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State of New York Public Employment Relations Board Decisions from July 30, 1990

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from July 30, 1990

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WAVERLY ASSOCIATION OF SUPPORT
PERSONNEL,

Charging Party,

-and-

CASE NO. U-9977

WAVERLY CENTRAL SCHOOL DISTRICT,

Respondent.

JOHN B. SCHAMEL, for Charging Party

R. WHITNEY MITCHELL, for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of both the Waverly Association of Support Personnel (Association) and the Waverly Central School District (District) to the decision of the Administrative Law Judge (ALJ) on the Association's charge that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally setting its health insurance premium contribution on behalf of certain retirees.

The Association has represented the present unit of noninstructional employees since May 1985. Most of the current unit employees were represented before that date in separate units by different unions. The contracts covering the predecessor units contained provisions requiring the District's payment of 100% of the individual health insurance

premium and 85% of the dependent premium for retirees during the life of those contracts. Neither the 1985-1987 contract nor the 1987-1989 contract between the District and the Association contain any similar provisions and the parties further stipulated that the issue of retirees' health insurance was not raised during the negotiations for those agreements.

On August 12, 1987, the District's board of education adopted the following resolution:

Effective Sept. 1, 1987, the district will pay one hundred per cent (100%) of the Individual Health Insurance premium for all non-instructional employees who are represented by a collective bargaining agent; and, who satisfy ten (10) years of continuous service immediately preceding their date of retirement; and, whose regular work week is thirty (30) hours or more.

The District will pay a rate equal to the individual health insurance premium for those retired employees who are eligible for, and select, family plan coverage.

This resolution shall not supersede any contrary provisions contained in any collective bargaining agreement.

Two unit employees retired during the 1987-89 contract. The District notified each that it would pay toward the family health insurance premium only an amount equal to the individual premium, which the Association alleged was a diminution in the District's contribution rate.

The ALJ dismissed part of the Association's charge on a finding that the District's earlier health insurance premium

contributions arose only by contract and were conditioned upon the continuation of a contractual obligation to pay. According to the ALJ, the benefit was conditional and the District's payment obligation ceased when the contractual provisions were allowed to lapse in both the 1985-87 and 1987-89 contracts. The ALJ concluded, however, that the District's resolution effected a unilateral grant of a financial benefit which was mandatorily negotiable. Rejecting the District's contention that the Association waived its right to bargain by neither raising nor incorporating relevant health insurance provisions in either of its two contracts with the District, the ALJ ordered the District to rescind the resolution and to negotiate on demand with the Association regarding health insurance benefits for any employees who retired during the life of any collective agreements existing as of the August 12, 1987 resolution to the date of her decision.

The Association excepts to a footnote in the ALJ's decision in which the ALJ states that a related arbitration award was unclear as to whether there was a change in the retirees' health insurance eligibility^{1/} or the District's rate of premium contribution, the Association alleging that the arbitrator was referring to the latter. It also excepts to the ALJ's failure to order the District to pay the

^{1/}The charge as filed included allegations regarding changes in eligibility requirements, but it was subsequently limited by stipulation to the contribution rate.

retirees' insurance premiums in the same manner as the regular employees. The District excepts to the ALJ's decision that the Association did not waive its right to bargain and to the scope of the remedial order.

We affirm the decision of the ALJ, but modify the remedial order in one respect for the reasons set forth below.

The Association's exceptions hinge on a contention that the District had an extra-contractual, unconditional practice of paying the health insurance premiums of retirees on the same terms and at the same rate as regular unit employees. We are persuaded, as was the ALJ, that there is nothing in the parties' stipulated record to establish the existence of such a practice. The "status quo" to which the Association would have the District revert simply does not exist on the record before us. The basis for the ALJ's determination in this respect renders the footnoted reference to the arbitration award immaterial to the ALJ's decision.

The waiver arguments presented to us on the District's exceptions were raised and properly decided by the ALJ. The Association's unexplained declination to seek the negotiation of relevant contract provisions during the negotiations for the 1985-87 and 1987-89 contracts does not privilege the District's unilateral grant of a financial benefit to employees on whose behalf the Association has a continuing right to bargain despite either their retirement or the

subsequent negotiation of a 1989-91 contract. Notwithstanding the parties' current 1989-91 contract, there exists a continuing duty to bargain with respect to mandatory subjects of bargaining not covered by that agreement nor otherwise waived by the party seeking those negotiations. Inasmuch as the ALJ's order exposes the District to a bargaining duty only on the Association's demand, it is properly framed.

The District also alleges that the ALJ's bargaining order is too broad because it cannot be required to bargain on behalf of any persons who retired under the Association's two contracts prior to the 1989-91 contract. The ALJ's order in this respect is, however, also properly framed. Nobody retired under the 1985-87 contract, and even if someone had, the retiree would not have been covered by the ALJ's bargaining order. Persons who retired under the 1987-89 contract are covered and the record shows that at least two unit employees retired under that contract after the date the District's resolution was adopted. Had the Association's charge been decided during the term of the 1987-89 contract, the appropriate relief would have included an order to bargain as to those employees' health insurance for the duration of the 1987-89 contract. Demands for the continuation of health insurance benefits after retirement are mandatorily negotiable if limited to a period of time not to exceed the duration of the contract in effect at the date

of the employees' retirement.^{2/} For example, the District need bargain on demand the health insurance benefits of the two employees known to have retired under the 1987-89 contract only to the expiration date of that agreement. The simple passage of time necessary to process this charge to completion cannot render inappropriate an order which is otherwise necessary to remedy the violation found. To hold otherwise would create an incentive for respondents to delay the improper practice proceedings until after expiration of the relevant contract to escape the imposition of any remedial relief. The Association is similarly privileged to bargain on demand for any employees who may have retired under the 1989-91 contract or may yet do so.

We find some merit, however, in the District's argument directed to the scope of the ALJ's order to rescind the resolution. Although it is implicit in every order we issue that the remedial relief is extended only to the person or persons covered by the charge, it is appropriate on the District's exceptions to make the order explicit in that respect and to revise accordingly the notice we require the District to post.

IT IS THEREFORE ORDERED that the decision of the ALJ be, and it hereby is, affirmed. IT IS FURTHER ORDERED that:

1. The District rescind the August 12, 1987 resolution regarding retirees' health

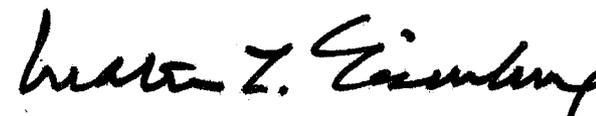
^{2/}Incorporated Village of Garden City, 21 PERB ¶3027 (1988).

insurance as to present or former unit employees who have retired or may retire during the life of the 1987-1989 or 1989-1991 collective bargaining agreements between the District and the Association;

2. The District negotiate in good faith with the Association on demand regarding the health insurance benefits for present or former unit employees who have retired or may retire during the life of the 1987-1989 or 1989-1991 collective bargaining agreements between the District and the Association; and
3. The District post a notice in the form attached at locations customarily used to post written communications to unit employees.

DATED: July 30, 1990
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees of the Waverly Central School District in the unit represented by the Waverly Association of Support Personnel that the Waverly Central School District:

1. Will rescind the August 12, 1987 resolution regarding retirees' health insurance as to present or former unit employees who have retired or may retire during the life of the 1987-1989 or 1989-1991 collective bargaining agreements between the District and the Association; and
2. Will negotiate in good faith with the Association on demand regarding the health insurance benefits for present or former unit employees who have retired or may retire during the life of the 1987-1989 or 1989-1991 collective bargaining agreements between the District and the Association.

Waverly Central School District

Dated

By
(Representative) (Title)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

IRWIN VEIRA,

Charging Party,

-and-

CASE NO. U-10053

PROFESSIONAL STAFF CONGRESS and CITY
UNIVERSITY OF NEW YORK,

Respondents.

IRWIN VEIRA, pro se

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C. (IRWIN BLUESTEIN,
ESQ., of Counsel), for Respondent Professional Staff
Congress

NICHOLAS R. SANTANGELO, ESQ., for Respondent City
University of New York

BOARD DECISION AND ORDER

Irwin Veira (charging party) excepts to the dismissal, on motion, of his improper practice charge against the Professional Staff Congress (PSC),^{1/} which alleges that the PSC violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it failed to pursue his contract grievance to arbitration. The assigned ALJ dismissed the charge at the conclusion of the presentation of the charging

^{1/}The Administrative Law Judge's (ALJ's) dismissal of the charge against the City University of New York (CUNY) for failure to state a claim upon which relief may be granted is not the subject of exceptions, and CUNY has accordingly not participated in this appeal.

party's proof based upon his failure to adduce evidence which, if taken in its most favorable light, would establish the existence of a prima facie case of violation of the Act. In his exceptions, the charging party asserts that he met his burden of proof and that the ALJ erred in dismissing the charge.^{2/}

The facts giving rise to this case may be briefly stated. The charging party was originally employed by CUNY as a Substitute College Laboratory Technician on December 17, 1979. He remained in that position as a result of successive short-term appointments until July 1, 1980, when he was appointed as a College Laboratory Technician (CLT) for two successive one-year terms. On April 19, 1982, the charging party, at the request of a CUNY representative, executed a document which purportedly extinguished any rights he may have had to the CLT position and which allowed for his appointment to the higher level position of Assistant to Higher Education Officer (HEO) and a \$2,000. increase in salary. Although the charging party acknowledged executing the document, he asserts that he was "tricked" into doing so by the CUNY representative who presented it to him because he was, at that moment, in a hurry to perform work assignments

^{2/}Although the charging party alleged in his charge that the PSC failed to proceed to arbitration with his grievance because of his race and national origin, the ALJ's dismissal of that aspect of the charge is not the subject of exceptions and is not now before us.

and because the document was presented as a formality necessary to accomplish a promotion.

Notwithstanding the charging party's assertion that he did not realize what he had signed, he received written notice of successive one-year appointments to the Assistant to HEO position until February 22, 1985, when he was informed that he would not be reappointed beyond June 30, 1985.

On March 20, 1985, the charging party filed a contract grievance whose "essence . . . was the illegal appointment of Mr. Veira to [an] aHEO position" (charging party's exceptions). The grievance was denied by CUNY at the first two steps of the grievance procedure in effect between CUNY and the PSC, and the PSC Grievance Policy Committee, which reviews and decides whether pending grievances will be submitted to arbitration, declined to process the case to arbitration. The grounds stated by the PSC for its refusal to process the charging party's grievance to arbitration were that the grievance was untimely^{3/} and that the charging

^{3/}The collective bargaining agreement between the PSC and CUNY provides:

A grievance must be filed by an employee or PSC within thirty (30) days . . . after the PSC or the employee on whose behalf the grievance was filed became aware of the action complained of Any grievance or informal complaint not processed in accordance with the time limit specified herein shall be deemed waived by the grievant.

party's acceptance of the Assistant to HEO position and its higher salary for a period of three years would significantly diminish the likelihood of persuading an arbitrator that he was improperly removed from his CLT position and should be granted the employment security afforded to the CLT position by the parties' agreement.

The ALJ found, following the presentation of the charging party's case, that he had failed to establish the existence of any improper motivation, discrimination, or bad faith conduct on the part of the PSC when it declined to process his contract grievance to arbitration.^{4/} Indeed, the ALJ concluded that the reasons presented by the PSC to the charging party had not been established as constituting anything other than a sound basis for its determination.

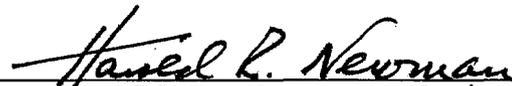
We have carefully scrutinized the record in this matter, which consists of many exhibits and the testimony of five witnesses, including the charging party's, and conclude that there is nothing on this record which establishes, or from which it may be inferred, that the PSC violated §209-a.2(a) of the Act when it declined to pursue his contract grievance to arbitration. Indeed, the record establishes that the PSC utilized a detailed procedure for the review and analysis of all contract grievances being considered for arbitration,

^{4/}CSEA v. PERB and Diaz, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), aff'd on other grounds, 73 N.Y.2d 796, 21 PERB ¶7017 (1988).

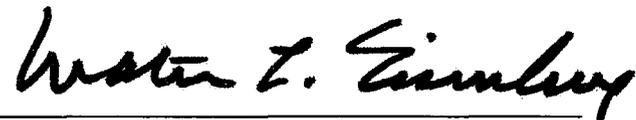
that the charging party's grievance was subjected to that procedure, and that it was rejected following deliberation and evaluation by the PSC's Grievance Policy Committee. The PSC acted well within the broad range of discretion accorded to employee organizations in the administration of collective bargaining agreements.^{5/}

IT IS THEREFORE ORDERED that the charge be, and it hereby is, dismissed.

DATED: July 30, 1990
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

^{5/}New York City Transit Authority and Chapter 2, Civil Service Technical Guild (Nwasokwa), 22 PERB ¶3028 (1989).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

OYSTER BAY-EAST NORWICH FACULTY COUNCIL,
NYSUT, AFT, AFL-CIO 2910,

Charging Party,

-and-

CASE NO. U-10336

OYSTER BAY-EAST NORWICH CENTRAL SCHOOL
DISTRICT,

Respondent.

HARRY WILSON, for Charging Party

ROBINSON & LYNCH (STEPHEN J. LYNCH, ESQ., of Counsel),
for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Oyster Bay-East Norwich Central School District (District) to an Administrative Law Judge (ALJ) Decision and Recommended Order which finds that the District violated §§209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) when it transferred Frank Garone from its high school to its middle school in retaliation for his advocacy on behalf of unit members in his capacity as a building representative for the Oyster Bay-East Norwich Faculty Council, NYSUT, AFT, AFL-CIO 2910 (Council).

The facts of this case, which are set out in detail in the ALJ decision (23 PERB ¶4522 (1990)), may be briefly outlined as follows. On April 20, 1988, Frank Garone, an

English high school teacher in the District since 1974, participated in a discussion with Sidney Freund, Superintendent of Schools, and others concerning the District's determination not to proceed with the previously agreed upon resolution of an employment matter involving another employee based upon alleged intervening misconduct by the employee. The ALJ found the discussion to have been a "heated" one between Freund and Garone. Since Garone was acting in his capacity as a union representative, there is no issue that Garone's involvement in the discussion constituted activity protected by the Act.^{1/} At approximately the same time or shortly before this April 20 meeting, a need arose in the District's middle school for an English teacher because another employee had become medically unable to perform his regular teaching duties and, effective September, 1988, was to be assigned other responsibilities after rejecting an early retirement proposal made by the District.

Two days following the April 20, 1988 meeting, the members of the English department at the District's high school were informed by the high school principal, Elizabeth Scott, that it had become necessary to transfer one of them to the middle school to take over the teaching duties

^{1/}The record establishes that shortly before the April 20 discussion, Garone also had been an active and vocal advocate on behalf of two employees at and prior to an arbitration hearing.

previously performed by the middle school English teacher. Garone testified, and the ALJ found, that on April 27, he asked Scott if he would be the person transferred, and that Scott admitted that he was. On the following day, however, Superintendent Freund conducted a meeting of the administrators for the District and solicited their recommendations concerning the person who should be transferred from the high school to the middle school. In view of the ALJ's findings that Scott and the other administrators were aware prior to the meeting that Freund's preference was to transfer Garone, their unanimous recommendation of Garone was deemed not to have been independently made.

The ALJ concluded that the decision to transfer Garone, made specifically by Freund, on the heels of a heated exchange between Freund and Garone while Garone was engaged in protected activity, established a prima facie case of discrimination and retaliation. The ALJ further found that the reasons proffered by the District for its decision to make a transfer and its selection of Garone for the transfer were pretextual. In support of this determination, the ALJ found that the District's contention notwithstanding, declining enrollment at the high school level had not resulted in a determination that the reduction in teaching load would have required the layoff of one high school

English teacher if no transfer to the middle school had taken place, and further found that the District's assertion that it selected Garone for transfer because his transfer would have the least impact on the high school was unsupported by the record.

The District's exceptions primarily challenge the factual findings made by the ALJ. They assert that insufficient evidence exists on the record to support a finding of anti-union animus and improper motivation in the determination to transfer Garone, and that the ALJ failed to accord proper weight to the business reasons presented in support of the decision.

In essence, the ALJ's finding of violation of the Act rests upon three factors: first, a hostile exchange occurred between the Superintendent and Garone, while Garone was engaged in protected activity; second, immediately thereafter, Garone was selected by the Superintendent for an involuntary transfer; and, third, the reasons presented by the District in support of its decision to make a transfer, and to transfer Garone specifically, were unpersuasive.

It is our determination that the record amply supports the ALJ's finding that the exchange of April 20, 1988 between Freund and Garone was confrontational and angry. The record further supports the ALJ's finding that, following the meeting, Freund expressed to others a hostile attitude toward

Garone. We also agree that the timing of Freund's decision to transfer Garone, made within a few days following the exchange between the two, gives rise to an inference that the decision was made in retaliation for the exercise of rights protected by the Act, unless the District could establish, by credible evidence, the existence of legitimate business reasons for its decision.

In this regard, the ALJ determined that the stated need to make a transfer was not supported by the record to the extent that it was assertedly based upon a conclusion by the District that unless a transfer was made, a high school English teacher would have to be laid off due to a decline in enrollment which reduced the number of students to be taught, and based upon a change in law^{2/} which prohibited teachers from teaching out of their area of certification. According to the District, this prohibition precluded English teachers from teaching other courses to make up a full-time work load. The facts that all scheduling arrangements being made immediately prior to the decision to transfer Garone contemplated his continued employment teaching English at the high school, that no discussion or suggestion of a need for a

^{2/}The District cites no law in support of this statement and we find none. However, a change in the Regulations of the Commissioner of Education restricting the extent to which teachers may teach outside their areas of certification, of which we take administrative notice, did take place in 1988, but was not effective until July 1 of that year, after the events giving rise to this charge. See NYCRR §80.2(c).

layoff had taken place during the course of the many prior scheduling discussions, and that the teaching restrictions relied upon by the District were not shown to have been established immediately prior to the transfer decision, support the ALJ's determination that this reason proffered by the District was indeed pretextual.

Even if it became necessary to transfer a high school English teacher to the middle school, not because of a lack of need in the high school, but because of an affirmative need in the middle school also alleged by the District, the District still failed to meet its burden of persuasion that Garone was selected for reasons unrelated to his union activity. The credibility determination made by the ALJ supported the finding that the administrators' selection of Garone as the most appropriate candidate for transfer was not in fact independently arrived at, because they knew that the Superintendent had already singled out Garone for the transfer. She further found non-credible the District's assertions that Garone was best suited for transfer because of "intangible" qualities which he possessed and which were needed by the middle school, and that the impact of Garone's departure from the high school would be minimal.^{3/} As we

^{3/}In support of its "minimal impact" claim, the District relied upon the fact that Garone was not scheduled for any voluntary extra-curricular activities at the high school for the upcoming year. The impact of the transfer upon students and faculty at the high school apparently was not, however,

have previously held,^{4/} credibility determinations made by an ALJ having the opportunity to observe the demeanor of witnesses will not be disturbed by us absent extraordinary record evidence, not here present.^{5/}

The District's contention that affirmance of the ALJ decision would require the substitution of the judgment of this Board for that of the District's Board in determining the criteria that should be applied to a decision to make transfers, and to the selection of employees for transfers, is misplaced. Management prerogatives are limited by the Act only to the extent that they may not be exercised as a means to retaliate or discriminate against an employee for the exercise of rights protected by the Act. Beyond that limitation, the District's exercise of discretion will not be, and is not here, reviewed by this Board.

The District makes one further exception to the ALJ decision, contending that the ALJ erred in failing to dismiss the charge as untimely. In the first instance, as we held in Middle Country Teachers Association (Werner), 21 PERB ¶3012

taken into account.

^{4/}See State of New York (Division of Human Rights), 22 PERB ¶3036 at 3085 (1989).

^{5/}See Board of Education of the City School District of the City of New York, 21 PERB ¶3056, at 3120-21 (1988) (appeal pending), in which the Board reversed a credibility determination based upon strong documentary evidence which contradicted the accepted testimony.

(1988), a charge may be filed either within four months of the date of notification of an intention to act, or within four months of the date when the act occurs and the charging party is affected thereby. However, the District argues that even if the original charge was timely filed (i.e. filed within four months^{6/} of the notification to Garone that his transfer was to take place), the charge is nevertheless untimely because it was amended (to correct deficiencies pointed out by PERB's Assistant Director of Public Employment Practices and Representation) more than four months following the date of notification of transfer. The original charge was in fact filed within four months of the date of notification to Garone, and even though amended on September 13, 1988, beyond the four-month period, the amendment merely establishes additional details, and does not set forth a new or different improper practice charge. The amendment made by the Council on September 13, 1988, therefore, properly relates back to the original filing date of the charge. In any event, the effective date of Garone's transfer was at the commencement of the 1988-89 academic year, and the amendment to the charge, even if treated as a charge originally filed on September 13, 1988, would have been a timely one, having been filed within four months of the

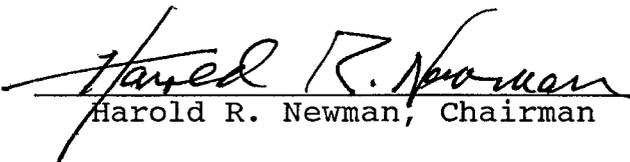
^{6/}See §204.1(a) of PERB's Rules of Procedure (Rules).

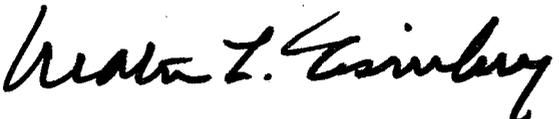
implementation of the transfer decision. The District's exception in this regard is accordingly also denied.

For the foregoing reasons, the ALJ decision is affirmed in its entirety, and IT IS ORDERED that the District:

1. Cease and desist from interfering with, restraining, coercing or discriminating against unit employees for the exercise of rights protected by the Act;
2. Immediately offer to reassign^{1/} Frank Garone to the high school; and
3. Post notice in the form attached in all locations within the District at which notices of information to unit employees are customarily posted.

DATED: July 30, 1990
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

^{1/}This order contemplates the immediate reassignment of Garone, if the Council does not otherwise reach agreement with the District as to the time-table or details of the reassignment.

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 Oyster Bay-East Norwich Faculty Council, NYSUT, AFT, AFL-CIO 2910 that the Oyster Bay-East Norwich Central School District:

1. Will not interfere with, restrain, coerce or discriminate against unit employees for the exercise of rights protected by the Act;
2. Will immediately offer to reassign Frank Garone to the high school.

Oyster Bay-East Norwich School District
.....

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

In the Matter of

THE SCHOOL NURSES OF THE SCHENECTADY
EDUCATIONAL SECRETARIES/RN UNION,

Petitioner,

- and -

CASE NO. C-3593

CITY SCHOOL DISTRICT OF THE CITY OF
SCHENECTADY,

Employer,

- and -

SCHENECTADY CITY SCHOOL DISTRICT
EDUCATIONAL SECRETARIES/REGISTERED
NURSES UNIT OF LOCAL 847 OF THE CIVIL
SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor.

MARY W. D'ISABEL, for Petitioner

CLAYMAN, MEAD & GALLO, ESQS. (JAMES A. BONAQUIST, ESQ., of
Counsel), for Employer

NANCY E. HOFFMAN, ESQ. (JEROME LEFKOWITZ, ESQ., of Counsel),
for Intervenor

BOARD DECISION AND ORDER

The School Nurses of the Schenectady Educational Secretaries/RN Union (Petitioner) excepts to the dismissal by the Director of Public Employment Practices and Representation (Director) of a petition filed by it on November 3, 1989, relating to nurses employed by the City School District of the City of Schenectady (District) who are currently represented in a unit including secretaries and

others, by the Schenectady City School District Educational Secretaries/Registered Nurses Unit of Local 847 of the Civil Service Employees Association, Inc. (CSEA). The precise nature of the petition was in-issue in the proceedings before the Director.

The Director dismissed the petition on alternative grounds, finding that, if the petition is properly characterized as a decertification petition, it was not accompanied by a showing of interest of 30 percent of the members of the existing bargaining unit, as required by §201.3(d) of PERB's Rules of Procedure (Rules).^{1/} The Director further found that, if the petition is treated as a petition for certification of a new bargaining agent for the nurses, the showing of interest therefor was substantively deficient because the document, entitled "Petition for Disaffiliation - The following people request disaffiliation from the Educational Secretaries/RN Unit of CSEA Local 847," fails to indicate that certification of an employee organization was, in fact, the intent of its signatories.

If, as the CSEA contends in its response to the exceptions in this matter, the petition is most appropriately characterized as a petition for disaffiliation (disaffiliation being defined as a severance of the

^{1/}The petition was supported by a document signed by 21 employees, less than 30 percent of the more than 100 members of the unit.

relationship between an employee organization and its parent employee organization), this Board is without jurisdiction to grant the relief requested. This is so because decisions by employee organizations to affiliate or disaffiliate with or from parent organizations are matters over which PERB is without jurisdiction to preside, and in which it will not otherwise involve itself, except upon proceedings otherwise proper under the Act relating to the representation status of the employee organization with respect to a bargaining unit.^{2/}

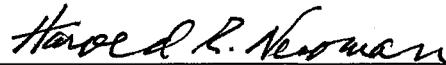
In its exceptions, the Petitioner asserts that its petition is properly characterized as a petition for certification of an employee organization now identified as the Schenectady Federation of School Registered Nurses. Even were we to conclude that the change in name of the Petitioner reflects no change in the identity of the employee organization filing the petition, we must nevertheless conclude that the petition, as a certification petition, is deficient. We so find because it is not supported by the requisite showing of interest to support such a petition. The "Petition for Disaffiliation" cannot reasonably be read to establish the existence of an interest on the part of its

^{2/}See, e.g., State of New York (Unified Court System), 12 PERB ¶13019 (1979); Norwich CSD, 14 PERB ¶14654 (1981); and Board of Education of the City School District of the City of New York, 17 PERB ¶14011 (1984).

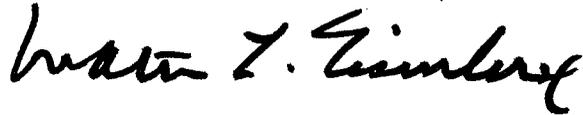
signatories to a disaffiliation and a like interest in the certification of an unnamed employee organization. Therefore, even if we were to agree with the Petitioner that its petition is appropriately characterized as a certification petition, the petition must nevertheless be dismissed based upon the failure to establish that the showing of interest presented by the Petitioner represents a showing of interest for certification of the Schenectady Federation of School Registered Nurses or the School Nurses of the Schenectady Educational Secretaries/RN Union.

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

DATED: July 30, 1990
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SENECA FALLS CENTRAL SCHOOL DISTRICT,

Charging Party,

-and-

CASE NO. U-10766

SENECA FALLS TEACHERS ASSOCIATION,

Respondent.

MURRY F. SOLOMON, for Charging Party

CHRISTOPHER J. KELLY, for Respondent

BOARD DECISION AND ORDER

The Seneca Falls Teachers Association (Association) excepts to an Administrative Law Judge (ALJ) decision finding it to have violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by insisting upon negotiations concerning a nonmandatory subject of bargaining over the objection of the Seneca Falls Central School District (District).

The Association admits that it seeks negotiations concerning the continuation of language contained in its expired agreement with the District, but asserts that the demand is mandatory. In the alternative, it asserts that, if the demand is nonmandatory, its conduct does not violate the Act because factfinding has not taken place and an improper

practice charge lies only where insistence upon pursuing a nonmandatory item "to factfinding" is established.

The demand in issue provides as follows:

C. Work Load

1. During the ... school year,^{1/} the sixth grade teacher load will be 135 students per teacher. During the school years 1986-1990, the teacher load will be 125 students per teacher.
2. Teachers 7-12
The maximum work load shall be:
 - (a) Business Education, English, Social Studies,
Mathematics
5 teaching periods - 125 students per day
1 study hall
 - (b) Foreign Language
5 teaching periods including language labs - 125 students per day
One teacher in the department may be assigned six teaching periods
 - (c) Health and Science
Grades 7, 8, 9
5 teaching periods - 125 students per day
1 study hall
Grades 10, 11, 12
5 teaching periods - 125 students per day
1 study hall
6 teaching periods including labs - 125 students per day
Biology - 5 teaching periods plus Biology Lectures with an average of 125 students per day per week
 - (d) Reading Teachers
5 teaching periods - 50 students per day
1 study hall
 - (e) Industrial Arts
2 teachers
5 teaching periods - 85 students per day
1 study hall

^{1/} The language of the demand is set forth in the parties' expired contract. Essentially, the Association demands that this language be carried forward into a successor agreement, modifying only the applicable school years to correspond with the term of the new contract.

- 2 teachers
6 teaching periods - 100 students per day
No study hall
- (f) Art
5 teaching periods - 94 students per day
1 study hall
- (g) General Music
5 teaching periods - 95 students per day
1 Chorus
- (h) Home Economics
5 teaching periods - 90 students per day
1 study hall
One teacher in the department may be assigned
six teaching periods
- (i) Instrumental Music
5 teaching periods of lessons
1 band
- (j) Guidance - Maximum of 400 students including
counseling and other functions
1 preparation period per day
- (k) Librarian 7-12
1 preparation period per day
Remainder of school day is assigned to
library floor duty
- (l) Physical Education
6 teaching periods - 150 pupils per day
- (m) Driver Education
6 teaching periods per day with student load
maximum as provided by state regulation
- (n) Department Chairpersons
English, Social Studies, Art and Industrial
Arts, Mathematics
4 teaching periods, 1 department duty per day

C.2. Teachers K-5

The total number of students in grades 4-5 divided by the number of homeroom teachers will develop a ratio not to exceed 27-1. Teachers of physical education, art, library, music, computer science and health will have an average student contact assignment up to 4 hours and 40 minutes per day. All teachers will have a thirty minute per day planning time during the student instruction day.

The total number of students in grades K-3 (pre-first not included) divided by the number of homeroom teachers will develop a ratio not to exceed 25-1. (Kindergarten computed at .5 per student). Teachers of physical education, art, library and music will

have an average student contact assignment up to 4 clock hours per day. All teachers will have at least 25 minutes per day planning time during the student instructional day.

The ALJ determined that the demand both seeks to fix the maximum number of students in teaching periods to which teachers may be assigned and to limit the District's ability to assign duties which are inherent in the employees' positions, and found the demand to be a nonmandatory subject of negotiations.

In the first instance, we agree with the ALJ's determination that the demand would control the nature and type of teaching duties which teachers in the District could be assigned to perform, by limiting duties to a specified number of teaching periods and a specified number of study halls and/or department duties. As we have previously held,^{2/} an employer has the discretion to assign duties to teachers which are part of the essential function of a teaching position, and demands which would eliminate such discretion are nonmandatory.

We also agree with the ALJ's holding that the demand is nonmandatory upon the ground that it essentially constitutes a class size demand, which we have previously held to be a

^{2/}See e.g. Waverly CSD, 10 PERB ¶3103 (1977); Norwich CSD, 14 PERB ¶3059 (1981); and Oyster Bay - East Norwich CSD, 18 PERB ¶3075 (1985).

nonmandatory subject of negotiations.^{3/} The Association contends that its demand combines the factors of number of students per day and number of teaching periods, and, as such, is appropriately construed as a workload demand, to be likened to a "weighted student contact minute" demand held mandatory by this Board in Yorktown CSD, 7 PERB ¶3030 (1974).^{4/}

This argument fails, however, with respect to the demand at issue insofar as it relates to teachers K-5, as to whom a maximum class size limit is established simply as no more than 27 students for teachers of grades 4 and 5 and no more than 25 students for teachers of grades K to 3. Thus, with respect to Section C.2 of the demand, it is nothing more nor less than a class size demand and is nonmandatory.

With respect to the demand insofar as it relates to teachers of grades 6 through 12, the Association's argument appears to have some merit, because the demand seeks to establish a maximum student limit and teaching period limit per day, rather than to establish a specific maximum number of students per teaching period. While, as a theoretical

^{3/}See, e.g., Hudson Valley Community College Faculty Association, 12 PERB ¶3030 (1979).

^{4/}In Yorktown CSD, supra, class size was one of numerous other factors which were themselves mandatory subjects of negotiation, and which, when considered together, were held by the Board to create a workload rather than class size demand.

matter, a limit of 125 students per day, over 5 teaching periods, for example, may be translatable into a range of options available to the District^{5/}, realistically the demand with respect to teachers in grades 6 through 12 is intended to achieve a roughly equal number of students per teaching period (e.g., no more than 25 students per teaching period), and so constitutes a class size demand.^{6/}

For the foregoing reasons, we affirm the ALJ's decision that the demand is nonmandatory.

The sole remaining question before us is whether the Association's defense to the charge that it has not insisted upon submission of the demand to factfinding is meritorious. In this regard, it is noted that the District communicated its intention to the Association to request factfinding and requested that the Association state whether it intended to pursue at factfinding the in-issue demand. The Association affirmed in writing that it intended to continue to seek inclusion of the demand in a successor collective bargaining agreement. Thereafter, the parties entered into a new collective bargaining agreement, and stipulated that:

^{5/}For example, 5 teaching periods, 125 students per day, may result in 5 classes of 25 students each or 4 classes of 20 students each and 1 of 45, or some other combination which, in total, results in no more than 125 students nor more than 5 classes.

^{6/}Accord, Queensbury UFSD, 9 PERB ¶3057 (1976).

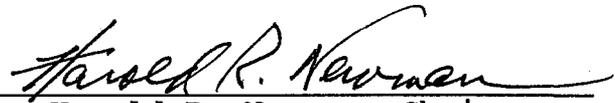
The parties fully understand and agree that the interim settlement reached on Friday, May 12, 1989, covering the 1988-89 and 1989-90 school years shall not render the pending Improper Labor Practices Charge [Case U-10766] is in anyway [sic] moot. Consequently, if PERB decides that the disputed clause is a non-mandatory subject of collective negotiations and the District is not required to carry such clause forward into the contract which succeeds the contract which expired on June 30, 1988, then such clause shall not in anyway [sic] be a part of such contract that became effective July 1, 1988. If, however, PERB decides that the disputed clause is a mandatory subject of collective negotiations or that the District is required to carry such clause forward into the successor contract that expired on June 30, 1988, then such clause shall fully remain a part of the current contract.

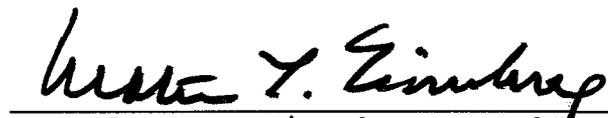
Based upon the foregoing, even though the Association and the District have avoided factfinding by entering into a new agreement, the exception of the in-issue demand from the agreement and the expression of mutual intent to obtain a determination from this Board concerning the duty to bargain the demand compels the conclusion that the Association's defense must fail. This is so because the parties did proceed to the point of factfinding, which gave rise to an improper practice charge at the time that it was filed. The subsequent contract settlement did not, by agreement, serve to moot the instant charge. Therefore, even if the Association may have otherwise had a meritorious defense to the charge because the parties did not in fact proceed to factfinding, the stipulation entered into by it reflects, in

our view, an intention to consent to the issuance of a scope of bargaining determination by this Board and is, in essence, a waiver of the defense.^{7/} The Association's exception in this regard is accordingly denied.

Based upon the foregoing, the ALJ decision is affirmed.^{8/}

DATED: July 30, 1990
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

^{7/}Even were we to accept the Association's defense that the District has failed to establish a §209-a.1(d) violation by failing to establish that the Association pursued a nonmandatory demand at factfinding, the District would have the right to immediately file a declaratory ruling petition pursuant to Part 210 of the Board's Rules of Procedure (Rules), which would determine the duty to negotiate the demand in any event. In view of the parties' stipulation, resort to the filing of a declaratory ruling petition is unnecessary, because the parties have agreed to a determination on the merits on the instant charge.

^{8/}In view of the stipulation reached by the parties, no remedial relief is warranted under the circumstances of this case.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CATSKILL REGIONAL OFF-TRACK BETTING
CORPORATION,

Employer/Petitioner,

- and -

CASE NO. C-3677

LOCAL 300-S, PRODUCTION, SERVICE AND
SALES DISTRICT COUNCIL, H.E.R.E., AFL-CIO,

Intervenor.

In the Matter of

CATSKILL REGIONAL OFF-TRACK BETTING
CORPORATION,

Employer/Petitioner,

- and -

CASE NO. C-3678

LOCAL 21-S, PRODUCTION, SERVICE & SALES
DISTRICT COUNCIL, H.E.R.E., AFL-CIO,

Intervenor.

In the Matter of

LOCAL 21-S, PRODUCTION, SERVICE & SALES
DISTRICT COUNCIL, H.E.R.E., AFL-CIO,

Petitioner,

- and -

CASE NO. C-3681

CATSKILL REGIONAL OFF-TRACK BETTING
CORPORATION,

Employer.

MARK D. STERN, ESQ., for Employer/Petitioner

BRUCE J. COOPER, ESQ., for Intervenor/Petitioner, Local 21-S, Production, Service & Sales District Council, H.E.R.E., AFL-CIO and Intervenor, Local 300-S, Production, Service and Sales District Council, H.E.R.E., AFL-CIO

BOARD DECISION AND ORDER

On April 19, 1990, the Catskill Regional Off-Track Betting Corporation filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, timely petitions in response to demands for recognition made by Local 300-S, Production, Service and Sales District Council, H.E.R.E., AFL-CIO (Local 300-S) (Case No. C-3677), and by Local 21-S, Production, Service & Sales District Council, H.E.R.E., AFL-CIO (Local 21-S) (Case No. C-3678) to represent certain of its employees.

On April 24, Local 21-S filed a timely petition to represent full-time and part-time cashiers and customer aides (Case No. C-3681) and Local 300-S intervened in Case No. C-3677 to represent branch supervisors.

Thereafter, the parties executed consent agreements in which they stipulated that the following negotiating units were appropriate:

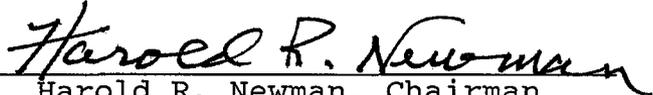
Unit I Included: Branch supervisor.
 Excluded: All other employees.

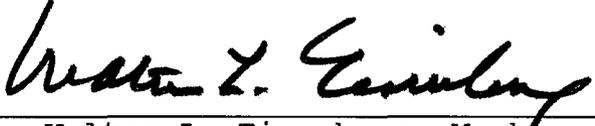
Unit II Included: Full-time and part-time cashiers and
 customer aides.
 Excluded: All other employees.

Pursuant to those agreements secret-ballot elections were held on June 12, 1990.^{1/}

Inasmuch as the results of the elections indicate that a majority of the eligible voters in each unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the participating employee organizations, IT IS ORDERED that the petitions should be, and hereby are, dismissed.

DATED: July 30, 1990
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

^{1/} Of the 54 employees in Unit I, 48 cast ballots; 20 ballots were cast in favor of representation, 24 ballots were cast against representation and 4 ballots were challenged.

Of the 178 employees in Unit II, 145 cast ballots; 57 ballots were cast in favor of representation, 74 ballots were cast against representation and 14 ballots were challenged.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 648, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

- and -

CASE NO. C-3679

TOWN OF JAY,

Employer.

KENNETH H. RAMSEY, for Petitioner

DANIEL T. MANNING, JR., ESQ., for Employer

BOARD DECISION AND ORDER

On April 20, 1990, Teamsters Local Union 648, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Jay (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: Maintenance Equipment Operator.

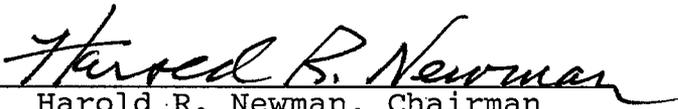
Excluded: All other employees.

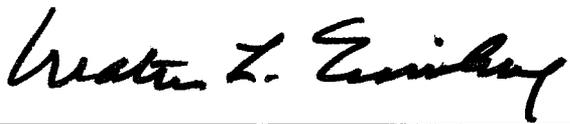
Pursuant to that agreement, a secret-ballot election was held, on June 26, 1990, at which 3 ballots were cast in favor of

representation by the petitioner and 4 ballots were cast against representation by the petitioner.^{1/}

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: July 30, 1990
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

^{1/} There are 8 employees in the stipulated unit.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SMITHTOWN TEACHERS ASSOCIATION, NYSUT,
AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3664

SMITHTOWN CENTRAL SCHOOL DISTRICT,

Employer.

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,

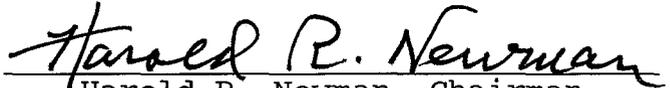
IT IS HEREBY CERTIFIED that the Smithtown Teachers Association, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

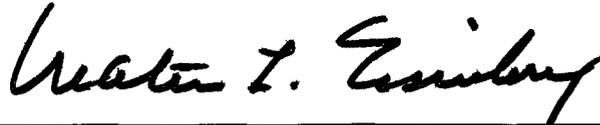
Unit: Included: All per diem substitute teachers who have received a reasonable assurance of continuing employment as referenced in §201.7(d) of the Civil Service Law.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Smithtown Teachers Association, NYSUT, AFT, 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: July 30, 1990
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3696

COUNTY OF ALBANY,

Employer.

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 New York State Public Employees Federation, 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.

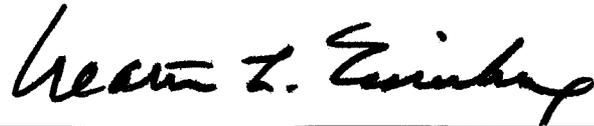
Unit: Included: All employees in the following titles:
Probation Assistants, Probation Officer
Trainees, Probation Officers, Senior Probation
Officers, Probation Supervisors.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Public Employees Federation, 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: July 30, 1990
Albany, New York


Harold R. Newman, Chairman


Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LYONS SUPPORT STAFF ASSOCIATION, NYSUT,
AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3675

LYONS CENTRAL SCHOOL DISTRICT,

Employer.

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 Lyons Support Staff Association, NYSUT, AFT, 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 full-time and part-time clerical, custodial, building and grounds, teacher aides/assistants/monitors (other than bus monitors), food service and mechanics.

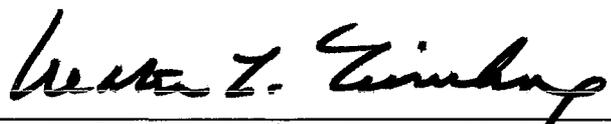
Excluded: Teachers, bus drivers, bus monitors and supervisors.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Lyons Support Staff Association, NYSUT, AFT, 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: July 30, 1990
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AUBURN PER DIEM SUBSTITUTE TEACHERS/NYSUT,
NEW YORK STATE UNITED TEACHERS, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3646

AUBURN ENLARGED CITY SCHOOL DISTRICT,

Employer.

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 Auburn Per Diem Substitute Teachers/NYSUT, New York State United Teachers, AFT, 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: Per diem substitute teachers who taught and received payment as a per diem teacher during the 1988-89 school year, received a letter of reasonable assurance of continuing employment, and have worked at least one day as of May 31, 1990 with the Auburn Enlarged City School District.

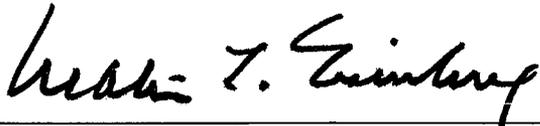
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Auburn Per Diem Substitute Teachers/NYSUT, New York State United Teachers, AFT, 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: July 30, 1990
Albany, New York



Harold R. Newman, Chairman



Walter L. Eisenberg, Member