 1987, the NLRB considered the application of the six-month limitation period contained in §10(b) of the National Labor Relations Act in the context of a claim that a union and an employer unlawfully maintained and enforced provisions in a collective bargaining agreement which granted superseniority to certain union officers for purposes of layoff and shift preference. The employer and union argued that the charge was untimely because it was not commenced within six months of execution of the allegedly unlawful agreement. The NLRB declined to so rule, and held

that the charging party properly filed his charge within six months after he was adversely affected by the application of the superseniority clause, which resulted in a shop steward bumping him from his shift.

Although we are mindful of the fact that our holding in this case represents a departure from at least some of the cases previously decided by this Board, our experience has demonstrated that to compel a "rush to judgment" approach is not always in the best interest of the employer, employee organization or employee. Rather, by allowing for an opportunity to rethink and change, a better labor climate may be provided for resolving the matter without the need for litigation. In cases raising, for example, allegations of a failure to negotiate in good faith, a breach of the duty of fair representation, or a discriminatory discharge, a party has standing to file an improper practice charge within four months after notification of a decision to perform an action alleged to be violative of the Act. The party may also await performance of the action and file an improper practice charge within four months after the intended action is actually implemented and the charging party is injured thereby.

Applying this principle to the instant case, the portion of the charge which alleges that the agency shop fee refund procedure fails to provide for the creation of an escrow



account is timely, since not more than four months have elapsed from its application to Werner and his filing of the charge.

The portion of the charge which alleges a failure to provide for a final "end stage" decision at the conclusion of the fiscal year is time barred since it was not filed within four months of issuance of the procedure, and is premature since, as of the date of filing of the charge, Werner had not yet been affected by the omission. As to the portions of the charge alleging that the Association did not properly justify how its advance reduction was calculated, that the procedure requires the filing of objections prior to receiving adequate financial information upon which objections can be based and that it requires the filing of objections by certified or registered mail only, they are untimely. These matters were applied to Werner more than four months prior to the filing of the charge. Those aspects of the charge are accordingly dismissed.

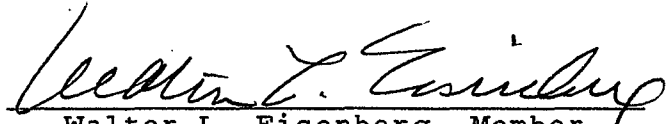
IT IS THEREFORE ORDERED that:

1. Allegations of the charge numbered 1, 2, 3 and 6 are dismissed as untimely;
2. Allegation number 5, which relates to a final "end stage" decision is dismissed without prejudice to the filing of a new charge, if then timely, when and if Werner is denied an "end stage" decision at the conclusion of the 1986-87 fiscal year; and

3. The remainder of the charge, insofar as it relates to the failure to create an escrow account, is remanded to the Director for further proceedings on its merits.

DATED: January 28, 1988  
New York, New York

  
Harold R. Newman, Chairman

  
Walter L. Eisenberg, Member