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State of New York Public Employment Relations Board Decisions from June 30, 1992

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from June 30, 1992

Keywords

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

Comments

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2A-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF HENRIETTA

Upon a Petition for Declaratory Ruling

CASE NO. DR-030

BERNARD WINTERMAN, for Petitioner

ROBERT J. FLAVIN, for CWA, Local 1170

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Communications Workers of America, Local 1170 (CWA) to a decision by the Director of Public Employment Practices and Representation (Director) on a petition filed by the Town of Henrietta (Town) seeking a declaratory ruling on the negotiability of the following CWA demand:

After sixteen hundred (1,600) hours have been accumulated of performing higher rated work by lower craft, the Town shall permanently promote to the higher rated classification the senior qualified employee.

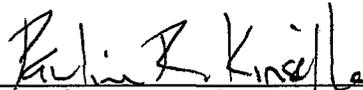
The Director ruled that the demand is a nonmandatory subject of negotiation because it requires the Town to create a position and/or fill a vacancy each time an employee has performed out-of-title work for more than 1600 hours.

The Director's decision addresses the material aspects of CWA's exceptions and we affirm his ruling for the reasons stated in his decision. To those, we would only add that the ruling does not, as CWA claims, deprive it of a right to bargain the

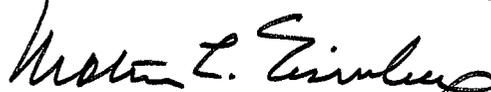
compensation to be paid to employees who work out-of-title for any given period of time. The Director's ruling means only that the Town need not bargain a requirement that job positions be created or filled.

For the reasons set forth above, CWA's exceptions are denied and the Director's ruling is affirmed. The Board, therefore, declares the demand in issue to be a nonmandatory subject of negotiation.

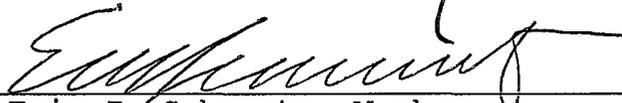
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2B-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROSWELL PARK MEMORIAL INSTITUTE, LOCAL 303,
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-10220

STATE OF NEW YORK (DEPARTMENT OF HEALTH),

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (ROBERT DeCATALDO
of counsel), for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Department of Health) (State) to a decision by an Administrative Law Judge (ALJ). After several days of hearing, the ALJ held that the State's imposition of a smoking ban affecting nonpublic office areas at the Roswell Park Memorial Institute (RPMI) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) as charged by the Roswell Park Memorial Institute, Local 303, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

The State argues in its exceptions that the ALJ's negotiability determination fails to afford sufficient weight to

RPMI's special mission as a comprehensive cancer care center.^{1/} In conjunction with this mission argument, the State requests that we take notice of an accreditation standard promulgated in March 1991 by the Joint Commission on Accreditation of Health Organizations. The new standard, which became effective January 1, 1992, after the ALJ's decision was issued, requires all accredited institutions to prohibit the use of smoking materials in hospital buildings. Alternatively, the State argues that the record should be reopened for further hearings on the accreditation issue. The State also argues that its contracts covering the RPMI employees represented by CSEA, and certain smoking guidelines which it developed with CSEA under those contracts, either divest the Board of jurisdiction over this charge or establish a waiver of any further bargaining right regarding the promulgation and implementation of the smoking policies at RPMI.

CSEA argues in response that the State's jurisdictional and waiver defenses were correctly rejected and that the ALJ properly applied our balancing test in determining that the private office smoking ban is a mandatory subject of negotiation.

Before reaching any of the State's exceptions which affect the disposition of the charge on its merits, we address the

^{1/}The ALJ dismissed the charge to the extent the smoking ban applied to the two other areas in which employees at RPMI previously had been allowed to smoke because those areas (cafeteria and solarium) were used by patients. No exceptions have been filed to the ALJ's decision in this respect.

State's jurisdictional defense because it questions our power to entertain the charge.^{2/}

Section 205.5(d) of the Act denies PERB jurisdiction over violations of an agreement between an employer and an employee organization which do not otherwise constitute improper practices. We have held that this section of the Act is triggered if an agreement is a source of right to a charging party which would support a reasonable claim that the actions complained of in the improper practice charge violate that agreement.^{3/}

Having reviewed both the parties' collective bargaining agreement and the smoking guidelines, we find that neither is a source of right to CSEA with respect to the allegation in its charge that its unit employees are entitled to a continuation of smoking privileges in nonpublic office spaces within the RPMI. As we will detail hereafter in conjunction with the discussion of the State's waiver defense, the contract and the smoking guidelines establish a framework for the resolution of workplace smoking issues. In relevant respect, the smoking guidelines vest the State with the arguable right to take the action it did after having exhausted the guidelines' processes for the resolution of disputes over smoking policies. Thus viewed, the guidelines and

^{2/}Erie County Water Auth., 25 PERB ¶3017 (1992).

^{3/}State of New York - Unified Court System, 25 PERB ¶3035 (June 30, 1992); County of Nassau, 24 PERB ¶3029 (1991).

the contract from which they derived, represent only a source of right to the State which form the basis for the waiver defense we next address.^{4/}

Workplace smoking was the State's key health and safety issue for the negotiations which led to the parties' 1985-88 contract.^{5/} Having agreed that health and safety issues were best discussed by committee, the parties established a State-level committee for that purpose. That committee's deliberations led to Article 15 of the parties' contract entitled "Safety and Health Maintenance". The contract establishes a State-wide Safety and Health Maintenance Committee and includes the following among its initiatives:

Exploration of options with respect to health effects of smoking in the workplace which shall include establishing, on a pilot basis, no smoking areas in state owned and leased buildings.

The State-wide Safety and Health Maintenance Committee met after negotiations for the 1985-88 contract had ended and it decided that workplace smoking should be discussed with several of the State unions. A state-wide coalition labor-management

^{4/}Having decided that we have jurisdiction over the charge for the reasons stated, we have no occasion to decide whether the smoking guidelines are the type of "agreement" to which §205.5(d) of the Act applies.

^{5/}CSEA represents three units of State employees who are assigned to the RPMI; the Administrative Services Unit (ASU), the Institutional Services Unit (ISU) and the Operational Services Unit (OSU). The relevant negotiating history and contract language is common to all three contracts.

committee was then established to discuss workplace smoking which included representatives of CSEA at the State level. The coalition committee quickly decided that the best way to address the many issues associated with workplace smoking was to develop smoking guidelines for implementation at the local level. After several meetings, extending over a period of months, a comprehensive set of smoking guidelines were developed and reduced to writing in a four-page document entitled "Guidelines for Development of Policies on Smoking in the Workplace". The record establishes that these smoking guidelines, issued in August 1986, were developed and approved jointly by the leadership of the State, CSEA and other unions and that its content reflected a compromise of initial ideas and demands.

The guidelines recognize the hazards of smoking and express a mutual purpose to work toward a smoke-free environment in the workplace. The guidelines suggest that agencies should develop smoking policies which contain a general statement of purpose, an identification of smoking and nonsmoking areas, promotion of smoking cessation and other educational programs and a review of workplace design and ventilation. The guidelines also anticipate that there might be problems in establishing smoking policies and they create a mechanism for the resolution of such conflicts. Impasses were to be referred through the local labor-management process and to the State-wide labor management process as necessary. With respect to the designation of smoking and

nonsmoking areas, the guidelines provide that should a "good faith effort" through "the labor/management process" not effect a mutually satisfactory resolution, then "management shall have the responsibility to take appropriate action."

The ALJ held that the contract and the guidelines, whether taken separately or together, did not establish a waiver of CSEA's right to bargain implementation of RPMI's smoking ban. We disagree and, accordingly, reverse.

We find from our review of the record that the parties clearly intended through the contract and the smoking guidelines to establish a comprehensive program for the development of smoking policies at the facility level and for the resolution of any disputes which might arise concerning those issues. The smoking guidelines were developed as a result of an agreement reached and codified in the parties' formal contract and themselves represent the parties' mutual agreement obtained through joint deliberation and approval. As we view the contract and the smoking guidelines, they represent much more than a convenient way to avoid dealing with the issue of workplace smoking at the bargaining table. Rather, we find them to have been the means by which the parties intended to discharge their mutual right and duty to bargain regarding the development and implementation of smoking policies at the local level. In such

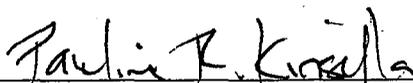
circumstances, we hold that CSEA knowingly relinquished^{6/} any statutory right to further bargaining regarding the implementation of smoking policies at RPMI, substituting the agreements embodied in Article 15 of the contract and those subsequently developed in the smoking guidelines.

Our dismissal of the charge on the basis of the State's waiver defense makes it unnecessary to consider the State's exceptions which are directed to the ALJ's negotiability determination.

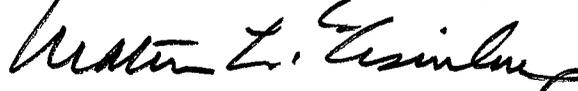
For the reasons set forth above, we grant such of the State's exceptions as are directed to a waiver defense and reverse the ALJ's decision.

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

DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{6/}Civil Service Employees Ass'n v. Newman, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982), aff'd, 61 N.Y.2d 1001, 17 PERB ¶7007 (1984).

20-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, RENSSELAER
LOCAL #842, HUDSON VALLEY COMMUNITY
COLLEGE UNIT,

Charging Party,

-and-

CASE NO. U-11843

HUDSON VALLEY COMMUNITY COLLEGE,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of
counsel), for Charging Party

ROBERT E. GRAY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Rensselaer Local #842, Hudson Valley Community College Unit (CSEA) to a decision by an Administrative Law Judge (ALJ). After hearing, the ALJ dismissed CSEA's charge against the Hudson Valley Community College (College) which alleges, as amended, that the College violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it brought disciplinary charges under §75 of the Civil Service Law against Richard D. Evans, a College security officer and CSEA's unit president. The

ALJ held that Evans was not protected in his April 26, 1990 investigation of a health and safety hazard which was caused by the College's decision to turn off its potable water supply. The ALJ also held that there was insufficient evidence that the disciplinary charges were brought against Evans because he had filed a safety complaint with the State's Department of Labor which led to the College being cited for serious violations of the Labor Law. Lastly, the ALJ held that the College's past practice regarding release time for union business was not changed by its order to Evans that he discontinue his safety investigation and return to work.

CSEA excepts to each of the ALJ's conclusions. The College has not responded to CSEA's exceptions nor has it filed cross-exceptions.

We turn first to CSEA's argument that the College's disciplinary charges unilaterally changed its past practice regarding leave for union business and, thereby, violated its duty to bargain under §209-a.1(d) of the Act. We affirm the ALJ's dismissal of this aspect of the charge. The circumstances surrounding Evans' safety investigation and his refusal to obey his supervisor's return-to-work order were unique. No matter how unrestricted his union leave time may have been in different circumstances in the past, we cannot conclude that the College's disciplinary charges indirectly changed its union leave practices. We do not consider the record sufficient to prove

that Evans had an absolute right to union leave time whenever he wanted and for whatever purpose and to whatever extent he wanted.

CSEA advances per se and improper motivation theories in support of its §209-a.1(a) and (c) allegations, each of which focuses upon a different aspect of Evans' activity on April 26. The per se theory of violation hinges upon Evans' asserted protected right to refuse a return-to-work order because at the time the order was issued he was allegedly engaged in a reasonable investigation of an existing health and safety emergency in his capacity as unit president. The improper motivation theory of violation focuses upon the safety complaint Evans filed with the Department of Labor. Using the latter theory, CSEA argues that the College's real motivation for bringing the disciplinary charges was to retaliate against Evans for making that complaint, not for his having refused a supervisor's return-to-work order.

As we disagree with the ALJ's conclusion that the College's improper motivation was not sufficiently evidenced by the record, we need not address the several factual and legal issues raised by CSEA's per se theory of violation.

Evans' report of a safety hazard to the Department of Labor was protected,^{1/} and the College officials who prepared and issued the disciplinary charges against Evans knew that he had

^{1/}City of White Plains, 22 PERB ¶3053 (1989); New York City Transit Auth., 19 PERB ¶3021 (1986).

filed the complaint. The only remaining issue, therefore, is whether the College disciplined him for making that complaint.

In dismissing CSEA's allegation that the College was improperly motivated in issuing the disciplinary charges against Evans, the ALJ herself noted that the record evidence regarding causation was "troublesome" for the College. In disagreement with the ALJ, however, we find that the unrebutted record evidence is sufficient to establish a violation of §209-a.1(a) and (c) of the Act.

The disciplinary charges against Evans were issued by Dr. Marco Silvestri, the College's Senior Vice-President for Administration. Evans' immediate supervisor, who ordered Evans to return to work on the day in issue at Silvestri's direction, was Sidney Bailey. Silvestri was openly angry with Evans simply for having contacted the Department of Labor. Silvestri's anger first manifested itself before he knew anything about Evans' refusal to return to work and it continued into a meeting with Evans and the safety inspector from the Department of Labor later on April 26. Bailey did not prefer charges against Evans for having disobeyed his order to return to work; indeed, he was initially tolerant of Evans' efforts to contact the appropriate State and union officials about the water problem. From our reading of the record, it appears that even after he issued the return-to-work order, Bailey was only interested in getting a clarification for the future about the proper accommodation

between Evans' dual roles as the unit president and a campus security officer until Silvestri suggested to him on April 27 that he prepare a written memorandum regarding the April 26 incident. It was not until May 14, after the College had been cited for serious safety violations by the Department of Labor, that the College served Evans with the disciplinary charges. The disciplinary charges themselves further substantiate CSEA's allegation that the motive behind the College's disciplinary charges was Evans' complaint to the Department of Labor. The disciplinary notice contained three charges, two of which concerned 1989 incidents which were unrelated to the April 26, 1990 water safety issue. These two unrelated allegations of misconduct had been, moreover, resolved before the April 26 incident by the parties' stipulation to waive their rights under §75 of the Civil Service Law, the very section of law under which the disciplinary charges against Evans were brought in May 1990.^{2/}

We believe that the inference of improper motivation which can reasonably be drawn from the facts noted above is stronger than any contrary inference which might be drawn from other record facts. Inasmuch as CSEA satisfied its burden of proof by

^{2/}According to the College's answer, the hearing officer conducting the Civil Service Law §75 proceedings eliminated these specifications from the disciplinary charges against Evans.

a preponderance of the evidence^{3/} and there is insufficient evidence that legitimate business reasons prompted the College's filing of the disciplinary charges against Evans,^{4/} we reverse the ALJ's decision and hold the College to have violated §209-a.1(a) and (c) of the Act by bringing disciplinary charges against Evans.

For the reasons and to the extent set forth above, we, therefore, reverse the ALJ's decision dismissing CSEA's charge.

IT IS, THEREFORE, ORDERED that the College:

1. Immediately discontinue any prosecution of the disciplinary charges against Evans dated May 14, 1990 and immediately remove any copies of such charges, or any references thereto or to the subject matters thereof, from any files in the custody or control of the College or its agents.
2. Make Evans whole for any wages or benefits lost as a result of the institution or prosecution of the May 14, 1990 disciplinary charges against him, with interest at the currently prevailing maximum legal rate.
3. Cease and desist from interfering with or discriminating against Evans for having made health or

^{3/}That is the standard we have held charging parties must satisfy. See, e.g., State of New York (Division of Human Rights), 22 PERB ¶13036 (1989).

^{4/}Silvestri was not called to testify despite his ready availability.

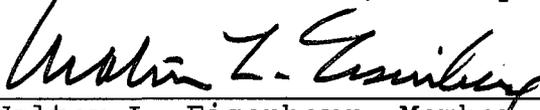
safety complaints to the State Department of Labor on April 26, 1990.

4. Sign and post notice in the form attached in all locations in which informational notices to CSEA unit employees are posted by the College.

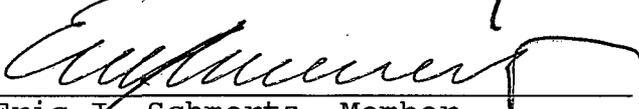
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter I. Eisenberg, Member



Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify the employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Rensselaer Local #842, Hudson Valley Community College Unit (CSEA) that Hudson Valley Community College:

1. Will immediately discontinue any prosecution of the disciplinary charges against Richard D. Evans dated May 14, 1990 and immediately remove any copies of such charges, or any references thereto or to the subject matters thereof, from any files in the custody or control of the College or its agents.
2. Will make Richard D. Evans whole for any wages or benefits lost as a result of the institution or prosecution of the May 14, 1990 disciplinary charges against him, with interest at the currently prevailing maximum legal rate.
3. Will not interfere with or discriminate against Richard D. Evans for having made health or safety complaints to the State Department of Labor on April 26, 1990.

..... HUDSON VALLEY COMMUNITY COLLEGE

Dated

By
(Representative) (Title)

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

2D-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COMMUNICATION WORKERS OF AMERICA,
LOCAL 1170,

Charging Party,

-and-

CASE NO. U-11855

TOWN OF HENRIETTA,

Respondent.

ROBERT FLAVIN, for Charging Party

BERNARD WINTERMAN, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Henrietta (Town) to a decision by an Administrative Law Judge (ALJ). After hearing, the ALJ held that the Town violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act), as alleged by the Communication Workers of America, Local 1170 (CWA), when it withdrew CWA's permission to use the Town's fax machine, prevented CWA from telephoning its stewards and unit employees at work, and removed a telephone from its sewer plant which unit employees had been permitted to use.^{1/} The Town's exceptions are addressed only to that part of the ALJ's decision and order concerning the removal of the telephone

^{1/}The ALJ dismissed an allegation that the Town had violated the Act by instructing employees to report problems or concerns to their department heads before contacting CWA. No exceptions have been filed to this part of the ALJ's decision.

in the sewer plant. The ALJ held that the Town removed the telephone, just as it had denied CWA access to other office equipment and unit employees at work, to retaliate against employees for the grievances filed against the Town, many of which the Town's supervisor, James Breese, considered to be frivolous.

The Town argues that its decision to remove the telephone was not improperly motivated, but that, in any event, it has an "absolute managerial right" to remove the telephone.

Having reviewed the record, we find no reason to disturb the ALJ's relevant findings of fact which rest in substantial part on her assessment of the witnesses' credibility. Having affirmed the ALJ's finding that the Town's decision to remove the telephone was improperly motivated, its claimed managerial right to install, deploy, or remove its business equipment is immaterial. The Town may not take an action, even one within its managerial discretion, for reasons which the Act prohibits or makes improper.^{2/}

For the reasons set forth above, the Town's exceptions are denied and the ALJ's decision is affirmed.

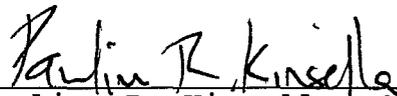
IT IS, THEREFORE, ORDERED that the Town:

1. Restore the CWA's access to the Town's fax machine.
2. Permit the CWA to directly contact stewards and unit employees and leave messages for them at the workplace.

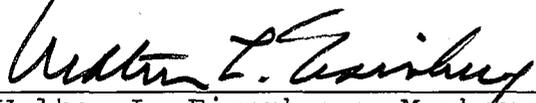
^{2/}City of Albany v. Helsby, 29 N.Y.2d 433, 5 PERB ¶7000 (1972).

3. Restore the telephone in the sewer plant.
4. Sign and post the attached notice at all locations ordinarily used by the Town to communicate with unit employees.

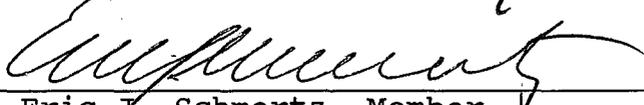
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Town of Henrietta in the unit represented by the Communication Workers of America, Local 1170 (CWA), that the Town of Henrietta:

1. Will restore the CWA's access to the Town's fax machine.
2. Will permit the CWA to directly contact stewards and unit employees and leave messages for them at the workplace.
3. Will restore the telephone in the sewer plant.

.....TOWN OF HENRIETTA.....

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.

2E-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO (CAPITAL REGION
JUDICIARY LOCAL 694),

Charging Party,

-and-

CASE NO. U-11927

STATE OF NEW YORK-UNIFIED COURT SYSTEM,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ
of counsel), for Charging Party

HOWARD E. RUBENSTEIN, ESQ. (NORMA MEACHAM and LEONARD
KERSHAW of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (Capital Region Judiciary Local 694) (CSEA) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). The Assistant Director dismissed CSEA's charge against the State of New York-Unified Court System (UCS) which alleges that the UCS violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it rescinded its practice of permitting unit employees to attend CSEA's annual picnic without charge to their accrued leave time. The Assistant Director dismissed the charge on two different grounds. First, he held that CSEA had waived any further right

to bargain over picnic leave because it gave UCS the discretion to grant or deny paid leave for certain purposes, including a picnic, in the parties' collective bargaining agreement. Alternatively, the Assistant Director held that CSEA's allegations were beyond our jurisdiction because the contractual leave provisions were a reasonably arguable source of right^{1/} to CSEA with respect to paid leave for picnic attendance.

CSEA argues in its exceptions that the contractual leave provisions are not a waiver of its right to a continuation of paid leave for picnics because they do not apply to picnics. CSEA also argues that the Assistant Director's dismissal for lack of jurisdiction is incorrect because the contract clause is not a source of right to it in relevant respect. UCS argues in its response that the Assistant Director's decision is correct and should be affirmed.

Article 9 of the parties' 1988-91 contract, covering time and leave, lists several types of paid leave. Paid leave for attendance at picnics is not specifically mentioned. However, §9.5(j) of the contract provides that UCS' Deputy Chief Administrator for Management Support or his/her designee may

^{1/}County of Nassau, 24 PERB ¶3029 (1991), in which we held that the jurisdictional limitation in §205.5(d) of the Act is triggered if a contract is a reasonably arguable source of right to a charging party with respect to the subject matter of its charge.

grant leave with pay for purposes other than the several specified.^{2/}

The first ground for the Assistant Director's decision is a disposition of the charge on the merits, which necessarily assumes that we have the power to reach those merits. Logically, a jurisdictional determination must be made before any consideration is given to the merits of a charge because we cannot decide issues which the Legislature has not empowered us to decide.^{3/} Therefore, we first consider CSEA's exception to the Assistant Director's jurisdictional dismissal.

We do not agree that the parties' contract is a reasonably arguable source of right to CSEA with respect to its allegation that unit employees are entitled to paid leave to attend the CSEA picnic. As the jurisdictional limitation in §205.5(d) of the Act is keyed, in relevant respect, to a violation of contract, it is not triggered unless a charging party can claim arguably that the actions subject to its improper practice charge violate its contract. Having vested UCS with unqualified discretion regarding the grant of paid leave for picnics, nothing in the parties' contract gives CSEA unit employees a right to paid leave for that purpose. As we view the clause, it is only a source of

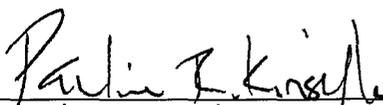
^{2/}The contract lists the following types of paid leave: annual, sick, workers' compensation, subpoenaed appearance and jury attendance, civil service examination, quarantine, leaves required by law, civil defense duties, death in immediate family, directed absences and blood donations.

^{3/}Erie County Water Auth., 25 PERB ¶13017 (1992).

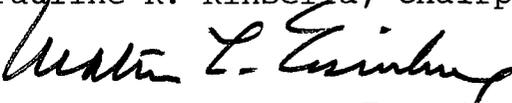
right to the UCS which forms a waiver defense to the charge. Therefore, the Assistant Director properly reached the merits of the charge. We, accordingly, reach consideration of the first ground for the Assistant Director's decision. Having thoroughly reviewed the exceptions and the parties' briefs, we find no factual or legal basis to set aside the Assistant Director's decision in this respect nor are there any issues raised on this appeal which were not fully and properly addressed by the Assistant Director. We, therefore, affirm the Assistant Director's dismissal of the charge for the reasons stated in his decision.

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

DATED: June 30, 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

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

Charging Party,

-and-

CASE NO. U-12056

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

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN
of counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (RICHARD W.
MC DOWELL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ). The ALJ, after hearing, dismissed CSEA's charge against the State of New York (Governor's Office of Employee Relations) (State) which alleges that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it cancelled unilaterally a labor-management achievement awards luncheon scheduled for November 20, 1990. The ALJ dismissed the charge for lack of jurisdiction because he held that the parties' contract covers the subject matter of the charge.

CSEA argues in its exceptions that we have jurisdiction over this charge because the achievement awards luncheons, and the

privileges extended to award recipients,^{1/} are noncontractual issues. The State argues in response that the awards luncheon is a project created and administered pursuant to Article 21 of the parties' contract, which establishes a Statewide Labor-Management Committee on productivity and quality of working life (CWEP). For the following reasons, we affirm the ALJ's dismissal of the charge for lack of jurisdiction.

The jurisdictional limitation in §205.5(d) of the Act^{2/} is triggered if the parties' contract is a reasonably arguable source of right to a charging party with respect to the subject matter of its charge.^{3/} It is clear from the record that the award luncheons which were held in the past, and the one in issue, originally scheduled for November 20, 1990, were held only by agreement between the State and CSEA pursuant to Article 21 of their contract which establishes the CWEP, defines its mission and establishes its operating procedures.^{4/} It is equally clear

^{1/}Award recipients were given release time to attend the luncheons and were reimbursed for travel expenses.

^{2/}Section 205.5(d) of the Act provides, in relevant part:

[T]he board shall not have authority to enforce an agreement between an employer and an 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.

^{3/}County of Nassau, 24 PERB ¶3029 (1991).

^{4/}The full text of Article 21 is set forth in the ALJ's decision and we do not restate it here because of its length.

that the privileges extended to award recipients were completely conditioned upon an awards luncheon being held. The source of CSEA's rights with respect to the awards luncheon is contractual and the State's announced decision to cancel the 1990 awards luncheon, which it had earlier agreed to hold, was either consistent with or in violation of Article 21 of the parties' contract. Therefore, the State's action merely arguably violated CSEA's contractual rights. In such circumstances, §205.5(d) of the Act necessitates a dismissal for lack of jurisdiction.^{5/} That the awards luncheons conceivably could have been held without an agreement is immaterial. What is controlling is that the awards luncheons, in fact, were always established by agreement and administered under the parties' contract.

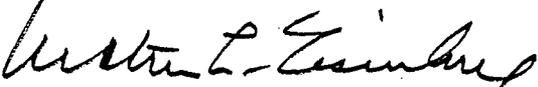
For the reasons set forth above, CSEA's exceptions are denied and the ALJ's decision is affirmed.

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

DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{5/}State of New York (Division of State Police), 20 PERB ¶3038 (1987); County of Nassau, 16 PERB ¶3043 (1983).

2G-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE NURSES ASSOCIATION,

Charging Party,

-and-

CASE NO. U-12238

COUNTY OF SCHENECTADY,

Respondent,

-and-

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

Intervenor.

HARDER SILBER AND BERGAN (RICHARD J. SILBER of counsel),
for Charging Party

THOMAS P. HAYNER, COUNTY ATTORNEY (ROBERT A. DE PAULA
of counsel), for Respondent

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Intervenor

BOARD DECISION AND ORDER

The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) and the County of Schenectady (County) have filed exceptions to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) holding that the County violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) by refusing to recognize and negotiate with the New York State Nurses Association (Association) as the bargaining agent for certain registered professional nurses (RNs), referred to

as community health nurses (CHNs), who were transferred from the City of Schenectady (City) to the County.

CSEA and the County argue that our decision in State of New York (Department of Environmental Conservation) and Olympic Regional Development Authority (ORDA),^{1/} requires dismissal of the charge. The Association, however, supports the Assistant Director's reliance on our decision in City of Amsterdam^{2/} and buttresses its argument with several decisions involving accretion under the National Labor Relations Act (NLRA).

The facts are not in dispute. Effective January 1, 1991, the nursing functions of the City of Schenectady's Health Department were transferred to the County.^{3/} From 1968 to that date, the RNs employed in the Community Health Unit of the City's Health Department

^{1/}20 PERB ¶3046 (1987).

^{2/}17 PERB ¶3045 (1984), petition to review dismissed, 17 PERB ¶7015 (Sup. Ct. Albany Co. 1984).

^{3/}No challenge to the transfer of function was made to us or, on this record, in any other forum. The County in its brief argues that the transfer of function was made in accordance with Civil Service Law §70. Stipulated documents in the record indicate that, by resolution dated September 4, 1990, the City elected to join the Schenectady County Health District and that the City Mayor issued her consent pursuant to Public Health Law §340, which provides, in relevant part:

No city or any part thereof shall be included as a part of any such health district unless the mayor and a majority of the common council of such city or the officials exercising similar powers shall have consented thereto and, in respect of cities having a population of 50,000 or more, according to the last preceding federal or state census or enumeration, unless a majority of the supervisors representing that part of the county outside such city shall have consented thereto.

had been in a separate negotiating unit represented by the Association. The most recent collective bargaining agreement for that unit was effective January 1, 1990 to December 31, 1992.

The approximately twelve RNs who transferred to the County on January 1, 1991 became employees of the County. The Association's January 4, 1991 request that the County "recognize this Association and bargain collectively with it as . . . representative" of these transferred employees was denied by the County on January 10, 1991,^{4/} because "CSEA presently represents all Registered Professional Nurses employed by the County of Schenectady."

By agreement between CSEA and the County, the transferred nurses were accreted to the "wall-to-wall" unit of approximately 940 County employees represented by CSEA. CSEA's unit includes RNs at the County Home and RNs and Licensed Practical Nurses at the County Jail. Licensed Practical Nurses employed by the County at the County Home are in a separate bargaining unit. CSEA and the County agreed that the terms of the CSEA/County 1990-93 collective bargaining agreement would apply to CHNs. In addition, because there was no provision for "stand-by pay" in that agreement, they negotiated that benefit for the CHNs, which was equivalent to a similar benefit provided in the collective bargaining agreement between the City and the Association. On or about March 19, 1991, the CHNs' office moved from City property to County office space.

The CHNs perform on a County-wide basis essentially the same functions as they did when employed by the City. The parties

^{4/}The letter is misdated "1990".

stipulated, however, that, while the CHNs' services are now available to all County residents, most of their functions are still performed at locations within the City. As of the date the record was closed, there was no working relationship between the CHNs and other County nurses, although the CHNs do "occasionally interact" with employees in the County's Department of Social Services, as they did when employed by the City.

On May 14, 1991, the County created the title of Director of Special Clinical Services,^{5/} which had not been filled by the date the record closed. The County expects the incumbent in that title to perform clinical services at both the County Jail and the Well Baby Clinics throughout the County. It is intended that the Director's job duties will include supervision of the nursing staff at the County Jail and that the Director will work in concert with the CHNs and may, at times, direct their duties when performing clinical duties at the Well Baby Clinics.^{6/}

Both the Association/City collective bargaining agreement and the one between the CSEA and County are extensive documents, covering a wide range of similar benefit areas, although the Association/City agreement more specifically addresses the working conditions of the CHNs.

^{5/}It appears that this position is not in a bargaining unit.

^{6/}The affidavit submitted by the County regarding this title also indicates that the County is planning to create a Sexually Transmitted Diseases Clinic in which the Director will have a similar role to that described above regarding the Well Baby Clinics.

This case involves accretion concepts and, more specifically, the statutory obligations of a successor employer to the representative of its predecessor's former employees.

We have defined accretion as

a procedure for clarifying a negotiating unit by specifying the inclusion within it of job titles that were implicitly within the unit when it was first defined. Thus, for example, a claim of accretion arises when an employer acquires an additional facility or when it creates new positions after the original unit was defined. The claim is that the original unit definition is sufficiently broad to encompass the employees working at the new facility or filling the new position.^{7/}

Although reference has been made to case law under the NLRA in analyzing accretion cases arising under the Act,^{8/} as we made clear in State of New York (Department of Environmental Conservation) and Olympic Regional Development Authority (at 3099):

[T]he treatment of the "successor employer" problem under the Taylor Law . . . must be fashioned on the basis of the policies and provisions of that Law and other statutes relevant to the conduct of the affected public employers.

In particular, the legal obligations of "successor" public employers must be consistent with our longstanding interpretation of the Act that the criteria set out in CSL §207.1 requires us to certify only the "most appropriate" units

^{7/}Incorporated Village of Hempstead, 12 PERB ¶3051, at 3095 (1979). See also Niagara Frontier Transportation Auth., 3 PERB ¶4020, at 4270 (1970), which defines accretion as "increase by adhesion or inclusion."

^{8/}State of New York (Dep't of Environmental Conservation) and ORDA, *supra* note 1; City of Amsterdam, *supra* note 2; Niagara Frontier Transportation Auth., *supra* note 7; Edwards-Russell Cent. School Dist., 19 PERB ¶4041 (1986). See also Power Auth. of the State of New York, 14 PERB ¶4652, at 4804 n. 3 (1981).

and that these are ordinarily the largest units consistent with the Act's standards.^{9/}

In City of Amsterdam, a representation proceeding, two discrete units were transferred from two separate employers to a third employer within six months of each other. Approximately seven months later, after it had created a department combining the employees of both units, the successor employer filed a petition seeking to merge the two units into one. We noted that the successor employer in that case was "required to deal with the unions that represented the employees of its two predecessors in the preexisting negotiating units, unless those negotiating units can otherwise be found to be inappropriate".^{10/} We then applied the uniting standards of §207.1 of the Act and determined that the "undisputed long history of effective representation in both negotiating units",^{11/} albeit under their prior employers, evidenced separate communities of interest and outweighed the employer's claim of administrative convenience. The petition to merge the units was, therefore, dismissed.

The Association misreads City of Amsterdam to the extent it argues that the County must continue to recognize and bargain with it for a separate unit of CHNs because the County took over the discrete City unit. Although in City of Amsterdam, as here, an entire discrete unit was transferred, the controlling feature of that case

^{9/}See also Cuba-Rushford Cent. School Dist. v. Rushford Faculty Ass'n, 24 PERB ¶7538, at 7612 (Sup. Ct. Allegany Co. 1991) (school district annexation); Binghamton-Johnson City Joint Sewage Bd., 24 PERB ¶4603, at 4759 (1991) (successor employee organization).

^{10/}City of Amsterdam, supra note 2, at 3072 n. 2.

^{11/}Id. at 3071.

was our conclusion on application of the uniting criteria in §207.1 of the Act that a continuation of the discrete units was most appropriate. Analysis here of those same uniting criteria, however, leads us to a different conclusion. The County has not succeeded to two separate uniting structures independent, as in City of Amsterdam, of any other uniting in the County. It is against the County's existing unit structure that the most appropriate unit determination must be made. Under such circumstances, the long history of effective representation in the City and County units^{12/} and the fact that the CHNs continue to function separately from other County operations are outweighed by the substantial community of interest evidenced by the overall recognition clause in the CSEA/County unit, the existence of other registered nurses in CSEA's unit,^{13/} the relatively small number of CHNs as compared to the large number of employees in the County unit, and the similarity of benefits in the units' most recent collective bargaining agreements.

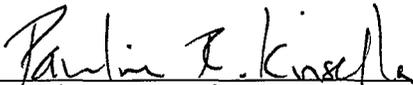
Based on the above, we find no legal obligation by the County to recognize or negotiate with the Association concerning the CHNs. Therefore, CSEA's and the County's exceptions are granted and the decision of the Assistant Director is reversed.

^{12/}There is no claim or evidence that the CSEA/County unit is of short duration, nor that the representation of either unit has been ineffective.

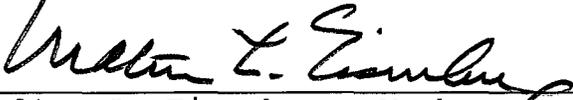
^{13/}Whether a separate unit of all County nurses would be appropriate is not before us here.

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

DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2H-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PETER G. SAREE,

Charging Party,

-and-

CASE NO. U-12753

TRANSIT SUPERVISORS ORGANIZATION and
TRANSIT SUPERVISORS BENEVOLENT
ASSOCIATION,

Respondents,

-and-

MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY,

Employer.

PETER G. SAREE, pro se

ALBERT C. COSENZA, ESQ. (RICHARD DREYFUS of counsel),
for Employer

BOARD DECISION AND ORDER

Peter G. Saree has filed exceptions to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge against the Transit Supervisors Organization (TSO), his former bargaining agent, and the Transit Supervisors Benevolent Association (TSBA), apparently his current bargaining agent. Saree alleges in his charge that both the TSO and the TSBA breached their duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment

Act (Act).^{1/} The Director notified Saree that his charge was legally and factually deficient as filed, remained deficient despite amendment, and, when Saree declined to withdraw the charge, the Director dismissed it.

The charge has several enumerated allegations against the TSBA and one against the TSO. As against the TSBA, Saree first alleges that it refused his request for a copy of the 1988-91 contract between it and the Authority. The Director dismissed this allegation on the ground that the TSBA had no statutory duty to give Saree a copy of the contract. Saree next alleges that the TSBA agreed in that contract to a clause which violates the federal wage and hour laws, permitted the Authority to charge his time-off from work against holidays instead of compensatory time accruals, permitted the Authority to institute a new sick leave policy, and failed to process his grievances in 1987, 1988 and 1989. The Director dismissed all of these allegations as untimely because they involved actions which were taken more than four months before the charge was filed.^{2/} Saree also alleges that the TSBA improperly refused to help him persuade the TSO to

^{1/}This section of the Act, added in 1990, codifies a union's duty of fair representation as previously recognized by us and the courts. Saree's employer, the Manhattan and Bronx Surface Transit Operating Authority (Authority) has been added as a party pursuant to §209-a.3 of the Act.

^{2/}Section 204.1(a)(1) of our Rules of Procedure (Rules) establishes a four-month filing period for improper practice charges.

represent him regarding a job-related complaint dating back to 1982 when he was represented by the TSO.^{3/} The Director dismissed this allegation on the ground that the TSBA had no legal duty to assist Saree because he was then represented by the TSO, not the TSBA.

Saree alleges as against the TSO that in 1991 it refused to represent him on that 1982 incident. The Director dismissed this allegation because there were no facts pleaded which would evidence that the TSO's refusal to represent Saree on the almost decade-old incident was arbitrary, discriminatory or in bad faith.^{4/}

Saree excepts to each of the Director's dispositions. In response to the exceptions, the Authority argues that the Director's decision is correct and, moreover, that the charge should be dismissed because it is so vague and incomprehensible as to deprive it and the respondents of an ability to prepare a defense.

For the reasons set forth below, we affirm the Director's dismissal of the charge.

^{3/}According to the allegations in Saree's charge, a pedestrian falsely alleged that Saree had assaulted him while on duty. The criminal charge, according to Saree, was dismissed after several court appearances.

^{4/}This is our standard for a union's breach of its duty of fair representation. See, e.g., AFSCME Local 650, 24 PERB ¶3040 (1991).

Although Saree argues in his exceptions that §204-a of the Act entitles him to a copy of the contract, we need not reach that legal issue.^{5/} There are no allegations in the charge as filed or amended as to whether the TSBA and the Authority even had negotiated or executed a 1988-91 contract at the dates of Saree's requests for a copy and similarly there are no allegations as to whether the TSBA ever submitted any document for ratification. Section 204-a of the Act could have no application under such circumstances and, therefore, Saree's argument that the Director incorrectly dismissed this aspect of his charge is meritless.

Saree's allegation that the TSBA breached its duty of fair representation by not helping him redress his complaints regarding the 1982 incident is deficient as a matter of law. The duty of fair representation is owed by the recognized or certified bargaining agent to the employees in its unit because the union is the exclusive representative for that unit.^{6/} The incident in 1982 happened when Saree was represented by the TSO. As the TSBA did not represent Saree in 1982, it was not under a legal obligation in 1991 to address his complaints arising from that incident even assuming, as alleged, that one of the TSBA's

^{5/}Section 204-a.2 of the Act provides, in relevant part, that every union "submitting . . . a written agreement to its members for ratification" shall publish the notice specified in §204-a.1 of the Act.

^{6/}Act §204.2.

agents years ago assured Saree that at some point he would be made whole by the Authority for the time he used and the money he spent in defense of the criminal complaint. To whatever extent Saree has any statutory cause of action in this respect, it lies against the TSO.

In his exceptions to the Director's dismissal on timeliness grounds of the various allegations against the TSBA, Saree argues that it was not until recently that he discovered that he had not been credited with certain time and leave accruals or reimbursed for the legal expenses he incurred in conjunction with the 1982 incident as allegedly promised him years ago by the TSBA and the TSO. As best we can understand Saree's charge, it appears that his allegations regarding lost time, pay and benefits relate directly or indirectly to this 1982 incident. Notwithstanding Saree's allegations that he was misled by certain statements made by certain TSBA and TSO agents, it appears fairly clear from the charge as amended that Saree had received information by at least January 1991 from which he concluded that he had been harmed. That is the last date, under any construction, from which his four-month filing period would begin to run on the particular allegations he filed. His charge as filed in August 1991 is, therefore, untimely in these respects. Although the TSBA's alleged refusal to process certain grievances in 1987, 1988 and 1989 is unrelated to the 1982 incident, the allegations in that respect are untimely because Saree either knew or should have

known of the TSBA's refusal to process these grievances more than four months before he filed the charge.

Saree's allegation that the TSBA years ago entered into a contract containing a clause which violates the federal wage and hour law warrants some additional comment. The violation alleged is limited to the entering into of that agreement, not to any application of it to him, and we have held that particular allegation to be time barred. Saree has not set forth the clause in issue, has not identified the provisions of federal law which were allegedly violated by the contract and he does not allege that the clause is currently in effect and is being applied to him illegally. Whether the clause is illegal under federal law and whether, if so, a charge contesting its present application to him would be similarly time barred are issues which are not raised by this charge.

This leaves for consideration Saree's allegation against the TSO which the Director dismissed on the merits. In August 1991, the TSO told Saree that it would not represent him on a grievance related to the 1982 incident because too much time had elapsed and it lacked the necessary supporting records. Saree argues that we should hold the TSO's 1991 decision to be in breach of its fair representation duty because the TSO's agents told him in 1983 and 1984 that it would file a grievance to have his legal expenses paid and that his leave accruals, which were charged for absences from work to attend court dates, would be credited.

In agreement with the Director, we hold that the TSO's decision not to file a grievance concerning the 1982 incident was not arbitrary, discriminatory or in bad faith. There is nothing in Saree's allegations to suggest that the TSO's agents in 1983 or 1984 never intended to carry through with their promise to address his complaints. From Saree's allegations, it appears that he was paid for certain court appearances and that he believed that his complaints had been otherwise satisfied. He then had no contact with the TSO regarding a grievance for several years from which it was not unreasonable for the TSO to conclude that the matter had been resolved. Accordingly, its refusal in August 1991 to resurrect the matter by grievance was not arbitrary, discriminatory or in bad faith, particularly given Saree's inaction. At most, both Saree and the TSO were negligent and negligence alone cannot establish a breach of duty.^{1/} By 1991, the TSO was faced with a situation in which it could reasonably conclude that a grievance concerning a 1982 incident would not be successful. We cannot say, under these circumstances, that its judgment in that respect was arbitrary, discriminatory or in bad faith.

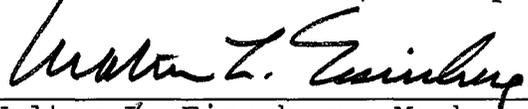
^{1/}Steelworkers v. Rawson, 495 U.S. 362, 134 LRRM 2153 (1990); Smith v. Sipe, 67 N.Y.2d 928, 19 PERB ¶7507 (1986).

For the reasons set forth above, we affirm the Director's decision and deny Saree's exceptions. IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed.

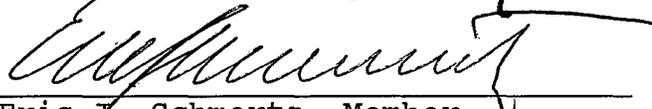
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter E. Eisenberg, Member



Eric J. Schmertz, Member

21-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CORRECTION OFFICERS' PROFESSIONAL SOCIETY
OF NASSAU COUNTY,

Petitioner,

-and-

CASE NO. C-3733

COUNTY OF NASSAU and NASSAU COUNTY
SHERIFF,

Employer,

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., NASSAU LOCAL 830, AFSCME, LOCAL
1000, AFL-CIO,

Intervenor.

MAHON & BERGER (LAWRENCE A. BERGER of counsel), for
Petitioner

BEE, DEANGELIS & EISMAN (PETER A. BEE of counsel), for
Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Correction Officers' Professional Society of Nassau County (COPS) to a decision by the Director of Public Employment Practices and Representation (Director). By the petition it filed with the Director, COPS seeks to be certified as the negotiating agent for deputy sheriffs (deputies) and correction officers (co's) who are employed in the Sheriff's Department of the County of Nassau. These employees are currently represented by the Civil Service

Employees Association, Inc., Nassau Local 830, AFSCME, Local 1000, AFL-CIO (CSEA) in a unit with most of the other employees of the County of Nassau (County).

The Director rejected COPS' assertion that the Sheriff of Nassau County (Sheriff), who is an appointee of the County Executive, is a joint employer with the County of the Sheriff's Department employees as a matter of law and fact. Finding the County to be the sole employer of the deputies and co's, the Director held that the petition was within the jurisdiction of the Nassau County Public Employment Relations Board (Mini-PERB), which covers representation disputes involving County employees. Pursuant to that determination, the Director transferred COPS' petition to the Mini-PERB for processing in accordance with that agency's rules.

The County and CSEA both support the Director's conclusion that the County is the sole employer of the deputies and co's. CSEA argues under its cross-exceptions, however, that the Director should have dismissed COPS' petition because the petition is not within our jurisdiction and its filing with us did not invoke the Mini-PERB's jurisdiction.

COPS on appeal renews its argument that, as to the deputies and co's, there is a joint employer relationship between the County and the Sheriff and, therefore, the petition is within our jurisdiction and not the Mini-PERB's. The basis for COPS' argument is that the appointive Sheriff is a "public employer"

within the meaning of §201.6(a)(vi) of the Public Employees' Fair Employment Act (Act).^{1/} The assertion underlying the entirety of COPS' argument is that if there are two or more public employers as defined in §201.6(a) of the Act as to any particular group of employees, then each of those public employers must be made a part of a joint employer relationship. Analysis of COPS' argument must be made within the context of our joint employer cases, both as they involve county sheriffs in particular and others in general.

In affirming the Board's decision in County of Ulster and the Ulster County Sheriff's Office (hereafter Ulster),^{2/} the Appellate Division, Third Department held that the sheriff was a public employer as an instrumentality of government who exercised governmental powers.^{3/} As the statutory powers and duties of a sheriff's office upon which the public employer finding was premised in Ulster do not appear to vary in material respect whether the incumbent is elected or appointed, COPS argues that an appointive sheriff also falls within the statutory definition of a public employer.

^{1/}Section 201.6(a)(vi) of the Act provides that the term "government" or "public employer" means: "any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state."

^{2/}3 PERB ¶3032 (1970).

^{3/}37 A.D.2d 437, 4 PERB ¶7015 (1971).

That the Sheriff here may be a public employer as defined does not, however, end our inquiry. The question still remains whether that public employer must be made a part of a joint employer relationship with the County. In that respect, nothing in Ulster, in which a majority of the Board first held there to be a joint employer relationship between a county and an elected sheriff, or our other decisions, supports the proposition advanced by COPS that all defined public employers must be established as a joint employer of any particular group of employees. We have held that the several statutory definitions of a public employer merely specify those persons or entities which are generally subject to the Act and that the existence of a joint employer relationship has no necessary implications for structuring the most appropriate negotiating unit.^{4/} Similarly, that a particular individual or entity literally meets the definition of a public employer has no necessary implications for a finding that there exists a joint employer relationship as a matter of law. Indeed, the contention advanced by COPS is essentially the same as the one advocated by then Board Member Denson in his dissent in Town of Ramapo,^{5/} which was rejected by the majority of the Board.

By focusing its arguments on the common law and statutory powers and duties of a sheriff's office, COPS ignores the basic

^{4/}Town of North Castle, 19 PERB ¶13025 (1986).

^{5/}8 PERB ¶13057 (1975).

reason for finding a joint employer relationship. Section 201.6(b) of the Act cautions that a joint employer determination should be made only when it "would best effectuate the purposes of [the Act]." Beginning with Ulster, in which the Appellate Division noted the "practical necessity"^{6/} for the joint employer determination it upheld in that case, we have found a joint employer relationship only when the control over the employment relationship is divided between two public employers to the point where there cannot be meaningful negotiations without a joint employer designation.^{7/} As joint employer status has been conceded in most cases involving sheriffs' department employees,^{8/} there has been little subsequent discussion of the basis for the joint employer determination in Ulster. A proper understanding of that decision necessitates an appreciation of the uniqueness of the sheriff's office from an historical perspective.

A sheriff was liable for the negligence or misconduct of his deputies, any of whose duties related to civil matters,^{9/} even when those civil duties were arguably slight and incidental to

^{6/}37 A.D.2d at 439, 4 PERB at 7100.

^{7/}See, e.g., Niagara Frontier Transportation Auth., 13 PERB ¶3003 (1980).

^{8/}See, e.g., County of Orange, 14 PERB ¶3012 (1981); County of Albany, 15 PERB ¶3008 (1982); and County of Clinton, 18 PERB ¶3070 (1985).

^{9/}Grifenhagen v. Ordway, 218 N.Y. 451 (1916), reaffirming Flaherty v. Milliken, 193 N.Y. 564 (1908).

criminal duties.^{10/} Because of this liability, a sheriff was generally permitted to hire and fire deputies, without benefit or restriction of any civil service requirements.^{11/} The sheriff's control over certain aspects of the deputies' employment relationship stemmed from this centuries-old imposition of vicarious liability. Construing Ulster not long after it was issued, the Board stated that a joint employer relationship was found in that case because "the Sheriff was responsible for appointing his deputies, who served at his pleasure, while the County controlled appropriations covering benefits sought by the deputy sheriffs."^{12/}

It is our opinion that this uniqueness of a sheriff's office, which is the primary underpinning for a joint employer relationship between a county and sheriff, has been removed by a

^{10/}O'Brien v. Ordway, 218 N.Y. 509 (1916). Appointees of the sheriff whose duties related exclusively to criminal matters were considered to be in the service of the general public and were always subject to civil service regulations.

^{11/}It has been recognized, however, that in certain circumstances a county, by local law, may place a sheriff's civil deputies within the classified civil service system. See McMahon v. Michaelian, 30 N.Y.2d 507 (1972), aff'g 38 A.D.2d 60 (2d Dep't 1971).

^{12/}New York Public Library, 5 PERB ¶13045, at 3079 n. 7 (1972) (subsequent history omitted).

recent change in the State Constitution, at least insofar as an appointive sheriff is concerned.^{13/}

Effective January 1, 1990, New York Constitution, Article XIII, §13(a) was amended to delete the provision exempting a county from responsibility for the acts of a sheriff. As construed in Thoubboron v. New York State Department of Civil Service^{14/} (hereafter Thoubboron), the purpose of this constitutional amendment was to relieve sheriffs throughout the State of personal liability for their acts or omissions and for the acts and omissions of their appointees in discharging official duties relating to civil process. In Thoubboron, the Court of Appeals held that the constitutional amendment overruled Flaherty v. Milliken,^{15/} thereby bringing even those appointees of sheriffs performing civil functions fully into the classified civil service system.

After Thoubboron, an appointive sheriff, for purposes of the Act, is no differently situated as a matter of law than the many different officials of state and local government who carry out statutory mandates of various types, none of whom have been

^{13/}We do not here decide the joint employer status of an elected sheriff. There may be other considerations involving an elected sheriff, not presented in this case, which may warrant continued recognition of a joint employer relationship between a county and an elected sheriff.

^{14/} ___ N.Y.2d ___ (April 30, 1992), aff'g 175 A.D.2d 443 (3d Dep't 1991).

^{15/}supra note 10.

identified as independent public employers or have been made part of a joint employer relationship.^{16/} Moreover, there is no basis for finding a joint employer relationship on the particular facts of this case because the record shows that effective control over the employment relationship of deputies and co's resides solely with the County.

The consequences of a contrary conclusion further persuade us that a finding of a joint employer relationship in this case would not, as required, effectuate the policies of the Act. First, establishing a joint employer relationship whenever an agency head or other identified position within a defined government had duties imposed upon them by law would make that relationship the norm for many employees, not the rarity we first contemplated in Ulster and have adhered to since that decision. Second, establishment of potentially hundreds of joint employer relationships would negatively affect existing bargaining relationships and complicate the application of long-established principles governing the formation of the most appropriate bargaining unit. Finally, a conclusion other than the one we reach would make it largely impossible for a government to

^{16/}See, e.g., Hudson Valley Dist. Council of Carpenters v. State of New York, 152 A.D.2d 15, 23 PERB ¶7514 (3d Dep't 1989) (State Commissioner of Correctional Services not a public employer); County of Erie Bd. of Elections, 19 PERB ¶3069 (1986) (County, not Board of Elections or commissioners thereof, held employer); Town of Ramapo, supra note 5 (elected Town Highway Superintendent not employer); County of Ontario, 15 PERB ¶4089 (1982) (County Election Board not employer).

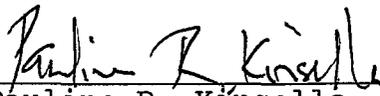
establish its own local agency for the disposition of representation disputes and bargaining impasses simply because of the sheer number of potential different governments which would be created under the proposition advanced by COPS.

Having concluded that the County is the sole employer of the employees in issue, we have no jurisdiction over the petition. As such, we are without power to order the petition transferred to the Mini-PERB. CSEA's cross-exception, objecting to the Director's transfer order, is, therefore, granted.

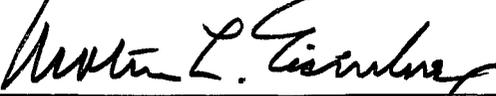
For the reasons set forth above, COPS' exceptions are denied and the Director's decision is affirmed except insofar as he ordered the petition transferred to the Mini-PERB for processing.

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

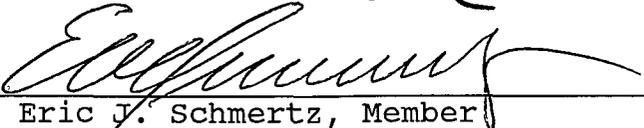
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2J-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,
GREENE COUNTY LOCAL 820,

Charging Party,

-and-

CASE NO. U-12442

COUNTY OF GREENE and GREENE COUNTY
SHERIFF,

Respondents.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN CRAIN
of counsel), for Charging Party

ROEMER & FEATHERSTONHAUGH, P.C. (ELAYNE G. GOLD of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to an Administrative Law Judge's (ALJ) decision filed by the County of Greene (County) and the Greene County Sheriff (Sheriff). On a stipulated record, the ALJ held that the County^{1/} violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally instituted a hearing procedure to determine an injured employee's eligibility for the salary and benefits provided to him under General Municipal Law (GML) §207-c. GML §207-c entitles a police officer who is injured or who becomes ill in the line of duty the

^{1/}The ALJ dismissed the charge as against the Sheriff because the stipulated record addressed only the County's actions. No exceptions have been taken to the ALJ's dismissal of the charge in this respect.

full amount of his or her salary or wages, medical and hospital expenses, subject to the conditions set forth in that statute.

The County argues in its exceptions that its benefits eligibility hearing is not mandatorily negotiable. CSEA argues in response that the ALJ's holding is correct and must be affirmed.

Several years after an employee's injury, for which he was placed on GML §207-c status, the County decided that his injury may not have been duty related. The employee, Robert Fisher, was notified in December 1990 that a hearing would be held to determine his eligibility for GML §207-c benefits, although no such procedure had previously existed or been used. The County held the hearing despite CSEA's objection that the hearing process was mandatorily negotiable.^{2/}

We decided closely related issues most recently in City of Schenectady.^{3/} We there held that GML §207-c benefits are terms and conditions of employment as a form of wages and that the procedures which condition, restrict or potentially deny an employee's receipt of those wages and benefits are generally mandatorily negotiable.

Although judicial interpretations of GML §207-c require an employer to hold a "due process" hearing before terminating an

^{2/}The hearing was apparently held before a hearing officer and resulted in the employee being denied GML §207-c benefits on a finding that his injury was not duty related.

^{3/}25 PERB ¶3022 (April 30, 1992).

employee's §207-c benefits,^{4/} neither GML §207-c itself nor the judicial interpretations of it specify the type of hearing that must be held. Indeed, GML §207-c by its terms is completely silent in this respect and the relevant case law establishes only the minimum constitutional due process protections which must be afforded an employee, such as notice and an opportunity to be heard.

The County's observance of those constitutional due process minimums, however, does not exempt it from a duty to comply with its separate obligation under the Act to bargain the terms and conditions of employment of its organized employees.^{5/} In this case, for example, CSEA may have preferred to have had the required hearing before an arbitrator who was selected mutually by the parties. The County's unilateral establishment and implementation of the hearing process in this case denied CSEA its statutory right to bargain the system by which its unit employees' wages and benefits will be determined.

Although in City of Schenectady^{6/} we concluded that the employer's unilateral imposition of a light duty and surgical requirement under GML §207-c did not violate the Act, we did so only on a finding that the Legislature intended to exempt an

^{4/}See, e.g., Hodella v. Town of Greenburgh, 73 A.D.2d 967 (2d Dep't 1980), motion for leave to appeal denied, 49 N.Y.2d 708 (1980).

^{5/}See, e.g., 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).

^{6/}Supra note 2.

employer from a duty to bargain those two particular requirements. Our conclusion was based upon the legislative scheme which we found evidenced in those two respects by the specification of mutual rights and obligations provided in GML §207-c and case law interpretations of that statute. We did not find any legislative scheme, however, with respect to several other GML §207-c procedures which had been promulgated unilaterally. As with those procedures which we held to be mandatorily negotiable in City of Schenectady, we find nothing in GML §207-c as written or interpreted to suggest that the Legislature intended to exempt an employer from a duty to bargain the hearing procedures by which an employee's eligibility for GML §207-c wages and benefits is determined.

For the reasons set forth above, the exceptions are denied and the ALJ's decision is affirmed.

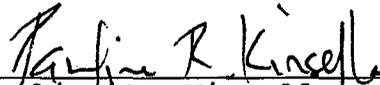
IT IS, THEREFORE, ORDERED that the County:

1. Rescind and cease implementation of the hearing procedure used to determine Robert Fisher's eligibility for benefits under GML §207-c.
2. Restore to Robert Fisher any salary or benefits lost as a result of the at-issue hearing procedure, with interest at the currently prevailing maximum legal rate.
3. Remove immediately and destroy any documents compiled pursuant to the at-issue hearing procedure which are

kept by the County or its agents for any personnel or employment-related purpose.

4. Sign and post notice in the form attached at all locations where the County or its agents ordinarily post informational notices to employees in CSEA's unit.

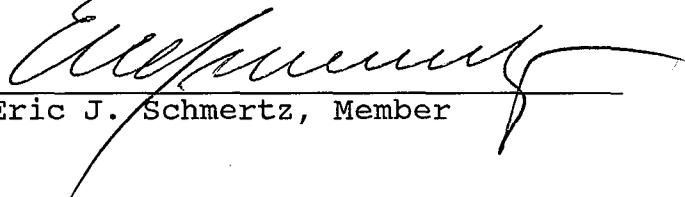
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify the employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Greene County Local 820, that the County:

1. Will rescind and cease implementation of the hearing procedure used to determine Robert Fisher's eligibility for benefits under General Municipal Law (GML) §207-c.
2. Will restore to Robert Fisher any salary or benefits lost as a result of the GML §207-c eligibility hearing, with interest at the currently prevailing maximum legal rate.
3. Will remove immediately and destroy any documents compiled pursuant to Robert Fisher's GML §207-c eligibility hearing which are kept by the County or its agents for any personnel or employment-related purpose.

..... COUNTY OF GREENE

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

UNIFORM FIREFIGHTERS OF COHOES,
LOCAL 2526, IAFF, AFL-CIO,

Charging Party,

-and-

CASE NOS. U-12114
and U-12436

CITY OF COHOES,

Respondent.

GRASSO AND GRASSO (KATHLEEN DeCATALDO of counsel),
for Charging Party

WERTIME, ROBINSON, RIES & VAN ULLEN, P.C. (STEPHEN J.
VAN ULLEN of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the City of Cohoes (City) to a decision by an Administrative Law Judge (ALJ) on two related charges filed against the City by the Uniform Firefighters of Cohoes, Local 2526, IAFF, AFL-CIO (Union). The Union alleges in its first charge that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it ordered unit employees to submit to tuberculosis testing under procedures determined unilaterally by the City and refused to negotiate the impact of that order. The Union alleges in its second charge that the City again violated §209-a.1(d) of the Act when it failed to negotiate the procedures regarding the unit

employees who were required to submit to follow-up tuberculosis testing.

After hearing, the ALJ held that the City violated §209-a.1(d) by imposing unilaterally the procedures for the tuberculosis testing^{1/} and by threatening the unit employees with discipline for noncompliance with the orders to submit to testing. The charges were dismissed in all other respects.

The City argues in its exceptions that the ALJ erred as a matter of law in finding any violation of the Act because its refusal to negotiate the tuberculosis testing procedures was not "deliberate" as required by §209-a.1(d). Rather, the City contends that its orders to unit employees to undergo testing were, at most, a product of a misunderstanding of the County Health Department's requirements. The City also claims that the ALJ erred factually in finding that it chose the method for the tuberculosis testing and threatened employees with discipline for noncompliance with the orders to submit to that testing. The City ends its exceptions with an argument that the ALJ's decision violates public policy and that the make-whole remedial order is inappropriate as applied to off-duty employees who were required to undergo the testing.

^{1/}The Union conceded before the ALJ the power of the County Health Department to order the testing and the City's duty to comply with that order. The ALJ dismissed the charges to whatever extent the Union may have challenged the testing requirement itself and no exceptions have been filed to this aspect of the ALJ's decision.

The Union in its response to the City's exceptions argues that the ALJ's conclusions of law are correct and that the findings of fact are consistent with the record and, therefore, that the decision should be affirmed.

In support of its argument that the charges should have been dismissed in their entirety because its refusal to bargain was not deliberate as required by §209-a.1 of the Act,^{2/} the City alleges that in ordering the tuberculosis testing, it was only doing what it believed had been required of it by the County Department of Health. The City's argument in this respect fails for two reasons.

First, if the action in issue is knowingly undertaken, it constitutes a deliberate action within the meaning of §209-a.1 of the Act.^{3/} An employer may commit an improper practice without a specific intent to do so if the actions it takes are necessarily inconsistent with its statutory obligations and the statutory rights of its employees.^{4/} In this case, the City's unilateral establishment of the testing procedures bypassed the bargaining process, whether or not it intended to disavow its bargaining obligation.

^{2/}The defined employer improper practices in §209-a.1 are all preceded by the following introductory language: "It shall be an improper practice for a public employer or its agents deliberately . . ." (emphasis added).

^{3/}See State of New York (Diaz), 18 PERB ¶3047 (1985), rev'd sub nom. Civil Service Employees Ass'n v. PERB, 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); Cohoes City School Dist., 12 PERB ¶3065 (1979).

^{4/}See State of New York, 10 PERB ¶3108 (1977).

Second, the record shows that the City's Mayor knew from conversations with an official from the County Health Department that the tuberculosis testing required by the Health Department could be done in a number of different ways. Notwithstanding this information, unit employees were instructed by the City to report to their departments for testing at a particular day and hour. Therefore, it is clear on the facts presented that the City deliberately chose one particular time and method of tuberculosis testing over others which were equally acceptable to the County Health Department.

We also agree with the ALJ's finding that the unit employees reasonably understood that they would be subject to discipline if they refused to submit to the testing as ordered by the City. The paramilitary nature of the fire fighters' employment and the means by which they were ordered to submit to the testing^{5/} persuade us that they could not reasonably have reached any other conclusion about a refusal to comply with the order. We add, however, that notwithstanding the City's argument to the contrary, we would reach the same conclusion about the negotiability of the testing procedures and the City's failure to meet its bargaining duty with respect thereto, even if there were no disciplinary component to the testing requirement. As the ALJ

^{5/}Departmental correspondence, issued by the City's Mayor to all department heads, was posted on the fire department's bulletin board, notice was added to the employees' pay envelopes, and at least one employee was informed by the Fire Chief's office of his obligation to submit to testing.

noted in her decision, the City's unilateral choice of testing procedures implicated many of the employees' terms and conditions of employment apart from the grounds for the imposition of discipline.

Our comments regarding the City's particularized exceptions are equally dispositive of its public policy arguments. There is no prescribed procedure for the tuberculosis testing required by the County Health Department. Bargaining about the choice of testing procedures and the timing of that testing would not have exempted the employees from an obligation to be tested nor would the bargaining otherwise have interfered with the City's effort to cooperate with the County Health Department in the accomplishment of a public health goal.

The City last argues that the ALJ's remedial order is inappropriate to the extent that it requires the City to pay any unit employees who were required to report for the testing when they were off-duty. The basis for the City's argument in this respect is that the time the off-duty employees spent in the testing was not in furtherance of the City's business. This claim is irrelevant, however, even if true. Regardless of its reasons, the City, as employer and through its control of the employment relationship, ordered employees to report for testing at a particular date and time. It is most appropriate that the City compensate those employees who were compelled to give up their personal time to comply with the City's order for what became, in effect, work time. Ordering pay for that time,

therefore, does not represent any windfall to the affected unit employees. We have, however, deleted the cease and desist order from the ALJ's remedy because the testing has been implemented and the circumstances under which it was ordered appear to us to have been unique. There being no objection raised to the requirement to be tested, the make-whole order adequately remedies the City's refusal to bargain the testing procedures.

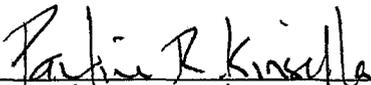
For the reasons set forth above, the City's exceptions are denied and the ALJ's decision is affirmed except as we have modified the remedy.

IT IS, THEREFORE, ORDERED that the City:

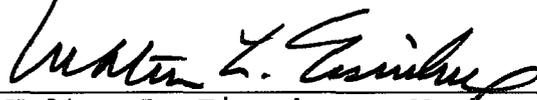
1. Pay, at their then prevailing rate, those unit employees who, pursuant to City orders posted in October, 1990, and January and February, 1991, reported for tuberculosis testing and/or follow-up testing on off-duty hours for which they have not already been compensated, plus the maximum legal rate of interest.
2. Restore any time and/or wages lost to any unit employees who were disciplined for failing to follow the procedure imposed by the City for tuberculosis testing.
3. Expunge any and all records of disciplinary action taken against any unit employee for failing to follow the procedure imposed by the City for tuberculosis testing.

4. Sign and post the attached notice at all locations ordinarily used to post notices of information to unit employees.

DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Uniform Firefighters of Cohoes, Local 2526, IAFF, AFL-CIO that the City of Cohoes (City) will:

1. Pay, at their then prevailing rate, those unit employees who, pursuant to City orders posted in October, 1990, and January and February, 1991, reported for tuberculosis testing and/or follow-up testing on off-duty hours, for which they have not already been compensated, plus the maximum legal rate of interest.
2. Restore time and/or wages lost to any unit employees who were disciplined for failing to follow the procedure imposed by the City for tuberculosis testing.
3. Expunge any and all records of disciplinary action taken against any unit employee for failing to follow the procedure imposed by the City for tuberculosis testing.

City of Cohoes

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

**ONONDAGA-CORTLAND-MADISON BOCES
FEDERATION OF TEACHERS, NYSUT,
AFT #2897,**

Charging Party,

-and-

CASE NO. U-12308

ONONDAGA-CORTLAND-MADISON BOCES,

Respondent.

HELEN W. BEALE, for Charging Party

REBECCA STREIB, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions of the Onondaga-Cortland-Madison BOCES Federation of Teachers, NYSUT, AFT #2897 (Federation) and cross-exceptions of the Onondaga-Cortland-Madison Board of Cooperative Educational Services (BOCES) to a decision by an Administrative Law Judge (ALJ). The Federation's charge centers upon BOCES' actions with respect to approximately eighty employees employed in the titles of adult education teacher, teacher assistant and other related professional titles which we added to the Federation's existing unit in April 1990.^{1/}

^{1/}23 PERB ¶3014 (1990). The Federation was certified by us as the representative for this unit on June 21, 1990. 23 PERB ¶3000.21 (1990).

In relevant part, the ALJ dismissed the Federation's allegations that BOCES violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) by refusing to deduct agency fee payments from the employees who were added to the unit in 1990, by making repeated objections to the presence and participation of one of the members of the Federation's negotiating team and by making onerous bargaining demands. The Federation's exceptions are directed to these aspects of the ALJ's decision. The ALJ held, however, that BOCES violated §209-a.1(a) and (c) of the Act when, on and after November 1, 1990, it withheld a wage increase from the newly accreted unit employees^{2/} and that it violated §209-a.1(d) by proposing during negotiations that the accreted employees be excluded from the unit. BOCES' exceptions are directed to these latter two aspects of the ALJ's decision and we turn to these first.

BOCES' exceptions to the ALJ's decision on the discontinuation of the wage increases are to both his conclusions of law and his findings of fact.

The first aspect of BOCES' exceptions necessitates a consideration of BOCES' obligation to maintain its compensation system after the Federation was certified. Under that system, the employees in issue had received annual wage increases

^{2/}The ALJ dismissed an allegation that the BOCES' action in this respect violated §209-a.1(d) of the Act. As no exceptions have been filed to the ALJ's dismissal of that allegation, we have no occasion to consider that part of the ALJ's decision.

pursuant to a performance review. BOCES argues that it was allowed, indeed required, to abandon its compensation system to permit a new wage system to be established for the accreted employees through collective negotiations. In this, BOCES misconstrues its duties under the Act. Any negotiations required over the at-issue employees' wages and other terms and conditions of employment begin with and proceed from their existing wage and benefit base. An employer's obligation to maintain this status quo starts on the date it is presented with a bona fide representation question and continues to the date a wage and benefit package is fixed by collective negotiations with the recognized or certified bargaining agent. BOCES concedes the existence of this status quo obligation during the processing of the Federation's representation petition.^{3/} With this concession, BOCES' argument that the obligation disappears on recognition or certification of a bargaining agent is insupportable. The employees' right to choose whether to be represented by a union without interference or discrimination becomes meaningless if, as BOCES argues, their existing wages and benefits were permitted or required to be discontinued once they elected to be represented by a union.

Contrary to BOCES' argument, this status quo obligation, which is necessary to preserve the employees' fundamental right to choose union representation, does not eviscerate the parties'

^{3/}See Hudson Valley Community College, 18 PERB ¶13057 (1985).

duty to bargain or the statutory policies underlying that bargaining. To say that negotiations generally start from an established base does not mean that they necessarily end there. Those wages and other terms and conditions of employment which must be negotiated on demand may be improved, diminished or left unchanged. BOCES, for example, may propose that pay increases should be something less than the customary annual amount or that the merit-based system of compensation should be ended completely.

BOCES' argument that it was in a "no win" situation because the Federation would have brought an improper practice charge against it even if it had continued the existing compensation plan is without merit. If BOCES had continued its wage policy after the Federation's certification, any charge objecting to the continuation of that policy would have been dismissed because BOCES would have honored its statutory obligation by maintaining the status quo.

BOCES also argues that the record does not support the ALJ's finding that those employees who were rated satisfactory would have received a \$1.00 per hour wage increase. Rather, BOCES argues that its wage policy for unrepresented employees had been discretionary, such that the employees might have received no increase at all or an increase in an amount less than \$1.00.

The ALJ's finding that the wage increases had "routinely been one dollar per hour" rested on the unrebutted testimony of

Kathleen Stanton, who was one of the employees who had been added to the unit in 1990.^{4/} Having reviewed the record, we, too, find that the employees in question received under BOCES' existing wage policy increases pursuant to a performance review and that those increases were, in the past, always in the amount of \$1.00 per hour. BOCES' wage policy, adopted in September 1985 and revised in June 1987 in undefined respects, states that pay increases "will be based on program budget, years of service and job performance" On this record, however, it appears that for approximately five years and without regard to circumstance, employees have received \$1.00 per hour wage increases if rated satisfactory. There is no claim or evidence to suggest that BOCES would not again have granted a \$1.00 increase had it not been for the bargaining order which derived from the employees' decision to unionize. To the contrary, BOCES stipulated that it did not "issue the hourly increases because negotiations had begun as of November 1st". In light of this record evidence, we have no basis to separate the amount of the wage increases from the salary review which led to them. We, therefore, conclude, as did the ALJ, that the at-issue employees would have received a \$1.00 per hour wage increase had they not organized and that BOCES' refusal to grant that \$1.00 per hour increase violated §209-a.1(a) and (c) of the Act.

^{4/}Stanton left her employment with the BOCES in June 1990 to take a position with a different employer.

BOCES argues under its second exception that the ALJ erred as a matter of law in finding that it violated its bargaining obligation by seeking during negotiations to change the scope of the certified unit. A proposal to change the scope of a bargaining unit is a nonmandatory subject of negotiation.^{5/} We have held, however, that a party does not violate its bargaining obligation until it presses a nonmandatory subject to the point of insistence.^{6/} At the time the Federation's charge was filed, the parties were not at impasse. While recognizing our decisions in this respect, the ALJ concluded that BOCES' proposal violated its bargaining obligation because its demand to alter the unit rendered PERB's earlier certification proceedings meaningless.

The ALJ carved out an exception to our cases on the improper insistence on nonmandatory subjects of negotiation for those demands relating to the composition of a bargaining unit. Although we fully recognize that negotiations about terms and conditions of employment may be made more difficult by permitting a party to raise a demand to change the unit definition, whatever temporary disruption in the bargaining process is caused by that type of demand is not greater than that caused by allowing negotiations for a time about many other nonmandatory subjects. We are not persuaded that our policy of encouraging the negotiation of nonmandatory subjects to the point of insistence

^{5/}City of Binghamton, 10 PERB ¶3092 (1977).

^{6/}Monroe-Woodbury Teachers Ass'n, 10 PERB ¶3029 (1977).

is ill-advised. Moreover, we cannot discern any basis upon which to differentiate among the many circumstances in which a negotiating unit may have been established^{7/} or the many types of nonmandatory subjects as the ALJ's analysis would require. Therefore, consistent with our earlier decisions on this issue, the ALJ's decision in this respect must be reversed.

We turn now to a consideration of the Federation's exceptions.

The ALJ dismissed that part of the charge relating to BOCES' refusal to deduct and transmit agency shop fee payments from the nonmember employees who were added to the unit in 1990 because he concluded that the authorization to negotiate an agency shop fee in §208.3(b) of the Act did not create any rights protected by the improper practice provisions of the Act. Rather, he held that §208.3(b) merely made mandatorily negotiable what was once a prohibited subject of negotiation because of its inherent interference with §202 rights.^{8/} We disagree and reverse in this respect.

The agency shop fee provisions in the Act are more than just an authorization for involuntary monetary deductions from the salary or wages of the nonmembers of a union which would

^{7/}It is not clear to us, for example, whether the ALJ would have reached the same conclusion if the unit had been fashioned by agreement between the parties or if the certification had issued without a hearing.

^{8/}Farrigan v. Helsby, 42 A.D.2d 265, 6 PERB ¶7009 (3d Dep't 1973).

otherwise violate the Act. The agency shop fee provisions in §208.3 of the Act are part of a statutory system of union security arrangements which the Legislature considered were necessary and appropriate to the financial strength of the bargaining agent. Employees have the statutory right to representation by a bargaining agent of their choice. A union's ability to effectively represent its unit employees is unquestionably compromised by an employer's withholding of monies which the Act currently requires be deducted and transmitted, in this case, on negotiation of an agency shop fee provision.^{2/} Any adverse effect upon the union caused by the withholding of fees the Act required be deducted necessarily affects the representation the union is able to give the unit and, thereby, improperly interferes with the right of all unit employees to be represented by that union.

Our conclusion that an employer violates §209-a.1(a) of the Act by refusing to deduct agency shop fee monies in accordance with its agreement is also consistent with the legislative scheme underlying the deduction of agency fee monies. The improper practice provisions of the Act may be and have been invoked regularly by individuals who object to the deduction of agency fees from their salary or wages. Having required the deduction

^{2/}Employees in State negotiating units are subject to a mandatory agency shop fee deduction. Act §208.3(a). Legislation is currently pending, however, which would make the agency shop fee deduction mandatory for employees of local governments.

and transmittal of agency fees once negotiated, the Legislature could not reasonably have intended that the enforcement mechanism available to objecting individuals would be denied to the unions objecting to an employer's allegedly improper withholding of such monies.

It remains to be decided, however, whether the at-issue employees are, in fact, covered by the agency shop fee provision in the parties' contract. BOCES argues that they are not because they were added to the unit after the agency shop clause was negotiated in 1989. We find no merit in this argument as a matter of law or fact. Nothing in the Act necessarily renders all existing contract terms inapplicable as a matter of law to all employees who become members of a bargaining unit after the date the contract is negotiated and BOCES offers no facts in support of its claim that the parties intended when the contract was negotiated to exclude future unit employees from the effects of the agency shop clause. The agency shop clause in the parties' contract applies to "each bargaining unit employee who is not a member of the Federation. . . ." The clause as written permits by its terms no exceptions. Rather, it is a benefit/obligation dependent simply upon a person's dual status, i.e., nonunion member/unit employee.

Our interpretation of the parties' contract is further consistent with the purposes served by an agency shop fee deduction. The payments exacted from the nonmember unit

employees are for services required to be rendered by the bargaining agent on their behalf. That duty of representation becomes a union obligation when the nonmember employee is included in the negotiating unit and continues for so long as the person remains a member of the unit. It would be unreasonable to conclude from the language of the parties' contract that they intended the Federation would be burdened by the service obligation to nonmember employees but not benefitted by their payment obligation. Had the parties intended this result, they could have easily drafted the clause to apply only to those employees who were employed at the date the contract was executed. Given the language of the contract, the general purposes of an agency shop fee provision, and the absence of affirmative evidence of a contrary intent, we find that the parties' agency shop fee clause is applicable to all unit employees, including those who were added to the unit in 1990.^{10/}

As BOCES' refusal to deduct and transmit agency fees from the nonmembers among the accreted employees is a violation of §209-a.1(a) of the Act, BOCES is mistaken in its argument that we

^{10/}In reaching this conclusion we are aware that by letter decision dated March 25, 1991, Supreme Court, Onondaga County, stayed the Federation's demand for arbitration on a grievance involving the BOCES' refusal to deduct the agency fees from the accreted employees. The Court stayed arbitration on the ground that there was no valid agreement to arbitrate the grievance. Thus, its decision is not relevant to the disposition of this charge because the issues before us are not the same as those presented to the Court.

have no jurisdiction over this aspect of the Federation's charge because its duties are contractual in nature. Section 205.5(d) of the Act provides that we do not have jurisdiction over violations of contract which do not otherwise constitute an improper practice. BOCES' obligation to deduct and transmit the agency fees is, in part, contractual, but breach of that particular contractual obligation falls within our jurisdiction because of its necessary interference with the unit employees' fundamental statutory rights.

Our footnoted statement in the representation proceeding involving the at-issue employees that "negotiations for the existing unit are very unlikely to have contemplated that new employees would in the future be covered"^{11/} is not inconsistent with our decision in this case. Our statement in the earlier representation proceeding was made only in response to BOCES' request for the issuance of a bargaining order. We did not have before us at that time any issue as to whether any particular contract term applied to persons who were added to the unit after the contract was negotiated.

The Federation's remaining exceptions are denied. BOCES' statements during negotiations in opposition to Stanton's being a member of the Federation's negotiating team did not violate the Act because they were neither threatening nor coercive with

^{11/}Onondaga-Cortland-Madison BOCES, 23 PERB ¶3014, at 3031 n.8 (1990).

respect to the exercise of employee rights nor did they establish a refusal to bargain in good faith. We reach the same conclusion with respect to the Federation's allegations which are based largely upon the alleged "onerous" nature of BOCES' bargaining proposals. Several of BOCES' proposals called for a reduction in the accreted employees' existing benefits. The Federation also alleges that BOCES' wage proposal was, at best, underdeveloped even by the date the parties reached impasse. However, the ALJ concluded that BOCES' proposals were not made in bad faith or in an effort to preclude the parties from reaching an agreement. Having reviewed the record and the parties' arguments, we find no basis on which to disturb the ALJ's determination in this respect.

Our findings that BOCES violated the Act by discontinuing its annual wage reviews resulting in the denial of \$1.00 per hour wage increases for the employees who were added to the Federation's unit in 1990 and by refusing to deduct and transmit agency shop fees from the nonmembers of the Federation among those employees necessitate a consideration of the appropriate remedy. In that respect, we have been apprised by the parties that in May 1992, they reached a contract covering the employees who were accreted to the unit. The contract was made effective from July 1, 1990 through June 30, 1992, and it covers both wages and agency fees for the at-issue employees. Remedial relief with respect to these two issues has been rendered

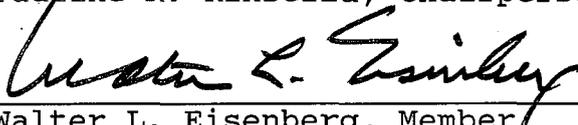
unnecessary by the agreements the parties themselves have reached. In that circumstance, we find that a posting of notice of violation will fully effectuate the policies of the Act.^{12/}

IT IS, THEREFORE, ORDERED that BOCES post notice in the form attached at all locations ordinarily used to post notices of information to employees in the Federation's unit.

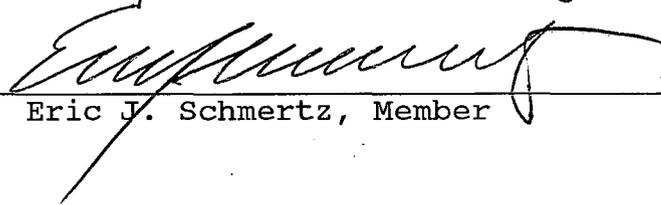
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{12/}See Arlington Cent. School Dist., 25 PERB ¶3001 (1992) (appeal pending).

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 Onondaga-Cortland-Madison BOCES Federation of Teachers, NYSUT, AFT #2897 (Federation) that the Onondaga-Cortland-Madison BOCES has been found by the Board to have violated §209-a.1(a) and (c) of the Act by discontinuing its annual wage review resulting in the denial of \$1.00 per hour wage increases for certain employees who were added to the Federation's unit in 1990 and to have violated §209-a.1(a) of the Act by refusing to deduct and transmit agency shop fees from the nonmembers of the Federation among those employees who were added to the Federation's unit in 1990.

.....Onondaga-Cortland-Madison BOCES.....

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.

3A-06/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL UNION NO. 445, IBT,

Petitioner,

-and-

CASE NO. C-3922

TOWN OF CHESTER,

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,

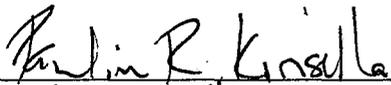
IT IS HEREBY CERTIFIED that the Teamsters Local Union No. 445, IBT has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Mechanic, MEO, HEO, water plant operator and working foreman.

Excluded: Managerial and confidential employees and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Town of Chester. 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.

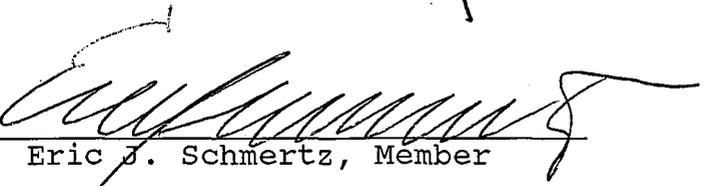
DATED: June 30, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member