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State of New York Public Employment Relations Board Decisions from January 31, 1992

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from January 31, 1992

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RICHARD L. BRIDGHAM,

Charging Party,

-and-

CASE NO. U-10857

~~PROFESSIONAL FIREFIGHTERS ASSOCIATION,~~
LOCAL 274, IAFF, AFL-CIO,

Respondent.

RICHARD L. BRIDGHAM, pro se

THOMAS F. DE SOYE, ESQ., for Respondent

BOARD DECISION AND ORDER

Richard L. Bridgham excepts to an Administrative Law Judge's (ALJ) dismissal, after hearing,^{1/} of his improper practice charge against the Professional Firefighters Association, Local 274, IAFF, AFL-CIO (Association), which alleges that the Association violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) by refusing to represent him at an arbitration concerning a grievance he had filed against his employer, the City of White Plains (employer). The Association cross-excepts to the ALJ's decision to receive evidence concerning an allegation that the Association improperly analyzed Bridgham's grievance. The Association contends that the ALJ's

^{1/}By decision dated May 14, 1990 (23 PERB ¶3021), this Board reversed the same ALJ's decision (23 PERB ¶4511) dismissing Bridgham's charge without hearing, and remanded the matter for further proceedings. Following two days of hearing, the ALJ again dismissed Bridgham's charge for failure of proof, a decision from which Bridgham now appeals.

ruling was incorrect because the charge is limited to an allegation that the Association breached its duty of fair representation by withdrawing the grievance "in conflict with the explicit language of the . . . contract."

On November 4, 1987, Bridgham was injured on the job, suffering a lacerated arm and lower back strain, according to his and the employer's physicians. Bridgham was directed by his employer to return to light duty on December 21, 1987, an instruction he disobeyed upon advice from a third physician who recommended bed rest for a possible herniated disk.

Based upon his failure to return to work, together with a statement from the employer's physician that Bridgham was sufficiently recovered from his on-the-job injuries to return to light duty, the employer converted Bridgham's absence from "line of duty" leave pursuant to §207-a of the General Municipal Law (GML), to ordinary sick leave. Bridgham was then ordered confined to his home pursuant to the employer's ordinary sick leave policy. Bridgham returned to work for light duty on January 6, 1988, and he worked until February 8, when he retired under a 20-year service retirement option. Pursuant to an application made on his behalf by the Association's counsel, Bridgham's service retirement was converted in September 1988 to an accidental disability retirement, retroactive to his actual retirement on February 8, 1988.

In February 1988, the Association filed, on Bridgham's behalf, a contract grievance alleging that the employer's order

of confinement, which remained in place from December 21, 1987 to January 6, 1988, violated the parties' collective bargaining agreement because Bridgham's absence for that period was occasioned by an on-the-job injury to which an order of confinement was not properly applicable.

On October 14, 1988, the date of the scheduled arbitration, the employer agreed to "concede" the grievance if the Association could establish that Bridgham's absence for the period in question was a "207-a" absence by proof that his herniated disk was the result of the on-the-job injury which occurred on November 4, 1987. On the same day, the Association was advised by Bridgham, apparently for the first time, that immediately following his ordinary service retirement in February 1988, he had accepted and continued in alternative private employment as a chauffeur. In January 1989, following an exchange of medical documentation, the Association informed Bridgham that it would not proceed to arbitration with his grievance because his acceptance of the alternative employment jeopardized his entitlement to GML §207-a benefits. With the Association's permission, Bridgham proceeded to arbitration with the assistance of privately retained counsel. He subsequently received an arbitration award which held that the order of confinement in effect for the period December 21, 1987 to January 6, 1988 did not violate the collective bargaining agreement because Bridgham had not established that his herniated disk was the result of an on-the-job injury. Therefore, the employer's rules, including

the order of confinement applicable to ordinary sick leave, were properly applied.

At issue before us is whether the Association acted in an arbitrary manner when it refused to represent Bridgham at the arbitration in connection with his "order of confinement" grievance.^{2/} Bridgham contends that the explanation provided by the Association for its refusal to represent him (i.e., that his acceptance of private employment might adversely affect his entitlement to GML §207-a benefits and, therefore, his contract grievance) is patently wrong and, therefore, arbitrary. We disagree.

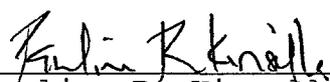
It is unclear to us whether Bridgham's employment as a chauffeur on and after February 18, 1988 could have adversely affected his entitlement to "line of duty" benefits and, consequently, the merits of his confinement grievance for the period December 21, 1987 to January 6, 1988. Nevertheless, Bridgham's argument that the absence of a clear connection between the two matters establishes an arbitrary refusal to proceed to arbitration is without merit. The Association had a reasonable basis to advise Bridgham that he should discontinue his efforts at arbitration to obtain overtime compensation for the period of time to which the order of confinement applied because, by pursuing that issue, he could separately jeopardize his entitlement to the payment made by the employer pursuant to GML

^{2/}Bridgham does not claim that the Association's decision was discriminatory or made in bad faith.

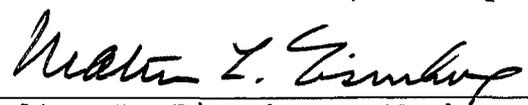
§207-a, which supplements the disability retirement allowance received by him from February 8, 1988 onward. The Association's concern about the potential for Bridgham to lose this supplemental payment, and its subsequent refusal to participate in an arbitration proceeding at which the issue of other employment would ~~in all likelihood be raised, reflects a concern for Bridgham's~~ welfare and the welfare of other unit employees similarly situated which comports with its duty of fair representation. We hold, therefore, that even if Bridgham is correct that there is no obvious connection between the order of confinement grievance and his subsequent employment, the Association's refusal to proceed to arbitration was reasonably based and was not arbitrary or otherwise violative of §209-a.2(a) of the Act.

Based upon the foregoing, IT IS HEREBY ORDERED that the ALJ's decision be, and it hereby is, affirmed, Bridgham's exceptions are denied, and the charge is dismissed in its entirety.^{3/}

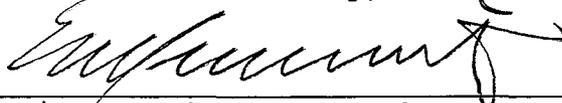
DATED: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{3/}In dismissing Bridgham's charge, we deny the Association's cross-exceptions to whatever extent the Association argues that the charge is something other than what we have characterized it to be.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
PUBLIC EMPLOYEES FEDERATION, AFL-CIO,
Charging Party,

-and-

CASE NO. U-11794

STATE OF NEW YORK (GOVERNOR'S OFFICE
OF EMPLOYEE RELATIONS and DEPARTMENT
OF HEALTH),

Respondent.

In the Matter of
**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Charging Party,

-and-

CASE NO. U-11812

STATE OF NEW YORK (GOVERNOR'S OFFICE OF
EMPLOYEE RELATIONS and DEPARTMENT OF
HEALTH),

Respondent.

ROGER L. SCALES, for Public Employees Federation, AFL-CIO

NANCY E. HOFFMAN, ESQ. (MIGUEL ORTIZ of counsel), for
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000,
AFSCME, AFL-CIO

WALTER J. PELLEGRINI, ESQ. (RICHARD J. DAUTNER of counsel),
for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the State of
New York (Governor's Office of Employee Relations and Department
of Health) (State) to a decision by an Administrative Law Judge

(ALJ) on two improper practice charges, one filed by the Public Employees Federation, AFL-CIO (PEF), the other by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). Both PEF and CSEA allege that the State violated ~~§209-a.1(d) of the Public Employees' Fair Employment Act (Act)~~ when it discontinued a practice of allowing employees to attend a picnic during working hours without any charge to their leave accruals.^{1/}

After hearing, the ALJ concluded that there was a practice of granting paid leave to attend the picnic when consistent with the department's operational needs. The ALJ held that the State's decision to not sponsor the 1990 picnic was based upon fiscal concerns which was inconsistent with that practice.

The State argues in its exceptions that the ALJ misinterpreted its practice of permitting employees to take up to 3.75 hours to attend a picnic without charge to their leave accruals. According to the State, its practice is conditioned upon an annual determination by the department's chief executive officer that attendance at a social activity without charge to accruals is beneficial to employee relations and is in the department's best interests. The State argues that this determination is necessarily reserved to management's discretion

^{1/}CSEA also alleges that the State's action violated §209-a.1(a) of the Act. The ALJ dismissed this allegation for lack of proof and no exceptions have been taken to this aspect of the ALJ's decision.

and that current fiscal conditions and the perceptions flowing from a sponsored picnic in times of fiscal stringency are properly considered by the department when it assesses its best interests.

It is clear that employees have been permitted to attend a picnic on work time without charge to accruals only when the department has sponsored the picnic. Although the department has sponsored a picnic for many years, it is equally clear that a decision to sponsor the picnic is made annually and it is not automatic. There is also no dispute that the decision to sponsor the picnic had to be minimally consistent with the department's view of its operational or program needs. We believe, however, that the ALJ defined the departmental practice too narrowly and incorrectly when he restricted the department's discretion in deciding whether to sponsor a picnic to an assessment of its operational needs.

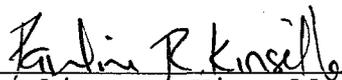
As we read the record, the sole source of the departmental practice stems from a state-wide policy memorandum first issued in 1970 which covered social activities of different types, including picnics, which was subsequently made a part of the State's attendance and leave manual which applies to all State agencies and departments. That policy reserves unfettered discretion to the chief executive officer of each agency to decide whether the planned social activity will be in the agency's best interests. We do not find any persuasive evidence

in the record to support a conclusion that the Department of Health was operating under some different standard in deciding each year whether to sponsor an agency picnic. We also hold that the best interests standard is broad enough to include the fiscal and related concerns articulated by the State as the reasons why it could not sponsor a departmental picnic for 1990.

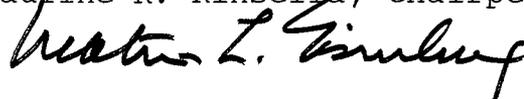
We hold that the State's decision to not sponsor a picnic for 1990 was consistent with its practice and that employees were not, therefore, entitled to attend a picnic during their working hours without appropriate charge to leave accruals. The ALJ's decision and order is accordingly reversed.

IT IS, THEREFORE, ORDERED that the charges be, and they hereby are, dismissed.

DATED: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
PUBLIC EMPLOYEES FEDERATION, AFL-CIO,
Charging Party,

-and-

CASE NOS. U-9397
& U-11611

STATE OF NEW YORK (DEPARTMENT OF HEALTH),
Respondent.

JOHN RYAN and ROGER L. SCALES, for Charging Party

WALTER J. PELLEGRINI, Esq. (RICHARD J. DAUTNER of counsel),
for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions by the State of New York (Department of Health) (State) to a decision rendered by an Administrative Law Judge (ALJ) after hearing on a charge filed by the Public Employees Federation, AFL-CIO (PEF). The ALJ held that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the Department of Health (DOH) unilaterally promulgated a new policy requiring DOH employees to disclose their interests in any entities regulated or supervised by DOH. The ALJ held that DOH's policy was mandatorily negotiable because the disclosure requirements were in addition to the financial reporting requirements under the State "Ethics in Government Act" (Ethics Act).^{1/}

^{1/}N.Y. Pub. Off. Law §73-a (McKinney 1988 and Supp. 1991).

The State argues in its exceptions that its interest disclosure policy is authorized by Executive Law §94(9)(j) and that it is not mandatorily negotiable if a correct balancing test is applied. In that latter respect, the State argues that the ~~balance of competing interests should tip in its favor because~~ its need for the employees' disclosure is great and the required interest disclosures are only minimally intrusive of the employees' privacy rights. The State also argues that the ALJ's remedy is overly broad because the order to rescind the policy is not expressly limited to employees in PEF's unit. PEF argues in response that the ALJ's decision is correct and should be affirmed.

The charge in U-9397 concerns a financial disclosure policy which was superseded in 1989 by the interest disclosure policy which is the subject of the charge in U-11611. The ALJ's decision is based upon the 1989 policy only. No exceptions were filed to the ALJ's declination to consider separately the disclosure policy under U-9397. The parties' arguments in their briefs and during their oral argument before us were directed only to the 1989 policy. Under these circumstances, we limit our review and discussion to the issues raised by the 1989 disclosure policy.

DOH's 1989 disclosure policy was promulgated after the January 1, 1989 effective date of the financial disclosure requirements of the Ethics Act and, as stated by DOH, its policy

is intended to be an "addition to" and "separate from" the financial disclosure requirements of that statute. Under the 1989 policy, DOH employees must identify on a departmental form any entities which are regulated or supervised by DOH in which they or their immediate family members either have an interest or conduct activities. The covered interests or activities include service as an officer, director, partner, proprietor, employee, volunteer, contractor or advisor; receipt of wages, salary, interest, capital gain or gift over \$75 in value; investment activity and indebtedness to the regulated or supervised entity. In addition, employees must also list any interest or activities involving themselves or their immediate family members which might constitute an actual or apparent conflict of interest as defined in Public Officers Law §74. Employees are not required, however, to describe the nature of the identified interests or activities. DOH retains the right to "seek other related information as required" and to take "appropriate corrective action" if DOH determines a conflict of interest to exist. The policy also contains a provision for either an employee or the employee's negotiating agent to request an exemption from the disclosure requirements under certain specified circumstances. Employees who knowingly and intentionally violate the disclosure rules may be subject to disciplinary action.

For the reasons which follow, we affirm the ALJ's decision. Executive Law §94(9)(j), the claimed source of DOH's

authorization to promulgate its disclosure policy, sets forth one of several duties imposed upon the State Ethics Commission. Section 94(9)(j) requires the State Ethics Commission to advise and assist agencies in establishing conflict of interest rules. Even if Executive Law §94(9)(j) were to be read to indirectly authorize DOH to promulgate conflict of interest work rules, it would not be a source of a statutory mandate. Nothing in §94(9)(j) required DOH to promulgate its disclosure policy or any other conflict of interest rule. Rather, DOH's promulgation of its disclosure policy was merely discretionary. The exercise of that discretion is mandatorily negotiable to the extent that the subject matter of the disclosure policy embraces terms and conditions of employment.^{2/}

In assessing the negotiability of DOH's interest disclosure policy, we find it unnecessary and inappropriate to balance DOH's need for the required disclosures against the effects of the policy upon the employees' privacy rights or other interests. We hold that the Ethics Act codifies not only the general public policy associated with State employees' disclosure of actual or potential conflicts, but the full extent of the State's managerial interests as an employer with respect to that subject as well. DOH's disclosure policy, therefore, necessarily embraces mandatorily negotiable subject matters to whatever

^{2/}Board of Educ. of the City School Dist. of the City of New York v. PERB, 75 N.Y.2d 660, 23 PERB ¶7012 (1990).

extent and in whatever respects its required disclosures differ from those required by the Ethics Act. DOH's policy is, therefore, necessarily negotiable for those DOH employees in PEF's unit who are not required to file disclosure statements under the Ethics Act.^{3/} ~~The same result obtains for any DOH employees in PEF's unit who are required to file disclosure statements. As DOH's policy duplicates much of the information already required of such employees,^{4/} the State's asserted managerial need for an additional source of this information is not compelling. Moreover, as to these employees, the methods by which the disclosures are obtained and enforced under DOH's policy differ from those under the Ethics Act.~~

As to the ALJ's remedy, although the order necessarily applies only to the DOH employees in PEF's unit, it is appropriate on the State's exception to modify the order to restrict its application specifically to those employees.^{5/}

^{3/}Employees who hold policy-making positions or who receive compensation in excess of the filing rate, which is currently equated to the job rate for SG-24, must file disclosure statements under the Ethics Act. The record does not show how many of the DOH employees in PEF's unit file annual disclosure statements under that statute.

^{4/}The Ethics Act requires reporting individuals to disclose, for themselves, their spouses and unemancipated children, inter alia, business or professional associations, various financial investments and interests, gifts, reimbursements for expenditures made in connection with official duties, income and sources thereof, real property interests and most liabilities in excess of \$5,000.

^{5/}Waverly Cent. School Dist., 23 PERB ¶3029 (1990).

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 Public Employees Federation, AFL-CIO who work in the Department of Health (DOH) that the State of New York will:

1. Rescind DOH Executive Memorandum 89-8 dated December 29, 1989, insofar as it applies to DOH employees in the unit represented by PEF;
2. Expunge from its files any documents relating to any PEF unit employee's noncompliance with any section of the subject DOH disclosure policy.

Dated

By
(Representative) (Title)

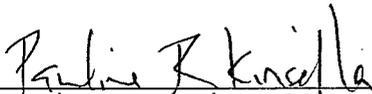
This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

For the reasons set forth above, the ALJ's decision and order is affirmed, his order is modified as set forth below, and the State's exceptions to his decision are dismissed.

IT IS ORDERED, THEREFORE, that the State:

1. ~~Rescind DOH Executive Memorandum 89-8 dated~~
December 29, 1989, insofar as it applies to DOH employees in the unit represented by PEF;
2. Expunge from its files any documents relating to any PEF unit employee's noncompliance with any section of the subject DOH disclosure policy;
3. Sign and post notice in the form attached in all locations ordinarily used to post notices of information to DOH employees in the unit represented by PEF.

DATED: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORANGE COUNTY DEPUTY SHERIFF'S
ASSOCIATION, INC.,

Charging Party,

- and -

CASE NO. U-11529

COUNTY OF ORANGE and SHERIFF OF ORANGE
COUNTY,

Respondent.

In the Matter of

ORANGE COUNTY DEPUTY SHERIFF'S
ASSOCIATION, INC.,

Charging Party,

- and -

COUNTY OF ORANGE and SHERIFF OF ORANGE
COUNTY,

CASE NO. U-11708

Respondent,

- and -

COUNTY OF ORANGE CORRECTION OFFICERS
BENEVOLENT ASSOCIATION,

Intervenor.

FERRARO, GOLDSTEIN, YATTO & ZUGIBE (SCOTT M. ALBRECHT of
counsel), for Charging Party in U-11529

WILSON & FRANZBLAU (KENNETH J. FRANZBLAU of counsel),
for Charging Party in U-11708

PROSKAUER, ROSE, GOETZ & MENDELSON (KATHLEEN M. MCKENNA
of counsel), for Respondent

KAUFF, McCLAIN & McGUIRE (HARLAN SILVERSTEIN and BETH J.
FALK of counsel), for Intervenor

BOARD DECISION AND ORDER

The Orange County Deputy Sheriffs Association, Inc. (DSA) excepts to an Administrative Law Judge's (ALJ) dismissal of its charge in U-11529 which it filed against the County of Orange and the Sheriff of Orange County (County). The DSA alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it insisted upon negotiating for positions which are not within DSA's unit. Specifically, the DSA alleges that it represents only deputy sheriffs within the Sheriff's Department, and that it is no longer permitted or required to represent personnel within the Sheriff's Department whose status as deputy sheriffs had been removed by the County under a civil service reclassification effective in February 1990. The ALJ concluded after a hearing, however, that the County's elimination of the deputy sheriff status for several of the positions in the Sheriff's Department did not alter the composition of the bargaining unit which the DSA had represented since 1981. Finding DSA's unit to include both deputed and nondeputed positions within the Sheriff's Department, and finding that the County's bargaining demands were coextensive with the scope of that unit, the ALJ dismissed the DSA's refusal to bargain charge.

The DSA filed several procedural and substantive exceptions to the ALJ's decision in U-11529. The County argues in response to DSA's exceptions that the ALJ's rulings and findings in that case were correct in all relevant respects.

The DSA also filed the charge in U-11708 in which it alleges that the County violated §209-a.1(a), (b) and (d) of the Act when it recognized the County of Orange Correction Officers Benevolent Association (COBA) as the negotiating agent for all of the Sheriff's Department personnel. On a stipulated record, the ALJ held that the County's withdrawal of recognition from the DSA and its contemporaneous recognition of COBA violated §209-a.1(a) and (d) of the Act, but not §209-a.1(b). The ALJ held that COBA's recognition was improper because it extended to COBA the right to represent the deputy sheriffs whom the DSA has always claimed to represent.

COBA has also filed an exception to the ALJ's denial of its motion to intervene in U-11529. COBA and the County argue in their exceptions in U-11708 that COBA's recognition was privileged both because DSA abandoned its unit and as a matter of law apart from any abandonment theory.

A brief recitation of the background facts places the ALJ's decisions and the parties' exceptions in proper context.

DSA was certified by us as the bargaining agent for "all full-time deputy sheriffs" in April 1981 after we had fragmented those employees from a County-wide unit.^{1/} That same unit description also appears in the contracts between DSA and the County, the last of which expired on December 31, 1989. At the date of

^{1/}County of Orange and Sheriff of the County of Orange, 14 PERB ¶¶3012 and 3000.29 (1981).

certification, all of the employees in the Sheriff's Department were deputed. Effective in February 1990, the County eliminated the deputy sheriff status for correction officers and a number of other positions within the Sheriff's Department. Road patrol personnel and communications officers are, however, still deputed. DSA later notified the County that it did not and would not represent the correction officers and the other positions which were no longer deputed. The County disagreed with the DSA's assertion because it did not believe that any of the duties of the affected employees had been changed. Believing that the nondeputed positions were still in DSA's unit, the County sought through mid-March 1990 to have DSA bargain for them, which precipitated DSA's first charge.

In early May 1990, COBA requested that the County recognize it as the negotiating agent for a unit consisting of deputy sheriffs and those other positions which had been deputed before January 1990. After verifying through a third party that COBA had majority support within the unit for which it demanded recognition, the County, in late May, withdrew recognition from DSA and recognized COBA as the exclusive bargaining agent for the entire unit for which the County alleges the DSA was certified in 1981.

For the reasons which follow, we affirm the ALJ's dismissal of the charge in U-11529 and his findings of violation in

U-11708, cases which we have consolidated for decision because they raise common issues.

Preliminarily, we affirm the ALJ's ruling denying COBA's motion to intervene in U-11529 for the reasons stated in his decision.

~~Turning next to DSA's exceptions which are directed to the~~ ALJ's processing of U-11529, it alleges that the ALJ erred when he refused to grant its motion for summary judgment or a directed verdict. DSA premised its motion upon the County's alleged improper recognition of COBA.^{2/} As established by the decisions in these cases, however, the County's recognition of COBA and its insistence that DSA bargain for all of the titles in the historic unit are distinct legal issues. One issue is not dispositive of the other and, therefore, the ALJ was correct in denying DSA's motion, assuming it to have been properly framed.

DSA also alleges that the ALJ erred by disallowing the introduction of an affidavit of Joseph M. Dwyer, the County's Commissioner of Personnel. Dwyer's affidavit was submitted in an unrelated court proceeding to support an allegation that the DSA did not have standing to pursue an appeal in that matter.

One of the County's arguments in response to this exception is that the ALJ's evidentiary ruling was not preserved for appeal because it was not argued by DSA in its brief to the ALJ. However,

^{2/}On the date the DSA made its motion, the ALJ had not issued his decision in U-11708 in which he held that COBA had been improperly recognized by the County.

having made an offer of the document into evidence at the hearing, and having had the ALJ then refuse to accept it into evidence, the DSA was not required to reargue that same point in a post-hearing memorandum to the same ALJ to preserve an opportunity to argue to us that the ALJ's ruling was incorrect.

On the merits of this exception, in relevant part, Dwyer's affidavit merely restates DSA's position regarding the scope of its unit and the extent of its duty to represent County employees; it does not set forth the County's position on those issues. The ALJ's exclusion of the affidavit and any testimony related thereto was, therefore, correct.

The DSA also alleges that the parol evidence rule barred the ALJ from taking evidence regarding the composition of the unit because the reference to "all full-time deputy sheriffs" is clear on its face. The parol evidence rule, however, is not applicable in this case, even assuming the conditions for its invocation were otherwise present, because it is the meaning of our certification order which is in issue, not the meaning of the parties' contractual recognition clause. There being no evidence that the parties ever agreed to change the composition of the certified unit, the parties' contract must be viewed to have merely adopted the unit as certified. Inherent in our power to issue a certification order is the unrestricted statutory power to review that order as appropriate

in any case in which an interpretation of the order is relevant to the disposition of the pending administrative proceeding.

The DSA also alleges that the ALJ was powerless to consider whether nondeputed titles are within its unit because that question can be appropriately raised only in a unit clarification proceeding filed pursuant to §201.2(b) of our Rules of Procedure (Rules). The unit clarification rules, however, were never intended to be the exclusive means by which parties could obtain an interpretation of the scope of an existing bargaining unit. To the contrary, the unit clarification procedures were adopted to provide parties with a nonadversarial alternative to the improper practice proceedings which had been used, and still may be used, to secure an interpretation of the composition of a negotiating unit. The improper practice charge filed by the DSA necessitated an interpretation of DSA's unit description because the parties' duty to bargain is fixed by that unit configuration. The ALJ was both privileged and required to make that interpretation and no error can be attributed to him for having done so.

It is also alleged that by his decision the ALJ found an inappropriate negotiating unit. The ALJ, however, made only a factual determination regarding the scope of the currently existing unit. The ALJ made no finding as to whether the existing unit or a unit limited to deputized employees is most appropriate. Whether,

as DSA argues, deputy sheriffs should be afforded representation in a separate unit because of the distinctions now existing between deputed and nondeputed personnel in the Sheriff's Department is not an issue under the improper practice charge DSA filed against the County.

All of DSA's remaining exceptions rest directly or indirectly on its repeated assertion that its unit consists only of those persons who are deputy sheriffs. As correctly determined by the ALJ, however, we established DSA's unit because of the unique joint employer relationship between the County and the Sheriff. Our certification in 1981 of a unit consisting of all full-time deputy sheriffs encompassed all of the departmental personnel who were, and are, covered by that joint employer relationship. There being no claim or evidence that the now nondeputed titles in the Sheriff's Department are no longer subject to that joint employer relationship, those titles which were included in the unit when they were deputed continue to be part of the unit for which DSA was certified despite the removal of the deputy sheriff designation.^{3/} Therefore, the County did not violate the Act by insisting that DSA negotiate regarding the terms and conditions of employment of the nondeputed titles.

^{3/}We make no determination as to whether the unit would be most appropriately fragmented pursuant to a petition properly filed and adequately supported by a record developed in such a representation proceeding. Our holding here relates only to the composition of the unit as established and defined in 1981.

Turning to the exceptions taken to the ALJ's decision in U-11708, we first reject the County's and COBA's contention that the recognition of COBA was permissible on the facts of this case because the DSA abandoned or repudiated its unit when it claimed to represent only deputed personnel, irrespective of the subsequent petition it filed to represent such a unit.^{4/} Although in U-11529 we have held that the DSA was mistaken in its belief that only deputy sheriffs are included in its unit, its belief was based upon an arguable interpretation of the language in our certification order. Other than by the hindsight afforded by our decision in U-11529, DSA's position regarding the composition of its unit was no less arguable than the County's position that the unit description in our certification order should not be read literally. An abandonment or repudiation claim cannot be based upon a party's mistaken interpretation of the scope of its bargaining unit because there is in that circumstance no intent to abandon representation of the unit, of whatever it may consist. The representation petition it filed does not evidence an abandonment because the DSA, by that petition, merely sought to preserve the unit it understood to be in existence. Therefore, we reject any argument that DSA must be held

^{4/}The Director of Public Employment Practices and Representation (Director) dismissed that petition in a decision reported at 24 PERB ¶4017 (1991). The Director held that DSA's petition was untimely under §201.3(c) of the Rules because COBA's recognition had been nullified by the ALJ. No exceptions have been filed to the Director's decision.

to have abandoned or repudiated its unit simply because we have dismissed DSA's charge in U-11529.

Alternatively, COBA and the County argue that any public employer is statutorily permitted to withdraw recognition from an incumbent union and to extend recognition to another union whenever the incumbent union is open to challenge by anyone under a representation petition if the employer has objective evidence that the new union to be recognized has the support of a majority of employees within the unit.^{5/}

The County and COBA both argue that the ALJ erred when he relied upon our decisions in County of Orange^{6/} and Greece Union Free School District^{7/} to support his findings of a violation. County of Orange was allegedly misapplied by the ALJ because it involved an employer's unilateral alteration of a bargaining unit, whereas here, the County left the unit unchanged in fact, but substituted a bargaining agent for that unit. Greece Union Free School District was allegedly misapplied by the ALJ because that case involved an issue about an employer's right to file a decertification petition during a period in which a filing was not authorized by our Rules. The County and COBA submit that these

^{5/}The County recognized COBA in May 1990. DSA's last contract with the County expired on December 31, 1989, making May 1, 1990 the beginning of an open period for petitions for decertification by employees or for petitions for certification by any union other than the DSA.

^{6/}14 PERB ¶3060 (1981).

^{7/}18 PERB ¶3033 (1985).

cases are not dispositive of the County's right to recognize COBA as the bargaining agent for the unit historically represented by the DSA.

In County of Orange, we overruled a line of cases which had permitted an employer to effect a unilateral change in a negotiating unit during an open period for representation challenges. As did the ALJ, we view County of Orange to be dispositive of this case. An employer's change in a negotiating unit is a pro tanto withdrawal of recognition from the union that represents that unit. Properly viewed, the change in the unit is only one means by which the withdrawal of recognition is effected. Therefore, County of Orange necessarily prohibits an employer's partial withdrawal of recognition, whether or not the withdrawal of recognition is accompanied by a change in the unit. It follows, a fortiori, that a total withdrawal of recognition from one union in favor of another violates the Act under County of Orange. Since that decision, our statements in earlier cases, most often in dicta, which suggest that an employer may be privileged to withdraw recognition under certain circumstances, can no longer be considered controlling.^{8/}

County of Orange and Greece Union Free School District, taken together, represent our opinion that the policies of the Act are best served by requiring that representation disputes be channeled through the procedures available under our Rules rather than left to

^{8/}See, e.g., Hempstead Union Free School Dist., 7 PERB ¶13017 (1974).

an employer's unilateral action. We believe that in this way instability and uncertainty in the parties' labor relations will be eliminated or minimized and the rights of all parties can best be protected. In that respect, we disagree completely with the County's claim that its recognition of COBA "stabilized labor relations." One need only look to the record of these proceedings to see the unfortunate consequences of a contrary holding which would privilege an employer's withdrawal of recognition.

We emphasize that parties will not be disadvantaged or prejudiced by our requiring that they use the procedures of this Board to effect a change in an established bargaining relationship, whether it be the composition of the unit or the identity of the bargaining agent. In this case, for example, a unit clarification petition could have been filed by either the County or the DSA to resolve the unit status of the nondeputed titles because they were "new or substantially altered positions" within the meaning and for the purpose of the unit clarification rules. A decertification petition also could have been filed on or after May 1, 1990 by the employees themselves, or COBA or any other union could have filed a certification petition to represent the unit for which COBA was recognized or any part thereof alleged to be appropriate.^{2/} DSA's majority support could then have been tested, as necessary, in the

^{2/}COBA eventually did file a representation petition seeking certification as the bargaining agent for a unit of Sheriff's Department personnel. That petition is now pending before the Director.

context of an orderly election process, and during the pendency of such a petition, the County would not have been permitted or required to bargain with DSA, thereby obviating any concern about dealing with a nonmajority union. The availability of these several administrative procedures and the protections their utilization afford all parties persuade us that there is insufficient reason to permit an employer unilaterally to withdraw recognition from an incumbent union.

COBA's remaining exceptions in U-11708 require little comment. The ALJ's decision to process that case to completion before deciding U-11529 was a matter reserved to the exercise of his discretion. As no prejudice to the parties has been shown, we will not disturb the ALJ's decision. A violation of §209-a.1(a) of the Act need not be premised upon a specific finding of animus when, as here, the conduct interferes with fundamental statutory rights.^{10/} Similarly, the County's refusal to bargain with DSA is inherent in the County's withdrawal of recognition from DSA and its recognition of COBA as the exclusive bargaining agent for the unit for which DSA has been certified.

For the reasons set forth above, the County's and COBA's exceptions in U-11708 are denied as are the DSA's exceptions in U-11529 and the ALJ's decision in each case is affirmed.

^{10/}See, e.g., State of New York, 10 PERB ¶3108 (1977).

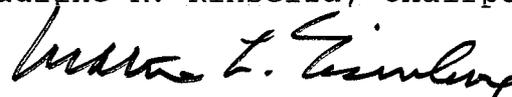
IT IS ORDERED, THEREFORE, that the County:

1. Immediately rescind its recognition of COBA as the negotiating agent for titles which are in the negotiating unit for which the DSA is the certified negotiating agent;
2. Forthwith publish notice of its rescission of COBA's recognition in the same periodicals which published notice of its recognition of COBA; and
3. Sign and post the attached notice at all locations ordinarily used to post notices of information to Sheriff's Department employees.

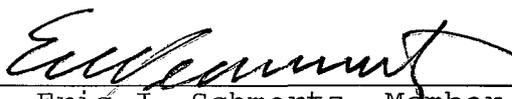
DATED: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, 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 all employees in the unit represented by the Orange County Deputy Sheriffs Association, Inc., (DSA) that the County of Orange and Sheriff of Orange County:

1. Will immediately rescind its recognition of the County of Orange Correction Officers Benevolent Association (COBA) as the exclusive negotiating agent for titles which are in the unit for which the DSA is the certified bargaining agent; and

2. Will forthwith publish notice of its rescission of the recognition granted COBA in the same periodicals which published notice of its recognition of COBA.

County of Orange and
.....Sheriff of Orange County.....

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

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
DUTCHESS COUNTY EDUCATION LOCAL NO. 867,
ARLINGTON SCHOOL DISTRICT UNIT, AFSCME,
AFL-CIO,

Charging Party,

-and-

CASE NO. U-10496

ARLINGTON CENTRAL SCHOOL DISTRICT,

Respondent.

NANCY E. HOFFMAN, ESQ. (JEROME LEFKOWITZ and
PAUL S. BAMBERGER of counsel), for Charging Party

RAYMOND G. KUNTZ, ESQ., for Respondent

ROBERT PEREZ-WILSON, ESQ. (LEONARD A. SCHRIER of
counsel), for District Council 37, American
Federation of State, County and Municipal
Employees, AFL-CIO, Amicus Curiae

DREYER, BOYAJIAN & TUTTLE, ESQS. (JAMES B. TUTTLE
of counsel), for Police Conference of New York,
Inc., Amicus Curiae

JAY WORONA, ESQ., for New York State School Boards
Association, Inc., Amicus Curiae

BERNARD F. ASHE, ESQ., for New York State United
Teachers, AFL-CIO, Amicus Curiae

RICHARD E. CASAGRANDE, ESQ. (ELIZABETH R. SCHUSTER
of counsel), for Public Employees Federation,
Amicus Curiae

BOARD DECISION AND ORDER

By decision dated March 30, 1990, the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissed this charge filed by the Civil Service Employees Association, Inc., Dutchess County Education Local No. 867, Arlington School District Unit, AFSCME, AFL-CIO (CSEA) against the Arlington Central School District (District). The charge alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subjected a bargaining unit employee, Theresa Davies, to a compulsory urinalysis test for drugs.^{1/}

The Assistant Director accepted the balancing test which would be used to determine the constitutionality of the drug test ordered in this case as the appropriate test to determine the negotiability of the test and found the drug test to be a nonmandatory subject of negotiation.

In its exceptions, CSEA argues that the Assistant Director misinterpreted and misapplied the balancing test generally used to determine negotiability questions. CSEA alleges that the balancing test used in a constitutional analysis cannot and should not here be equated to the balancing test used to

^{1/}The Assistant Director had consolidated a second charge (Case No. U-10601) with the one now before us. That charge alleged that Davies was tested for drugs and then discharged from employment in retaliation for her exercise of protected rights. No exceptions have been filed to the Assistant Director's dismissal of that charge.

determine negotiability of the drug test ordered in this case. It argues, moreover, that the testing procedures were also placed in issue under its charge and that the Assistant Director erred by not reaching that issue.

~~The District argues in response that it had a legal duty to~~ test Davies for suspected drug use such that its decision in that respect could not be bargained. Alternatively, the District argues that the Assistant Director's balancing test was correctly framed and applied by him to find that the District's order to Davies that she undergo the drug test was not mandatorily negotiable. Lastly, the District argues that the testing procedures are not in issue under the charge as filed and litigated, but, in any event, the procedures used were the same as had been used during annual medical examinations of employees. Therefore, the District submits that the procedures used in Davies' test did not represent any change in its practice.

The New York State School Boards Association, appearing as an amicus curiae, argues that suspicion-based drug testing is not a mandatory subject of negotiation. District Council 37, AFSCME, the Police Conference of New York, Inc., the New York State United Teachers, and the Public Employees Federation, amici curiae, argue on several different theories that the drug testing ordered in this case is a mandatory subject of negotiation.

STATEMENT OF FACTS

The facts of the case are not in dispute and may be briefly summarized as follows.

On September 1, 1988, Davies, a part-time school bus driver for the District, was ordered by District representatives to present herself to the District's school physician for urinalysis drug testing. Davies, accompanied by her supervisor, John Barrett, went to the doctor's office as ordered on September 1, 1988. Under protest, she there provided a urine sample in a paper cup, which she transferred to a plastic bottle pursuant to a direction from the doctor's office assistant. The sample was then placed into a plastic bag and closed.

Davies worked for the District during the period from September 1 to September 14, 1988, but she was not assigned bus driving duties. On or about September 12, 1988, the District received a laboratory report issued by International Clinical Laboratories, Inc., indicating a positive test result for cannabinoids and negative results for ten other drugs.^{2/}

On September 14, 1988, the District conducted a "stigma or name-clearing hearing" for Davies upon charges of testing positive for cannabinoids, excessive absenteeism and bringing an unloaded firearm onto District property on or about June 18,

^{2/}In addition to testing for cannabinoids, the urine sample was tested for the following: amphetamines, barbiturates, cocaine, benzodiazepines, codeine, methadone, methaqualone, opiates, phencyclidine and propoxyphene.

1988. After that hearing, Davies was discharged from her employment. By the District's admission, a "significant" factor in the decision to terminate Davies was the cannabinoids-positive drug test result.

~~The District's decision to direct Davies to undergo the drug~~ test was made solely as a result of its receipt of a sworn affidavit, provided on or about August 15, 1988, by Anita Crapser. In her affidavit, Crapser states that Davies had, on three occasions. (twice on January 1, 1988, and once on February 14, 1988) ingested cocaine in Crapser's presence. Crapser, who is not a District employee, provided the affidavit at the District's request, after Crapser had made the same allegations orally to District representatives in June 1988.

There is no dispute that before the drug test ordered of Davies, the District had never required any employee to submit to drug testing nor had there been any negotiations between the District and CSEA concerning implementation of a drug testing program or any procedures relating to drug testing of employees.

DECISION OF ASSISTANT DIRECTOR

The Assistant Director began his analysis of the District's duty to negotiate the decision to subject Davies to a drug test by reviewing the development of the State and Federal case law concerning the constitutionality of drug testing of public employees under Article 1, Section 12 of the New York State

Constitution and under the Fourth Amendment of the United States Constitution.^{3/}

From his review of this case law, the Assistant Director concluded that the balancing test used to determine the ~~constitutionality of drug testing is the same balancing test~~ which should be used in determining the negotiability of the test required of Davies. The Assistant Director did not decide whether the District's decision to test Davies was based upon reasonable suspicion, on the ground that if the District could have tested Davies randomly, as he held it could, it was privileged to test her as it did. He then concluded that for the same reasons the drug test would not be unreasonable by constitutional standards, it was also not a mandatory subject of bargaining under the Act.

The Assistant Director also concluded that CSEA had not questioned before him the negotiability of the testing procedures and he did not reach that issue.

^{3/}Both Constitutions provide:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

DISCUSSION

We begin our analysis by denying such of CSEA's exceptions which rest upon its misinterpretation of the Assistant Director's decision and such of the District's exceptions which rest upon a ~~misinterpretation of statute and administrative regulations.~~

As to the former, the Assistant Director did not hold that the constitutionality of an employer's action necessarily determines the negotiability of that action because the balancing tests are always the same. Rather, he correctly noted that in some circumstances those governmental interests which make an action constitutional can also exempt an employer from a statutory duty to bargain regarding that action. Therefore, we deny such of CSEA's exceptions as are taken to the Assistant Director's articulation of a balancing test. Whether the Assistant Director correctly formulated and applied the statutory balancing test to the drug test which was ordered in this case is a different issue and one which we will address below.

We similarly reject the District's assertion that it had a nondelegable, nonbargainable duty to subject Davies to a drug test once it had a reason to believe that she had used a controlled substance. The District's arguments in this regard

are based upon §913 of the Education Law^{4/} and several administrative regulations promulgated by the Commissioner of Education which relate to the operation of school buses.^{5/}

The District's reliance on Education Law §913 is misplaced. ~~That statute applies only to medical examinations, not purely~~ investigatory drug testing as was conducted by the District in this case. Not only was Davies not given a medical examination, but this record shows that drug tests have never been part of any required medical or general physical examinations in this District. Moreover, even assuming that §913 of the Education Law could be read to cover compulsory, investigatory drug testing not

^{4/}Section 913 of the Education Law, which relates to medical examinations of school district personnel, provides as follows:

In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district or a board of cooperative educational services shall be empowered to require any person employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician of his choice or school medical inspector of the board of education or trustees or board of cooperative educational services, in order to determine the physical or mental capacity of such person to perform his duties. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the board of education or trustees or board of cooperative educational services and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

^{5/}N.Y. Comp. Codes R. and Regs. title 8, §156.3 (c), (e), (f), & (g) (1991). These provisions pertain generally to safety regulations for school bus drivers and pupils, including physical fitness criteria, character requirements and driving rules.

incident to a medical examination to test for the employee's ability to perform his or her job, it is by its very terms only an authorization for such testing. A statutory duty which would prohibit negotiations or agreements regarding a decision to test ~~an employee for drug use is not properly constructed from a~~ simple grant of an empowerment.^{6/}

The Commissioner of Education's regulations prove equally unavailing to the District. As with Education Law §913, the regulations do not include drug testing as part of any required physical condition or code of driver conduct. We also do not believe that a general duty to ensure the safety of bus passengers, which can arguably be extracted from the Commissioner's regulations, is properly extended to make nondelegable, nonbargainable duties of every means chosen by a school district to better ensure that safety. To hold otherwise would unjustifiably proscribe the employees' right under the Act to have terms and conditions of their employment bargained.

Having denied the parties' exceptions in the above-mentioned respects, it becomes necessary to establish the framework for a consideration of the remaining issues.

First, we decline to assess the parties' rights and responsibilities as though the case before us arose in the context of a random drug test. However the District's drug test

^{6/}See generally Board of Educ. of the City School Dist. of the City of New York v. PERB, 75 N.Y.2d 660, 23 PERB ¶7012 (1990).

of Davies is characterized, it was plainly not a statistically random event. Davies was specifically targeted for the required drug test based upon some level of suspicion by the District of her alleged off-duty use of a controlled substance. We believe that the many factors which may appropriately be considered in assessing the negotiability of drug testing decisions may vary according to whether the testing is done randomly or pursuant to some individualized suspicion. The negotiability of the District's decision to test Davies must be examined, therefore, within the context in which the decision was actually made, not as it might otherwise have been made. Therefore, we decline to adopt the Assistant Director's determination that the District had no duty to bargain the decision to test Davies because it could have unilaterally subjected her to a random drug test. The negotiability of an employer's decision to subject employees in safety-sensitive positions to a random drug test is not before us in this case and we express no opinion on that issue here.^{7/}

Turning to the case as presented, the issue is whether the District could subject Davies to a compulsory urinalysis drug test without first having to negotiate that decision with CSEA. The negotiability of that decision turns, as the Assistant Director correctly observed, upon a balancing of competing

^{7/}We did consider that issue in City of Buffalo (Police Department), 20 PERB ¶13048 (1987). The disposition of this case does not necessitate any reexamination of that decision at this time.

interests. Davies' interests lie in her personal privacy, reputation and job security, interests which we have held can trigger a bargaining obligation.^{8/} As to the District, only its managerial interests as an employer are material to the balance used in making the negotiability determination.^{9/} The only mission-related, managerial interest asserted by the District in justification of its decision to test Davies is the safe transportation of its students. The burden rests with the District to establish that Davies' testing was necessitated by this interest. The District, as an employer, had no interest in Davies' off-duty use of any drug except and to the extent that her alleged use impaired her ability to drive a bus safely. However, no evidence was presented in this case that Davies' job performance was actually impaired, that any on-the-job drug use occurred or from which suspicion of impairment could reasonably be inferred.

In establishing a link between an employee's off-duty use of drugs and job impairment, we acknowledge that there can be reasonable argument made as to whether and at what point the

^{8/}See, e.g., Board of Educ. of the City School Dist. of the City of New York v. PERB, supra, note 6.

^{9/}It is for that reason that the factors used in assessing the constitutionality of an action may be different from those used in making a negotiability determination. For example, a constitutional analysis might include policy considerations which are not appropriately considered in a negotiability determination because they are divorced from the employment relationship. That, in part, explains why an action may be simultaneously constitutional yet mandatorily negotiable.

former can satisfactorily evidence the latter. Without deciding those issues, we will assume for purposes of this decision that off-duty drug use by persons who hold safety-sensitive jobs can sometimes be used to evidence a reasonable suspicion of impairment. ~~That off-duty drug use and any test to determine~~ such use, however, must be reasonably proximate to the employee's job performance. If the off-duty drug use is remote from the time at which the employee is called upon to render services, the employer's interest in having an employee subjected to a drug test to determine that use is not reasonably related to the delivery of its services or the accomplishment of its mission. In that circumstance, the balance of competing interests necessarily weighs in favor of the mandatory negotiability of a decision to subject an employee to a urinalysis test for drug use because only the employee's interests are affected.

Applying these standards to the facts of this case, it is readily apparent that the District's decision to subject Davies to compulsory urinalysis testing for drugs was mandatorily negotiable. The District tested Davies on September 1, 1988 pursuant to a report that she had used drugs while off duty twice on January 1, 1988 and once on February 14, 1988. Her reported uses occurred when school was not in session and the last was more than six months before the test was ordered and administered and several months before Davies last drove a bus for the District. There is, furthermore, no evidence that her off-duty

use occurred within a timeframe within which it might be inferred that she drove a bus while impaired. On these facts, the District's order to Davies that she undergo urinalysis testing for off-duty drug use was not reasonably proximate to her alleged use nor was it otherwise grounded upon a reasonable suspicion that she drove or attempted to drive a bus in an impaired condition. As such, the decision to subject her to that test was mandatorily negotiable.

Having found on this fact-specific analysis that the District did not have a reasonable suspicion of actual on-the-job impairment or such off-duty use which might evidence an impairment at a time reasonably proximate to the date it tested Davies, we do not decide whether or to what extent reasonable suspicion drug testing of persons in safety-sensitive positions is mandatorily negotiable. As with the negotiability of random drug tests for persons in such positions, we leave that issue for decision when required by the facts of a future case.

CSEA also excepts to the Assistant Director's determination that the negotiability of the drug testing procedures was not before him. Having read the charge as filed and the transcript of the hearings, we agree with the Assistant Director's decision in this respect and, accordingly, deny this exception. Any references to the testing methodology in the charge as filed or in the case as litigated occurs only in the context of the District's decision to test Davies and only as a background to a

consideration of that issue. Any remaining question in this respect is resolved by the brief CSEA filed with the Assistant Director, in which only the District's order that Davies undergo a drug test is identified as the issue for decision. As we will not consider allegations which are not raised in a charge or a timely amendment thereto,^{10/} we affirm the Assistant Director's decision not to address the negotiability of the procedures incident to the District's drug test of Davies.

Turning to the remedy, we would ordinarily order Davies reinstated to her former position with back pay and benefits as we did in City of Buffalo (Police Department)^{11/}. We take notice, however, of an arbitration award dated September 12, 1989 in which an arbitrator ordered Davies reinstated without back pay effective September 18, 1989, approximately one year after the date of her discharge from employment. From facts alleged and admitted in a second improper practice charge involving Davies filed by CSEA against the District,^{12/} we know that the District reinstated Davies pursuant to the arbitration award and ordered

^{10/}East Moriches Teachers Ass'n, 14 PERB ¶3056 (1981).

^{11/}Supra note 7. In that case, we held that the City of Buffalo had improperly required probationary police officers to submit to random drug testing. As part of the remedy in that case, we ordered the reinstatement of one employee who had been discharged because he had tested positive for the presence of a controlled substance.

^{12/}U-11278. This charge is presently pending before the Assistant Director of Public Employment Practices and Representation.

her to report to work on September 18, 1989 to be subjected that date to a drug test as permitted by the arbitrator's award. She refused to take that test and resigned her employment after she had been suspended by the District. CSEA alleges in that charge ~~that the District's actions following her reinstatement were~~ improper. Therefore, Davies was reinstated by the District and an order from us that she be reinstated would be unnecessary and confusing. The propriety of this other disciplinary action and Davies' reinstatement rights may be tested, as appropriate, by grievance under the parties' contract, by judicial action or proceeding, or by the other improper practice charge.

We also believe that a monetary remedy is neither necessary nor appropriate as a consequence of the District's September 1, 1988 drug test. The arbitrator held that Davies was properly disciplined for her possession on school property of an unloaded hand gun. As we read the arbitrator's award, the unpaid suspension was based substantially upon that infraction. To order a monetary remedy would negate the arbitrator's award which was based, in relevant part, upon grounds unrelated to the drug test which is the issue before us. Moreover, a monetary order in this case would alter the rights and duties which the parties acquired and assumed under their contract. For these reasons, we do not believe that a monetary remedy would effectuate the policies of the Act.

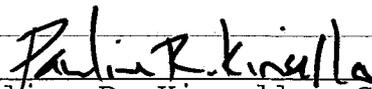
We conclude our discussion with an observation and a suggestion. As is readily apparent, the negotiability of drug testing decisions, procedures and penalties are complex and controversial issues. The disposition of these issues is ~~potentially affected by a great number of factors which will~~ undoubtedly vary case by case. For these reasons, we believe that all employers and unions subject to our jurisdiction would be well-advised to negotiate comprehensive drug testing policies if they have not already done so, before the need for testing of any particular persons arises. The alternative can only be recurrent litigation which will not well serve the policies of the Act, the best interests of employers and unions or the large number of individuals who are affected by the many problems associated with drug use within the employment context.

For the reasons set forth above, we hold that the District's order to Davies that she undergo an involuntary urinalysis test for drugs represented a unilateral change in a mandatorily negotiable subject in violation of §209-a.1(d) of the Act. The Assistant Director's decision dismissing the charge is, therefore, reversed.

Accordingly, the District IS HEREBY ORDERED to post notice

in the form attached at all locations ordinarily used to post notices of information to bargaining unit employees.

DATED: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, 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 all employees in the unit represented by the Civil Service Employees Association, Inc., Dutchess County Education Local No. 867, Arlington School District Unit, AFSCME, AFL-CIO that, the Arlington Central School District has been found to have violated §209-a.1(d) of the Act by subjecting Theresa Davies to a drug test on September 1, 1988.

.....
ARLINGTON CENTRAL 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

ALBANY PERMANENT PROFESSIONAL FIREFIGHTERS,
ASSOCIATION, LOCAL NOS. 2007 and 2007-A,
AFL-CIO-CLC,

Charging Party,

- and -

Case No. U-11948

CITY OF ALBANY,

Respondent.

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of
counsel), for Charging Party

VINCENT J. McARDLE, JR., CORPORATION COUNSEL (WILLIAM M.
GOLDSTEIN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Albany Permanent Professional Firefighters Association, Local Nos. 2007 and 2007-A, AFL-CIO-CLC (APPFA) and cross-exceptions filed by the City of Albany (City) to a decision by an Administrative Law Judge (ALJ). APPFA alleges that the City violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when, on September 20, 1990, it issued a memorandum stating that it would not pay unit employees for the time they spent traveling on a temporary work assignment called a detail.

After hearing, the ALJ dismissed the subparagraph (a) and (c) allegations for lack of proof.^{1/} He reached the merits of the unilateral change allegation filed under §209-a.1(d) of the Act despite the pendency of a contract grievance filed by APPFA which alleges, inter alia, that the City's memorandum violated the parties' then existing contract, an allegation which is twice repeated in the charge itself.

Had the charge alleged only a violation of §209-a.1(d) of the Act, the ALJ stated that he would have applied our decision in Herkimer County BOCES^{2/} and deferred the jurisdictional determination necessary to the disposition of the unilateral change allegation to the still-pending grievance. The ALJ, however, declined to defer the jurisdictional determination, because several days of hearing had been held on the interference and discrimination allegations. The ALJ then dismissed the interference and discrimination allegations, as noted, and he dismissed the unilateral change aspect of the charge on a finding that the City's memorandum did not change its practice regarding travel pay, making no determination concerning jurisdiction under §205.5(d) of the Act. He found that the City's practice was not to pay employees for travel when on a detail and that the City's memorandum merely restated that existing practice.

^{1/}No exceptions have been taken to this aspect of the ALJ's decision.

^{2/}20 PERB ¶3050 (1987).

APPFA alleges in its exceptions that the City's memorandum created a new practice where none previously existed because employees had never before asked to be paid for travel while on detail because they did not know that they might have a right to be paid for that time. According to APPFA, the employees' demand for pay, coupled with a large increase in the number of details necessitated by a work schedule change which the City had earlier implemented, established circumstances to which the City's former nonpayment practice did not apply.

The City alleges in its cross-exceptions that the charge is untimely because it was filed more than four months after APPFA first knew that demands for pay for detail travel would not be granted. The City otherwise argues that the ALJ's decision on the merits of the charge is correct.

Although no exceptions have been filed to the ALJ's treatment of the jurisdictional issue, we are obliged to reach that issue because it concerns our power to entertain the remaining unilateral change allegation. Pursuant to §205.5(d) of the Act,^{3/} the Legislature has made clear that it is not within our power to either entertain alleged contract violations or enforce a collective bargaining agreement. APPFA's grievance,

^{3/}Section 205.5(d) in relevant part provides:

[T]he board shall not have authority to enforce an agreement between an employer and employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

which involves the same subject matter as its improper practice charge, coupled with certain of the allegations in its charge, necessarily raise a jurisdictional question affecting the unilateral change allegation made under §209-a.1(d) of the Act.

Although we have jurisdiction over the subparagraph (a) and (c) allegations, we do not by virtue of that fact automatically acquire jurisdiction over the subparagraph (d) allegation. The jurisdictional inquiry under §205.5(d) of the Act is issue oriented. Each allegation in the charge must be considered separately in determining whether we have been empowered to consider the merits of the particular allegation. Were we to follow the jurisdictional approach taken by the ALJ in this case, a charging party alleging a unilateral change which arguably violated its contract could always evade the jurisdictional limitation in §205.5(d) of the Act simply by adding one or more different improper practice allegations to its unilateral change allegation. This result is plainly inconsistent with the Legislature's intention to restrict our role in contract interpretation and enforcement to the extent necessary to decide statutory questions. Therefore, we hold that the ALJ did not have the discretion to reach the merits of the §209-a.1(d) allegation without first disposing of the jurisdictional question.

The ALJ could have disposed of the jurisdictional question in one of two ways. He could have applied our decision in Herkimer BOCES as he stated he would have had the interference

and discrimination allegations not been litigated. Under that approach, the subparagraph (d) allegation would have been conditionally dismissed and the jurisdictional determination would have been deferred to the pending grievance with the possibility that that aspect of the charge could have been reopened after arbitration. Hearings would then have been held only on the interference and discrimination allegations. Alternatively, the ALJ could have decided the jurisdictional question. If he concluded that there was jurisdiction over the unilateral change allegation, he would then have proceeded to a consideration of the merits of that allegation, together with the other claims. If he concluded that there was no jurisdiction over that allegation, he would have unconditionally dismissed it for that reason without considering the merits of the allegation.

We have not had occasion before this case to decide how we should treat a jurisdictional issue when it is raised in a charge in conjunction with other allegations which do not present any jurisdictional questions. Of the two choices available to the ALJ, we think the second is preferable as a matter of policy. The approach we adopt for the disposition of this jurisdictional issue is much the same as the one we have taken for the deferral of the merits of improper practice allegations when all of those allegations have been determined to be within our jurisdiction. As exemplified by our decision in Connetquot Central School

District,^{4/} we have chosen not to defer any improper practice allegation over which we have jurisdiction unless we can properly defer all the allegations in the charge, in order to avoid multiplicity of forums to the extent possible.

Reaching that jurisdictional issue, we hold that we do not have jurisdiction over the subparagraph (d) allegation because it raises only a breach of contract claim which the Association would have us remedy by enforcing the contract provisions. Although, as the ALJ noted, the contract may not have a provision covering compensation for travel time specifically, it does have provisions covering compensation for hours worked and it is those latter provisions of the contract which APPFA alleges the City violated when it promulgated the memorandum in issue. From APPFA's charge as filed, its grievance, and its supporting arguments, it is plain that APPFA alleges that it has already bargained with the City regarding pay for detail travel through the hours worked clause and that the parties have reached an agreement on that subject which requires the City to pay for that travel. The allegations in the charge cannot be read to set forth a colorable claim of statutory violation separate and apart from this arguable contract violation. As such, a dismissal for lack of jurisdiction is required.^{5/}

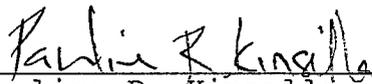
^{4/}19 PERB ¶3045 (1986).

^{5/}Warsaw Cent. School Dist., 23 PERB ¶3022 (1990); County of Suffolk, 22 PERB ¶3033 (1989).

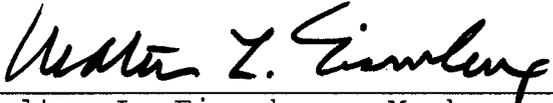
Having decided that we do not have jurisdiction over the §209-a.1(d) allegation, we do not consider either APPFA's or the City's exceptions on the merits of the case.

IT IS, THEREFORE, ORDERED that the charge be, and it hereby is, dismissed for lack of jurisdiction insofar as it alleges a violation of §209-a.1(d) of the Act.

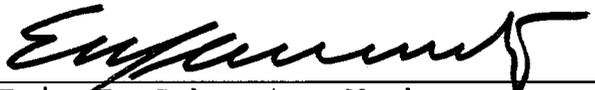
DATED: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLIAM T. BRUNS,

Charging Party

-and-

CASE NO. U-12252

STATE OF NEW YORK (DIVISION OF PAROLE)
and COUNCIL 82, AFSCME,

Respondents.

WILLIAM T. BRUNS, pro se

WALTER PELLEGRINI, ESQ. (LAUREN DE SOLE of counsel),
for Respondent State of New York

PETER SCAGNELLI, ESQ., for Respondent Council 82, AFSCME

BOARD DECISION AND ORDER ON MOTION

William T. Bruns, by motion, seeks our review of rulings made by an Administrative Law Judge (ALJ) during the processing of his still-pending improper practice charge against the State of New York (Division of Parole) and Council 82, AFSCME.^{1/}

Bruns asks us to review the ALJ's allegedly incorrect ruling on an offer of proof he submitted, at the ALJ's direction, which limited the issues in his charge, and the ALJ's refusal to recuse

^{1/}Such interlocutory review is authorized in our discretion under §204.7(h) of our Rules of Procedure (Rules) which we have interpreted to apply to pre-hearing rulings. Brunswick Cent. School Dist., 19 PERB ¶3018 (1986).

herself from the proceeding.^{2/} Bruns alleges in the latter respect that the ALJ is biased against him as evidenced by her ruling on his offer of proof and her conduct in processing his charge to date.

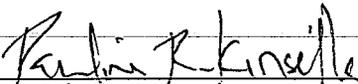
~~An interlocutory appeal from rulings by an ALJ is properly~~ entertained only if our failure to consider the appeal would result in harm to a party which cannot be remedied by our review of the ALJ's final decision and order.^{3/} We are persuaded that the ALJ's evidentiary ruling can be properly reviewed in the normal course of considering such exceptions to the ALJ's final decision and order as may be filed. We are not inclined to give interlocutory review to an ALJ's refusal to recuse himself or herself from a proceeding on a party's allegations of bias except in circumstances in which those allegations set forth facts upon which the ALJ's disqualification would be required. Brun's bias allegations, however, are not of that type. The motion for interlocutory review of the ALJ's denial of Brun's recusal motion and her evidentiary rulings is accordingly denied at this time. Our denial of Brun's motion with respect to either of the ALJ's rulings is without prejudice to his right to file exceptions to the ALJ's decision pursuant to §204.10 of the Rules.

^{2/}Rules §204.7(h)(1).

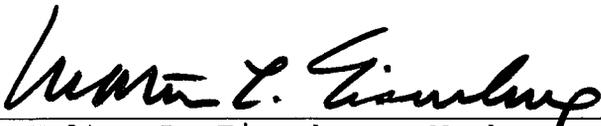
^{3/}United Univ. Professions, 19 PERB ¶13009 (1986).

IT IS, THEREFORE, ORDERED that the motion be, and it hereby is, denied.

DATED: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 200B, SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3782

CENTRAL NEW YORK REGIONAL MARKET AUTHORITY,

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,

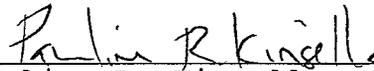
IT IS HEREBY CERTIFIED that Local 200B, Service Employees International Union, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Maintenance supervisor, collector, janitor,
maintenance man III and maintenance man.

Excluded: Administrative director, assistant director and
secretary.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 200B, Service Employees International Union. 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: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTHERN ADIRONDACK SUBSTITUTE TEACHERS
ALLIANCE, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3867

SARATOGA-WARREN COUNTIES BOARD OF
COOPERATIVE EDUCATIONAL SERVICES,

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 Southern Adirondack Substitute Teachers Alliance, 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 been given reasonable assurance of continued employment

Excluded: All other employees

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Southern Adirondack Substitute Teachers Alliance, 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: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 342, LONG ISLAND PUBLIC SERVICE
EMPLOYEES, UMD, ILA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3836

CENTERPORT FIRE 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,

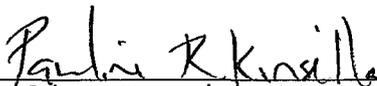
IT IS HEREBY CERTIFIED that Local 342, Long Island Public Service Employees, UMD, ILA, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Firehousemen, excluding part-time.

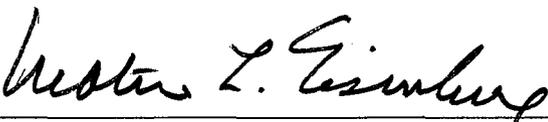
Excluded: Elected commissioners and district secretary/manager.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 342, Long Island Public Service Employees, UMD, ILA, 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: January 31, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member