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State of New York Public Employment Relations Board Decisions from August 25, 1992

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from August 25, 1992

Keywords

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Comments

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2A-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 1170, COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3449

TOWN OF GREECE,

Employer.

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA
(ROBERT J. REDEN of counsel), for Petitioner

HARTER, SECREST & EMERY (PETER G. SMITH and
MARGARET C. CALLANAN of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions of the Town of Greece (Town) and Local 1170, Communications Workers of America, AFL-CIO (CWA) to a decision by the Director of Public Employment Practices and Representation (Director).

CWA seeks to represent a unit consisting of the following titles: Town Clerk, Receiver of Taxes, Fire Marshal, Director of Youth Services, Building Inspector, Assessor, Library Director, and Director of Parks and Recreation.

The Director held that the Receiver of Taxes, an elected official of the Town, is not a public employee covered by the Public Employees' Fair Employment Act (Act) because the incumbent of an elected office does not hold a position "by appointment or employment in the service of a public employer" as required by

§201.7(a) of the Act. CWA excepts to this aspect of the Director's decision, which the Town endorses as the correct interpretation of the Act. The Director held that the incumbents of the other titles are covered employees, rejecting the Town's arguments that they are either managerial or confidential within the meaning of §201.7(a) of the Act. The Town excepts to the Director's decision in these respects, which CWA argues should be affirmed.

In its exceptions, the Town alleges that the positions of Director of Parks and Recreation and Director of Youth Services were abolished in 1992, after the record was closed and after the parties had filed their briefs with the Director. The functions of the departments headed by those titles were allegedly transferred to a new Department of Human Services headed by a Director of Human Services, which the Town submits is not a position in issue. CWA argues that the positions of Director of Parks and Recreation and Director of Youth Services should be considered vacant and included in its unit and it seeks a remand regarding the coverage and uniting of the Director of Human Services.

We believe that the issues raised in the above noted respects warrant a remand for further investigation. In the context of this representation proceeding, it is appropriate that we investigate, within reason, the limited new facts which bear upon the disposition of the representation questions and CWA's

possible certification.^{1/} A proper disposition of the representation questions in this case necessitates information as to whether the positions of Director of Parks and Recreation and Director of Youth Services have been abolished or merely left vacant. Information received in this respect may affect the definition of the appropriate bargaining unit. There is no record evidence regarding the duties of the Director of Human Services because the title did not exist when the petition was filed and the hearings were held. For that reason, and because the Director of Human Services is assertedly intended to replace the director positions which were covered by CWA's petition as filed, we hold that CWA's petition can be deemed amended to incorporate that latter-created title. Accordingly, information about that position is necessary to determine coverage and appropriate uniting.

Any decision we would issue in response to the parties' exceptions would not be dispositive of the representation questions, would not be final for purposes of appeal, nor could CWA be certified pursuant to it. Therefore, we would not expedite the processing of this case by reaching the parties' other exceptions at this time. In such circumstances, we believe there is no reason to issue an interim decision on those exceptions. The exceptions as filed, and such other exceptions

^{1/}See, e.g., Auburn Industrial Development Auth., 15 PERB ¶3139 (1982).

as may be filed pursuant to a decision on remand, may be raised to us at the appropriate later date.

For the reasons set forth above, IT IS ORDERED that the case is remanded to the Director for investigation of the issues raised since the close of the record regarding the three named director positions and for the preparation of such decision as is then appropriate.

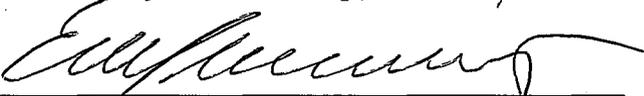
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2B-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SHERRILL POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-12251

CITY OF SHERRILL,

Respondent.

**DePERNO, KHANZADIAN & McGRATH (KAREN KHANZADIAN
of counsel), for Charging Party**

**HANCOCK & ESTABROOK (JOHN T. McCANN of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Sherrill to a decision by an Administrative Law Judge (ALJ) on a charge filed against the City by the Sherrill Police Benevolent Association (PBA). After hearing, the ALJ held that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally designated a hearing officer to hear the disciplinary charges which the City had instituted against a unit employee pursuant to Civil Service Law (CSL) §75.

The City argues in its exceptions that it did not make any change in the unit employees' terms and conditions of employment and that the PBA waived any right to bargain the designation of a CSL §75 hearing officer. The City also alleges that the ALJ made

certain factual errors which contributed to her allegedly erroneous conclusion of law. The PBA argues in response that the ALJ's decision is factually and legally correct in all material respects and should, therefore, be affirmed.

The ALJ properly treated this charge as a unilateral change case and it is in that context which we must review the ALJ's decision and the parties' arguments concerning it. For the reasons set forth below, we must reverse the ALJ's decision on the basis of the City's first exception.

CSL §75 prohibits the removal or discipline of certain civil service employees, including those in the PBA's unit, except for reasons of incompetency or misconduct "shown after a hearing". CSL §75 provides that the hearing "shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body"

No unit employee had ever been disciplined pursuant to CSL §75 or any other procedure until the hearing which precipitated the PBA's charge against the City. The City Manager, who is the removing authority for purposes of CSL §75, designated a local attorney to act as the CSL §75 hearing officer. The PBA objected to the City Manager's designation of a hearing officer and demanded negotiations on a procedure for the selection of a hearing officer. Despite the PBA's demand, the CSL §75 hearing proceeded before the City's designee, who recommended the employee's discharge.

The term and condition of employment in this case which is insulated from the City's unilateral change is the utilization of CSL §75 to define the grounds and procedures for the imposition of discipline. By designating a hearing officer as CSL §75 permits, the City maintained that term and condition of employment consistent with its statutory duty to bargain. The fact that it apparently had not been necessary previously to invoke CSL §75 does not give rise to a duty to bargain its invocation in a particular case. If we were to accept the ALJ's decision that the City's selection of a hearing officer in accordance with that statute was a mandatorily negotiable unilateral change, it would, as a matter of logic, equally prohibit the removing authority from serving as the CSL §75 hearing officer without prior negotiations with the PBA.

Our decision in this case is entirely consistent with our decision in Incorporated Village of Hempstead upon which the ALJ relied.^{1/} In that case, an allegation was made that the employer had a long established practice of appointing only hearing officers in CSL §75 cases such that its use of the removing authority to conduct a hearing arguably violated that practice. In such circumstances, the employees' term and condition of employment was a modified CSL §75 procedure. Had it not been for that alleged practice, we would have dismissed the

^{1/}19 PERB ¶3002 (1986), conf'd, 137 A.D.2d 378, 21 PERB ¶7013 (3d Dep't), motion for leave to appeal denied, 72 N.Y.2d 808, 21 PERB ¶7018 (1988).

charge in Incorporated Village of Hempstead, as our decision in that case specifically states.^{2/} Accordingly, we remanded the case to the ALJ to take evidence on the existence of the past practice.^{3/}

In this case, there is no practice which might be argued to have modified the statutory CSL §75 procedures and it is, therefore, those statutory procedures which constitute the employees' terms and conditions of employment with respect to disciplinary procedures. Until there is an agreement or an identifiable past practice modifying CSL §75,^{4/} it is the procedures in that statute which the employees are entitled to have maintained and the City is entitled to utilize. Therefore, the City's appointment and use of a hearing officer pursuant to CSL §75 maintained the employees' terms and conditions of employment and did not violate the Act.

For the reasons set forth above, the City's first exception is granted and the ALJ's decision is reversed.^{5/}

^{2/}19 PERB ¶3002 at 3005.

^{3/}On remand, the ALJ found that there was a consistent practice of using hearing officers and she found a violation of the Act on that basis. Incorporated Village of Hempstead, 22 PERB ¶4522 (1989).

^{4/}CSL §75 alternatives are mandatorily negotiable. See, e.g., Auburn Police Local 195 v. Helsby, 62 A.D.2d 12, 11 PERB ¶7003 (3d Dep't 1978), aff'd, 46 N.Y.2d 1034, 12 PERB ¶7006 (1979).

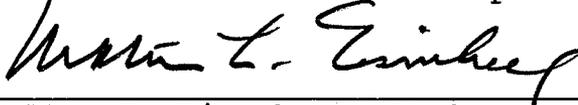
^{5/}In view of our holding, it is unnecessary for us to reach the City's remaining exceptions.

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

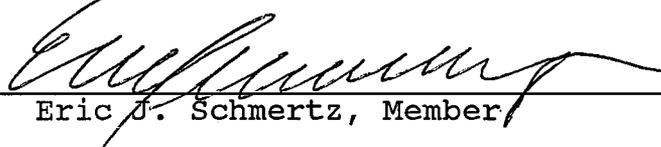
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

26-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RICHARD W. GLASHEEN,

CASE NO. DR-031

Upon a Petition For Declaratory Ruling

RICHARD W. GLASHEEN, pro se

RAINS & POGREBIN, P.C. (RICHARD K. ZUCKERMAN of counsel),
for COUNTY OF SUFFOLK and SUFFOLK COUNTY COMMUNITY COLLEGE

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Richard W. Glasheen to a decision by the Director of Public Employment Practices and Representation (Director).

In August 1991, Glasheen applied to the Director for a determination that the Suffolk County Community College (College) is his sole employer. Glasheen argued to the Director, and again in his exceptions, that Genesee Community College and County of Genesee,^{1/} in which we held a joint-employer relationship to exist as a matter of law between a community college and its county sponsor, was wrongly decided or is inapplicable to his employment at the College.

The Director treated Glasheen's application as a petition for a declaratory ruling pursuant to §210 of our Rules of

^{1/}24 PERB ¶3017 (1991).

Procedure (Rules).^{2/} He then dismissed the petition on the ground that the declaratory ruling procedures permit, in relevant part, only a limited determination as to whether the Act is applicable to a particular person, group or entity. The Director determined that the Act is applicable to Glasheen whether he is employed by the College, the County of Suffolk (County), or jointly by both. He dismissed the petition because he believed that the existing declaratory ruling procedures do not allow for a determination as to the specific identity of the public employer of a public employee.

Glasheen first argues that the Director erred^{3/} by treating his application as a petition for a declaratory ruling. Contrary to Glasheen's belief otherwise, §210 of the Rules is our only basis for the issuance of a declaratory ruling.^{4/} Had the Director not treated Glasheen's application as a petition for a declaratory ruling, there would have been no means by which his petition could have been processed. Therefore, no error can be ascribed to the Director for invoking the only procedure which enabled him to consider Glasheen's application.

^{2/}A declaratory ruling petition did not then have to be filed on a form available for that purpose. Section 210.1(a) of the Rules has since been amended to require the petition to be on a form prescribed by the Director.

^{3/}In their response, the County and the College urge affirmance of the Director's decision for the reasons he stated.

^{4/}Section 204 of the State Administrative Procedure Act authorizes, but does not require, an agency to issue declaratory rulings pursuant to the agency's prescribed rules.

We also hold that the Director properly dismissed Glasheen's petition. Section 210 of our Rules was intended, in relevant part, only to permit us to determine whether individuals are public employees or whether a particular entity is a public employer. In short, §210 of the Rules exists only to answer basic questions regarding the Act's coverage. Glasheen is admittedly a public employee of a public employer regardless of the specific identity of that public employer and he is unquestionably covered by the Act. Therefore, his petition does not raise any question as to the applicability of the Act to him within the meaning and intent of §210 of the Rules. We may not process his application further once having determined the Act is applicable to him. Therefore, we have no occasion to reach the rest of his exceptions, which are directed to his claim that the College is his sole employer.

Glasheen's application raises arguable questions as to whether our declaratory ruling procedures should be amended to encompass the type of more particularized coverage determination he requests. We recognize that there may be significant differences of opinion in that respect. This all the more persuades us that rather than effectively amend the Rules in the context of any particular case, where a change in the Rules is warranted, it should be done in accordance with the State

Administrative Procedure Act (APA)^{5/} under which all affected parties can be given an opportunity to comment.

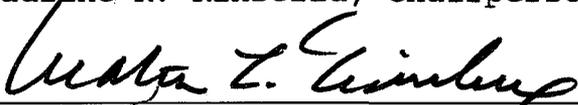
For the reasons set forth above, Glasheen's exceptions are denied and the Director's decision is affirmed.

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

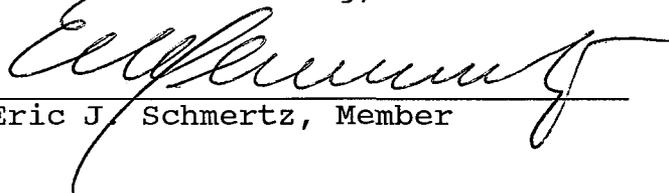
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{5/}Such a change arguably must be done under APA §202 (McKinney 1984 and Supp. 1992).

2D-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW BERLIN FACULTY ASSOCIATION, NYSUT,
AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12502

NEW BERLIN CENTRAL SCHOOL DISTRICT,

Respondent.

PETER D. BLOOD, for Charging Party

BOND, SCHOENECK & KING (R. DANIEL BORDONI of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New Berlin Central School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the New Berlin Faculty Association, NYSUT, AFT, AFL-CIO (Association). The Association alleges that the District violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed its practice of extending by one day the Memorial Day holiday if the snow or emergency day allotment for a school year had not been exhausted as of that holiday date.

On a stipulated record, the ALJ dismissed the §209-a.1(a) allegation,^{1/} but he found that the District had violated §209-a.1(d) of the Act as alleged. The ALJ held that the District's practice of extending the Memorial Day holiday was conditioned only upon there being unused snow or emergency days. That condition was satisfied in 1991 and, therefore, the District's refusal to continue its practice of giving unit employees the additional paid holiday, a mandatory subject of negotiation, violated its duty to bargain.

The District in its exceptions argues that the decision to grant the additional holiday was reserved to the board of education's discretion, which it exercised annually in conjunction with school calendar decisions. It also argues that the Association's charge concerns a school calendar decision which is not mandatorily negotiable.^{2/} Therefore, according to the District, there can be no violation of its duty to bargain even assuming we were to find a practice of granting an additional paid holiday to exist. It further argues that the charge is not within our jurisdiction under §205.5(d) of the Act,^{3/} that the Association waived any bargaining rights in relevant respect, and that the ALJ's remedial order is inappropriate.

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

^{2/}West Babylon Public Schools, 11 PERB ¶3012 (1978).

^{3/}That section of the Act deprives us of jurisdiction over alleged violations of an agreement not otherwise constituting an improper practice.

The Association argues in response that the ALJ's decision is correct and that his remedial order is appropriate.

Having reviewed the stipulated record and considered the parties' arguments, we affirm the ALJ's decision.

The Association satisfied its burden of proof regarding the holiday practice by showing that for eleven years prior to 1991, employees were given an additional holiday whenever there were unused snow or emergency days.^{4/} It was then the District's burden to establish that the annual grant of that paid holiday was further conditioned upon the exercise of the board of education's discretion. The only proof of the condition alleged to exist are the board of education's resolutions regarding the holiday which issued in only seven of the last eleven years. In four school years, including the one immediately preceding the year in issue, the practice continued without any resolution from the board of education. Under these circumstances, we do not consider the holiday extension to have been conditioned invariably upon an annual approval by the board of education.

The District's exception which is directed to the negotiability of the holiday is also without merit. Paid holidays are mandatorily negotiable subjects notwithstanding the

^{4/}State of New York (Division of Military and Naval Affairs), 24 PERB ¶3024 (1991) (appeal pending); Schuylerville Cent. School Dist., 14 PERB ¶3035 (1981).

ramifications those subjects may have upon the instructional calendar.^{5/}

As to the District's jurisdictional defense, there is nothing in the stipulated record to establish that the contract contains any provision which is a source of right to the Association in any relevant respect.^{6/} Therefore, there is no basis to hold that we are without jurisdiction over the charge. The stipulated record at most would support an arguable defense of waiver by agreement in that the parties' contract fixes the length of the work year at 185 days, which was not exceeded by the teachers working on May 24, 1991.^{7/} Consideration of that

^{5/}There may have been a compelling need for the teachers' presence as we recognized in similar circumstances in Cohoes City School Dist., 12 PERB ¶3113 (1979). In that case, however, unlike here, the employer had bargained with the union to impasse over the change in the teachers' workday. Had the District in this case elected to bargain its decision to deny the employees an extra holiday, it is conceivable that classes could have continued on May 24 with the teachers present even if there were no agreement with the Association on the holiday issue.

^{6/}County of Nassau, 23 PERB ¶3051 (1990).

^{7/}This particular contract language is recited in the District's answer which is part of the record. However, the contract itself is not part of the record and the parties' written stipulation does not refer to any contract provisions. The ALJ's letter to the parties which establishes the record states that a decision will issue on the facts "as set forth in your stipulation." We assume for purposes of this appeal that those portions of the Association's charge and the District's answer which were not modified by the parties' stipulation were incorporated into that stipulation. Therefore, we reach the waiver defense based upon the length of the work year. Article VI of the parties' contract, which is referred to in the District's brief on appeal, cannot, however, be considered part of the record on any theory. Therefore, we do not consider any arguments which are based on that contract provision.

waiver defense lies plainly within our jurisdiction.

In that respect, the District argues that our decision in Maine-Endwell Central School District (hereafter Maine-Endwell)^{8/} requires the dismissal of the charge. We disagree. In affirming the ALJ's decision in Maine-Endwell,^{9/} we held only that a unilateral increase in the length of class periods did not violate the Act because that increase in instructional work time was within the limit of the workday as fixed by the parties' contract.

The District argues that Maine-Endwell applies in this case because the unit employees were not worked beyond the contract's maximum 185 days. The District's interpretation of Maine-Endwell is incorrect because it would deny a union any right to bargain any issue associated with the length of the work year. Maine-Endwell, properly construed, does not give the District the right to unilaterally abolish a particular paid holiday which has been observed for years. The District's obtained right to have its employees work a specific number of days of work within a year does not also give it the unilateral right to rescind a long-standing paid holiday. The District's right is to require a maximum number of days of work by its employees in a year, not to control the period within which the maximum is reached through a manipulation or cancellation of observed holidays.

^{8/}15 PERB ¶3025 (1982).

^{9/}14 PERB ¶4625 (1981).

We do not reach any of the District's arguments regarding its impact bargaining obligations because the Association's charge rests on a unilateral change in a noncontractual practice, not a refusal to bargain the impact of the change pursuant to demand.

Having held that the decision to deny unit employees the paid holiday they had enjoyed for years violated the District's duty to bargain, we turn to a consideration of the ALJ's remedy. The ALJ ordered restoration of the practice and payment to the employees of one extra day's pay for the day they were required to work. The Association was not required to prove any damages, because we do not require such proof in our proceedings. In any event, the damages in this case are self-evident and certain. Although the unit employees were paid for the day they were required to work, it is appropriate that they be paid extra for that day because they would have been paid for the holiday without working. Restoration of the status quo is equally appropriate. The order restoring the holiday practice does not prevent the District from setting or changing a school calendar in accordance with its managerial prerogatives.

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

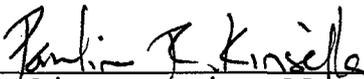
IT IS, THEREFORE, ORDERED that the District:

1. Forthwith pay any unit employee who worked on Friday before the Memorial Day holiday in 1991, the equivalent of one additional day's pay at the

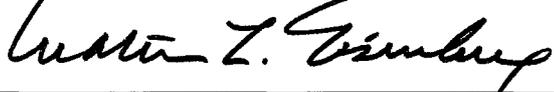
employee's applicable rate for the day, with interest thereon at the maximum legal rate.

2. Forthwith restore for unit employees its prior practice with respect to extending the Memorial Day holiday by one day.
3. Sign and post the attached notice at all locations normally used to communicate with unit employees.

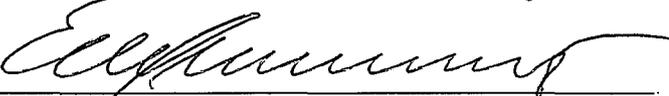
DATED: August 25, 1992
Albany, New York



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 represented by the New Berlin Faculty Association, NYSUT, AFT, AFL-CIO, that the New Berlin Central School District will:

1. Forthwith pay any unit employee who worked on Friday before the Memorial Day holiday in 1991, the equivalent of one additional day's pay at the employee's applicable rate for the day, with interest thereon at the maximum legal rate.
2. Forthwith restore for unit employees its prior practice with respect to extending the Memorial Day holiday by one day.

NEW BERLIN CENTRAL SCHOOL DISTRICT

Dated.....

By.....
(Representative) (Title)

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

2E-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUTCHESS COUNTY BOCES FACULTY ASSOCIATION,

Petitioner,

-and-

CASE NO. CP-246

DUTCHESS COUNTY BOARD OF COOPERATIVE
EDUCATIONAL SERVICES,

Employer.

ROBERT D. CLEARFIELD, GENERAL COUNSEL (HAROLD G. BEYER, JR.,
of counsel), for Petitioner

ANDERSON, BANKS, CURRAN & DONOGHUE (JOHN M. DONOGHUE of
counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Dutchess County Board of Cooperative Educational Services (BOCES) to a decision by the Director of Public Employment Practices and Representation (Director). The Director placed teaching assistants into the unit represented by the Dutchess County BOCES Faculty Association (Association) on a finding that the teaching assistants had a substantial community of interest with the teachers and the other allied professional personnel in the Association's unit, notwithstanding the teachers' role in evaluating the teaching assistants' job performance.

BOCES' main argument on appeal is that the teachers' evaluation of the teaching assistants creates both a potential

and actual conflicts of interest so great as to preclude the unit placement made by the Director. BOCES also argues that the teaching assistants do not share a community of interest with the other unit employees sufficient to warrant their placement in the Association's existing unit.

The Association argues in its response that the Director was correct in concluding that the teaching assistants have a community of interest with others in the Association's unit at least as great as that shared by the teacher aides who have been in the unit for many years.^{1/} The Association also argues that the teachers' evaluation of the teaching assistants poses no actual or potential conflicts sufficient to preclude the placement ordered by the Director.

Having reviewed the record and the parties' briefs and having heard oral argument, we affirm the Director's decision.

BOCES contends that no unit can be found most appropriate which includes both evaluators and evaluatees because that uniting inherently poses too great a potential for conflicts of interest. We reject that per se exclusion. The argument merely recasts a per se supervisory exclusion rule which, as the Director correctly observed, the Board rejected in one of its very first uniting cases.^{2/} The Board has repeatedly stressed

^{1/}Teaching assistants are instructional personnel; teacher aides are not.

^{2/}New York State Div. of State Police, 1 PERB ¶1399.32 (1968).

since that decision that it is the nature and degree of the supervisory authority actually being exercised by a supervisor over a subordinate, not a supervisory status itself, that is relevant to the determination of the appropriate unit.^{3/} The Director considered the teachers' role in the evaluation of the teaching assistants in the context of one of his recent decisions involving teaching assistants.^{4/} He concluded that the teachers merely provide others in BOCES' administration, who are responsible for employment decisions, with information about the teaching assistants in five designated areas.^{5/} The Director held that the teachers and teaching assistants have a close, cooperative, professional relationship, not characterized by the type of traditional supervisor-subordinate conflicts which might warrant exclusion of the teaching assistants from the Association's unit.

We consider the Director to have properly characterized the teachers' and the teaching assistants' relationship and hold, as did he, that it is not one which is either inherently or factually incompatible with the assistants being placed into the

^{3/}See Uniondale Union Free School Dist., 21 PERB ¶3060 (1988).

^{4/}Clinton-Essex-Warren-Washington BOCES, 24 PERB ¶4030 (1991).

^{5/}Teachers are asked to assess the assistants' rapport, poise, knowledge, teaching ability and control of student behavior. There is a dispute as to the extent to which the teachers are actually asked these questions. We need not resolve that dispute and will assume for purposes of this decision that all teachers who are assigned a teaching assistant are asked for input in each of these areas.

same unit as the teachers. We do not share BOCES' view that it is unit placement, in and of itself, that would inhibit a teacher's objective evaluation of a teaching assistant. It is the close working relationship between the teacher and his or her assistant which is likely to influence the teacher's evaluation, a factor entirely independent of any particular unit configuration.

We have reviewed each of the decisions which BOCES has relied upon in its brief and during oral argument before us and find them all to be readily distinguishable from this case. In each, there was a much broader range of supervisory functions being performed than in this case.^{6/} Arlington Central School District (hereafter Arlington),^{7/} the decision BOCES relies upon the most, is typical of the others which are equally inapposite. In Arlington, the Director determined that certain elementary teacher assistants to the principal should be placed in an administrative unit, not the teachers' unit. The teacher assistants in that case were not instructional teaching assistants as are the teaching assistants in this case. Rather, the incumbents of the at-issue positions in Arlington were former full-time or part-time administrators who continued to perform a

^{6/}See, e.g., Board of Educ. of the City School Dist. of the City of New York, 15 PERB ¶4074, aff'd, 15 PERB ¶3138 (1982); Mineola Union Free School Dist., 7 PERB ¶4033 (1974); East Meadow Union Free School Dist., 6 PERB ¶4027 (1973); City School Dist. of the City of White Plains, 1 PERB ¶433 (1968).

^{7/}10 PERB ¶4056 (1977).

full range of administrative functions in their teacher assistant title. Arlington did not rest upon a conflict of interest stemming from the teacher assistants' evaluation of teachers. Arlington simply represents the Director's determination in that case that the elementary teacher assistants to the principal had a greater community of interest with the administrators than with the teachers.

BOCES' community of interest arguments require little comment. The teaching assistants plainly have at least as much of a community of interest with the teachers and others in the Association's unit as do the teacher aides who have been in the Association's unit for many years. There are, as BOCES alleges, differences between teachers and teaching assistants in certain educational requirements, certain job assignments and supervisory hierarchy.^{8/} These, however, are no more significant to the teaching assistants' placement into the Association's unit than were the employment differences in the cases in which it was determined that teaching assistants were most appropriately grouped with teachers and other allied educational personnel.^{9/}

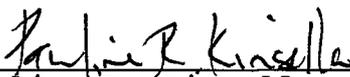
^{8/}Teaching assistants are not required under the Commissioner of Education's regulations to have a college degree and they do not participate, to the same degree as the teachers, in the development of educational programs for handicapped students. To the extent teaching assistants are supervised by teachers, the teaching assistants are subject to one more layer of supervision than are the teachers.

^{9/}Onondaga-Cortland-Madison BOCES, 23 PERB ¶3014 (1991); Whitesboro Cent. School Dist., 11 PERB ¶4043 (1978).

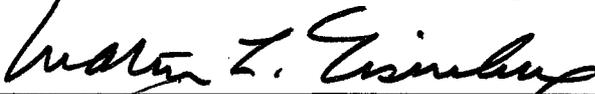
For the reasons set forth above, the Director's decision is affirmed and BOCES' exceptions are dismissed.

IT IS, THEREFORE, ORDERED that the position of teaching assistant be placed into the negotiating unit of BOCES' employees currently represented by the Association.

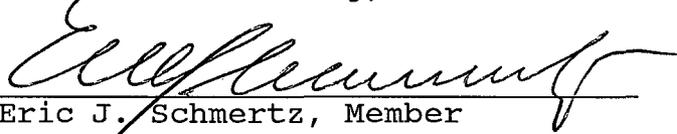
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2F-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORANGE COUNTY DEPUTY SHERIFFS
ASSOCIATION, INC.,

Petitioner,

-and-

CASE NO. CP-276

COUNTY OF ORANGE and SHERIFF OF
ORANGE COUNTY,

Employer.

WILSON & FRANZBLAU (KENNETH J. FRANZBLAU of counsel),
for Petitioner

PROSKAUER ROSE GOETZ & MENDELSON (KATHLEEN M. MCKENNA of
Counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Orange County Deputy Sheriffs Association, Inc. (OCDSA) to a decision by the Director of Public Employment Practices and Representation (Director) on a unit clarification petition. OCDSA seeks a determination that nondeputed personnel in the Sheriff's Department are not in its unit.

The Director declined to make the unit clarification requested by OCDSA, primarily on the ground that we had already decided the fact question raised by the petition in our decision on an improper practice charge OCDSA filed against the County of Orange and Sheriff of Orange County (County)^{1/}. In that

^{1/}County of Orange and Sheriff of Orange County, 25 PERB ¶3004 (1992).

decision, we found that OCDSA represented a unit of all Sheriff's Department personnel, not just the sworn deputy sheriffs as claimed by OCDSA. We held, therefore, that the County violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it recognized the County of Orange Correction Officers Benevolent Association (COBA) as the bargaining agent for OCDSA's unit. In a separate representation proceeding, we ordered an election in the existing unit.^{2/} The pendency of that election was an additional reason the Director declined to make any unit clarification. COBA received a majority of the valid votes cast in that election^{3/} and, accordingly, we have this date certified COBA as the bargaining agent for the existing unit.

OCDSA argues in its exceptions that the Director erred in declining to process its unit clarification petition, while the County responds that the Director's decision is correct. We affirm the Director's decision.

OCDSA's unit clarification petition raises only a fact question as to whether nondeputed personnel are included in its existing unit.^{4/} The petition was not filed for unit placement which would have raised a uniting question. As the Director

^{2/}County of Orange and Sheriff of Orange County, 25 PERB ¶3021 (1992).

^{3/}From 283 eligible voters, COBA received 192 votes, OCDSA received 49, and 3 votes were cast in favor of neither union.

^{4/}State of New York (Dep't of Audit and Control), 24 PERB ¶3019 (1991).

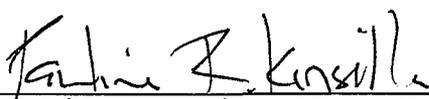
correctly observed, we have already decided the fact question raised by the unit clarification petition adversely to OCDSA in our earlier decision on its improper practice charge against the County.

Even were we to treat OCDSA's clarification petition as one for unit placement, we would dismiss it. As the name itself implies, a unit placement petition may not be used by a petitioner to fragment its own existing unit. Fragmentation of the type sought by OCDSA raises representation questions which are most appropriately decided within the context of our procedures for certification/decertification.

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

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

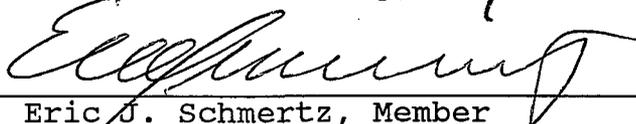
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

26-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED SCHOOL WORKERS OF MAHOPAC,

Charging Party,

-and-

CASE NO. U-12155

MAHOPAC CENTRAL SCHOOL DISTRICT,

Respondent.

RICHARD CASTELLITTO, for Charging Party

PLUNKETT AND JAFFE, P.C. (RONALD A. LONGO of counsel), for
Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United School Workers of Mahopac (USWOM) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed USWOM's charge against the Mahopac Central School District (District) which alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented a no-smoking policy.

The ALJ dismissed the charge, filed on December 20, 1990, as untimely. The smoking policy in issue, adopted on March 13, 1990, banned indoor smoking at least by April 1, 1990, and outdoor smoking effective September 1, 1990. The ALJ held that the occasions before September 1990 on which unit employees violated the indoor smoking ban without consequence, USWOM's alleged confusion about the meaning and application of the

smoking policy, and the contemporaneous contract negotiations, in which both parties had smoking proposals, did not affect the computation of the period within which USWOM could file a charge contesting the smoking policy. The ALJ established the beginning of the filing period at April 1, 1990, finding that USWOM's charge did not challenge the smoking ban as it applied to outdoor smoking effective September 1, 1990.

USWOM alleges in its exceptions that there was a more pervasive pattern of noncompliance with the smoking policy which was known to District agents than was related by the ALJ in his decision. USWOM would fix the implementation date of the indoor smoking ban in September 1990, at the earliest, when building principals made concerted efforts to prohibit employees from smoking. USWOM also alleges that it challenged the ban on outdoor smoking and that its December 20, 1990 charge is timely, at least insofar as it concerns the outdoor smoking ban. The District, in its response, argues that the ALJ's decision is a reasoned distillation of the record evidence, properly reflects the scope of the charge, and is a correct application of the controlling case law regarding timeliness.^{1/} It urges, therefore, that the ALJ's decision be affirmed.

The District's smoking policy as announced on March 13, 1990, was plain and clear by its terms. The indoor smoking ban,

^{1/}City of Oswego, 23 PERB ¶3007 (1990); Middle Country Teachers Ass'n (Werner), 21 PERB ¶3012 (1988).

if not effective immediately on promulgation of that policy, was implemented no later than April 1, 1990. Having reviewed the record, we do not agree with USWOM's contention that the instances of observed noncompliance with the indoor smoking ban, even as related by USWOM, were of a type or frequency which suggested that the effective date of the ban had been rescinded or postponed. Therefore, we hold that the ban on indoor smoking was effectively implemented no later than April 1, 1990, and, therefore, we affirm the ALJ's dismissal of that aspect of the charge as untimely.

Left for consideration is whether the charge encompassed an allegation regarding the outdoor smoking ban. As we read the charge as filed, it challenged both aspects of the District's March 13 smoking policy. USWOM may not, as the ALJ observed, have litigated the outdoor smoking ban at the hearing, but that affects only the adequacy of its proof of violation in that respect. It does not establish that USWOM intended to withdraw its allegations with respect to the second aspect of the District's smoking policy. Therefore, the case must be remanded to the ALJ for a decision on the timeliness of this aspect of the charge and, if timely, on its substantive merits.

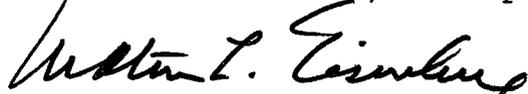
For the reasons set forth above, the ALJ's decision is affirmed as to that aspect of the charge regarding the ban on indoor smoking, USWOM's exceptions are denied in that respect, and the charge in that respect is hereby dismissed. That part of

the ALJ's decision finding the ban on outdoor smoking not to have been placed in issue is reversed, USWOM's exceptions in that respect are granted, and IT IS HEREBY ORDERED that the case is remanded to the ALJ for decision in accordance with the terms of our decision herein.

DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

24-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12246

STATE OF NEW YORK,

Respondent.

JOHN RYAN, for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (LAUREN DeSOLE 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 State of New York (State). After a hearing, the ALJ sustained in part and dismissed in part a charge filed against the State by the New York State Public Employees Federation, AFL-CIO (PEF). PEF alleges that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it closed several nursing stations and medical examination centers. The ALJ dismissed that part of the charge concerning the medical examination centers because he held that the decision to close those facilities was not mandatorily negotiable. No exceptions have been filed to this part of the ALJ's decision.

In contrast to the medical examination centers, which had existed to serve the State's managerial interests, the ALJ found

that the nursing stations offered employees two basic types of health service: on-site emergency medical treatment on a first responder basis and routine nursing care. He held that the State's abolition of the first responder service in all of the closed nursing facilities violated the Act. Routine nursing care was also eliminated at the closed facilities, but the State had arranged for alternative routine nursing services in some but not all locations. The ALJ held that the State did not provide any reasonable routine nursing alternative at Brooklyn (Hanson Place), Hauppauge and Hornell. The employees who had used the nursing station at the Albany State Campus Building #5 were to use the station at Campus Building #1 in the same complex, approximately one hundred yards from Building #5. When the nursing station at Albany SUNY Plaza was closed, employees were to use a nursing station on Pearl Street in Albany, approximately six blocks, according to the record, from the SUNY Plaza. Employees who had used the nursing station at 50 Wolf Road were to use the nursing station at the Albany State Campus, approximately six miles away. A nursing station at 125 Main Street in Buffalo was to substitute for the nursing station at Court Street in Buffalo which was closed, but the Main Street location was also closed when the assigned nurse resigned her position. The ALJ found a violation premised upon the elimination of routine nursing care as to all facilities except the State Campus, where he held that the State had continued a

nursing station for routine care within reasonable proximity to the site of the nursing station which was closed.

The State's exceptions are directed only to certain parts of the ALJ's decision. The State argues first that the ALJ erred by basing certain of his findings on the elimination of first responder services at the closed facilities. The State alleges that there was no cognizable change in practice in this respect because nursing stations were never intended to provide this service. The State also excepts to the ALJ's decision that the six blocks between the closed nursing station at the Albany SUNY Plaza and Pearl Street was too great to make the alternative site reasonably proximate. The State excepts also to the ALJ's findings regarding the City of Buffalo nursing stations because the closing of the Main Street facility, which was intended to substitute for the nursing station closed at Court Street, was caused by the voluntary resignation of the nurse who was assigned to Main Street. The State argues in this respect that another ALJ had previously found that nursing station closings caused by employee resignations did not violate the Act.^{1/} The State excepts finally to that part of the ALJ's order which requires it to reimburse employees for expenses they incurred as a result of the elimination of emergency first responder and routine nursing care. The State alleges that there is no proof of damage and that the order is otherwise inappropriate because there were cost-free alternative sites available for the employees' use.

^{1/}State of New York (Dep't of Civ. Serv.), 23 PERB ¶4514 (1990).

PEF argues in response that the record supports the ALJ's findings of fact, that his conclusions of law are correct and that the remedy is appropriate.

According to the ALJ, the employees' mandatorily negotiable benefit was the availability of emergency and routine nursing care at locations reasonably proximate to the nursing stations from which those services had been delivered. The closing of certain nursing stations was the method by which unit employees were deprived of the benefit. No exceptions have been taken by either party to the ALJ's characterization of the benefit or to its negotiability and we accept it for purposes of our analysis of the State's exceptions.

In this context, the State's first exception is without merit. Whether or not the State intended to offer the service to employees, the record shows that emergency nursing care on a first responder basis was in fact available for years to employees through the nurses at many if not all of the nursing stations which were recently closed. The State admittedly discontinued that benefit when it closed the nursing stations. Any questions regarding the precise nature or extent of those first responder services relate to the ALJ's remedy and they can be ascertained on compliance review if necessary.

The ALJ's assessment of the benefit necessitates an evaluation of the substantial equivalency of the alternative nursing services which the State made available at certain locations on a nonemergency basis. Routine nursing care has been

relocated to the Pearl Street nursing station for unit employees who had used the closed SUNY Plaza, a distance of approximately six blocks. The State argues that because there is no evidence that this change of nursing station affected the frequency of the employees' use of the nursing services, the ALJ had no basis to conclude that the Pearl Street location was not reasonably proximate to the nursing station which was formerly at the SUNY Plaza. We do not agree. In matters of health care, the distance an employee must travel to obtain the medical service is crucial, not only the frequency of use. Even if there had been an increase or no change in the utilization rate, that would not establish reasonable proximity, only the need for and value of the service. Alternatively, by the State's own argument, a decreased utilization rate would support a conclusion that the alternative was not substantially equivalent. PEF unit employees who are stationed at the SUNY Plaza are now required to travel several blocks in city traffic, exposed to the weather under varying conditions of medical distress. At least as to those unit employees who work at the SUNY Plaza, we cannot say that the nursing service at Pearl Street was reasonably proximate to that which was previously available to them.

We find no more merit in the State's third exception, which is directed to the ALJ's finding regarding the closing of the nursing station at Court Street in the City of Buffalo. The subsequent closing of the nursing station at Main Street in Buffalo is not in issue except to the extent the State intended

to use the Main Street location as a place where employees who had used the Court Street nursing station could go to obtain nursing care. The closing of the Main Street location, however, did not permit the State to deny nursing services at Court Street without substituting some reasonably proximate location. Having closed Court Street, it was the State's obligation to continue to provide substantially equivalent nursing services at a reasonably proximate location. The nurse's resignation at Main Street is entirely irrelevant to this issue and nothing in the ALJ's decision in State of New York (Dep't of Civil Service) is to the contrary. The State was not prevented, for example, from replacing the nurse at the Main Street station if it wished to make the Main Street station the alternative to the Court Street station. Having chosen not to staff the Main Street station, the State was obliged to find some other reasonably proximate location for nursing services, but it did not. In such circumstances, the Buffalo closing is subject to the same analysis which led to the ALJ's findings regarding the closings of the nursing stations in Brooklyn (Hanson Place), Hauppauge and Hornell to which no exceptions have been filed.

The State's exceptions to the ALJ's remedy are also denied. We believe that the identity of persons who are eligible for expense reimbursement, their entitlement to that reimbursement, and the amount of those reimbursements can be fixed with reasonable certainty by personal affidavit and accompanying documentation. No proof in this regard was necessary during the

hearing, as it is a matter for compliance investigation and enforcement.^{2/} Although certain cost-free nursing alternatives were available, none but the one which substituted Building #1 for Building #5 at the State Campus has been found to be reasonably proximate. Employees are not required to use cost-free alternatives which are remote from the locations at which they previously received nursing services.

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

IT IS, THEREFORE, ORDERED that the State:

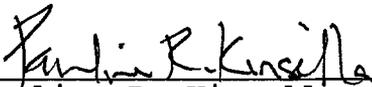
1. Forthwith reinstate the same level of first responder emergency health services to employees as had been provided by the nursing stations located at Buffalo (Court Street), Brooklyn (Hanson Place), Hauppauge, Hornell, Albany SUNY Plaza, Albany State Campus Building #5, and 50 Wolf Road, Albany facilities prior to the closing of the nursing stations at those locations in January and March 1991.
2. Forthwith reinstate the same level of nonemergency health care and safety services to employees as had been provided by the nursing stations located at Buffalo (Court Street), Brooklyn (Hanson Place), Hauppauge, Hornell, Albany SUNY Plaza, and 50 Wolf

^{2/}County of Broome, 22 PERB ¶3019 (1989); County of Onondaga, 24 PERB ¶3014 (1991) (appeal pending on other issues); State of New York (Division of Military and Naval Affairs), 24 PERB ¶3024 (1991) (appeal pending).

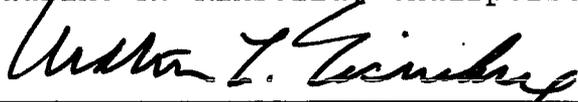
Road, Albany facilities prior to the closing of the nursing stations at those locations in January and March 1991.

3. Upon submission of appropriate documentation, reimburse unit employees for expenditures, if any, directly occasioned by the elimination of the first responder service at the nursing stations that were closed in January and March 1991 and by the elimination of non-emergency health and safety services at all nursing stations that were closed in January and March 1991, except for the Albany State Campus Building #5, with interest on any such amounts at the maximum legal rate, until such time as such services are restored consistent with this decision.
4. Sign and post the attached notice at all locations used to communicate with unit employees in the buildings where the at-issue nursing stations had been closed.

DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric S. 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 units represented by the New York State Public Employees Federation, AFL-CIO that the State of New York will:

1. Forthwith reinstate the same level of first responder emergency health services to employees as had been provided by the nursing stations located at its Buffalo (Court Street), Brooklyn (Hanson Place), Hauppauge, Hornell, Albany SUNY Plaza, Albany State Campus Building #5, and 50 Wolf Road, Albany facilities prior to the closing of the nursing stations at those locations in January and March 1991.
2. Forthwith reinstate the same level of nonemergency health care and safety services to employees as had been provided by the nursing stations located at Buffalo (Court Street), Brooklyn (Hanson Place), Hauppauge, Hornell, Albany SUNY Plaza, and 50 Wolf Road, Albany facilities prior to the closing of the nursing stations at those locations in January and March 1991.

21-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF RIVERHEAD,

Charging Party,

-and-

CASE NO. U-12367

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, TOWN OF
RIVERHEAD UNIT OF LOCAL 852,

Respondent.

RAINS & POGREBIN, P.C. (RICHARD K. ZUCKERMAN of counsel),
for Charging Party

NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ 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, Town of Riverhead Unit of Local 852 (CSEA) to a decision by an Administrative Law Judge (ALJ) on a charge filed against CSEA by the Town of Riverhead (Town). The Town alleges that CSEA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it cancelled negotiating sessions and refused to meet with the Town for purposes of negotiating a successor to the parties' collective bargaining agreement which expired on December 31, 1990. The ALJ deemed the material allegations in the charge admitted because CSEA failed to file a timely answer

and held no hearing as a result.^{1/} The ALJ held that CSEA's totality of conduct in conditioning meetings on employees being granted paid release time and its last minute cancellations of scheduled dates for meetings, unaccompanied by any agreement to future dates, evidenced a lack of good faith to reach an agreement and was in violation of CSEA's duty to bargain.

CSEA argues in its exceptions that the ALJ abused her discretion in denying it a hearing. It also alleges that the ALJ made certain factual errors and that her legal conclusion was wrong. CSEA further argues that its resumption of negotiations after the charge was filed either moots the charge or evidences its good faith.

The Town argues in response that the ALJ properly denied CSEA the opportunity to file a late answer and to participate in a hearing on the Town's allegations. It further argues that the record supports the ALJ's conclusion that CSEA's conduct before the charge was filed violated its duty to bargain.

The Town's charge was filed on March 18, 1991. According to our Rules of Procedure, CSEA's answer or motion to particularize was due within ten working days of its receipt of the charge from

^{1/}Section 204.3(f) of our Rules of Procedure provides as follows:

If the respondent fails to file a timely answer, such failure may be deemed by the administrative law judge to constitute an admission of the material facts alleged in the charge and a waiver by the respondent of a hearing.

PERB.^{2/} No answer had been received by the prehearing conference held on July 8, 1991. CSEA's representative at that conference informed the ALJ that an answer would not be filed because negotiations had resumed. Later in July, CSEA moved for leave to file a late answer even though it admitted that "there was no dispute to the facts alleged in the charge." CSEA again argued to the ALJ that it thought the charge was moot because negotiations had resumed in April 1991, but because the Town had elected to proceed with the charge, it wanted to answer. The Town formally opposed CSEA's request to file a late answer and the ALJ denied CSEA's request.

CSEA does not contest the ALJ's decision to deem the allegations in the charge admitted because it had admitted those allegations. It does argue, however, that it was an abuse of the ALJ's discretion to deny it a hearing to clarify and explain its conduct as admitted, there being no prejudice to the Town if a hearing is held.

Had CSEA filed an answer, it may well have been afforded a hearing to explain its admitted actions or to place them in context because its good faith or lack thereof is dependent upon the totality of circumstances which may include consideration of the parties' intent.^{3/} The issue, however, is not the relevancy of its evidence, but whether it was incorrectly denied an

^{2/}Rules of Procedure, §204.3(a) & (b).

^{3/}Town of Southampton, 2 PERB ¶13011 (1969).

opportunity to submit that evidence at a hearing. In the circumstances of this case, we hold that the ALJ did not abuse her discretion in denying CSEA a hearing.

CSEA's request to file an answer was first made months after a response was due, apparently after it had reconsidered its prior decision not to file an answer because it did not deem an answer necessary. The hearing CSEA seeks is for the purpose of defending the allegations of impropriety made in the Town's charge. That is, however, precisely one of the purposes to be served by the answer. Were we to grant CSEA's request for a hearing in this circumstance, we would undermine the purpose of the Rules in relevant respect, encourage disrespect and noncompliance with them, and simultaneously undercut the discretion afforded the ALJ by our Rules and decisions. Although sensitive to a party's due process rights, we must be equally sensitive to the rights of the other parties and to the public's interests in an orderly system of adjudication. Having considered the several interests at stake, we cannot conclude that the ALJ abused her discretion in denying CSEA permission to file a late answer. There being no answer and, therefore, no properly raised issues of fact or defense, there is no basis on which to require a hearing. Nor can we say there would be no prejudice to the Town if we were to reverse the ALJ and grant CSEA a hearing under the circumstances of this case.

CSEA's other exceptions are directed to the ALJ's finding of a violation. CSEA argues in this respect that the allegations in

the Town's charge as admitted are not sufficient to establish a violation of its duty to bargain. We disagree. The un rebutted allegations in the charge establish that CSEA repeatedly conditioned its scheduling of bargaining sessions on the Town's agreement to hold those sessions on the Town's time,^{4/} agreed to but few dates despite the Town's offer of many, and cancelled several scheduled bargaining sessions without explanation, twice on the morning of the day the parties were scheduled to meet, and otherwise generally made itself unavailable for meetings.

CSEA argues to us that the Town also violated its duty to bargain. However, there are no allegations of impropriety pending against the Town and we are, accordingly, unable to assess the claims relating to the propriety of the Town's bargaining conduct. In any event, even if it were to be established that the Town also refused to bargain in good faith, that would not excuse CSEA's own refusal to bargain as established by the admitted allegations in the charge.^{5/}

Although CSEA's resumption of negotiations after the charge was filed does not moot the charge or establish its good faith prior to the filing of that charge, it is a factor relevant to the need for any remedial action.^{6/} The parties having resumed

^{4/}Marcellus Faculty Ass'n, 21 PERB ¶3035 (1988) (conditioning of substantive negotiations on agreement to procedural ground rule held refusal to bargain).

^{5/}See City of Schenectady, 21 PERB ¶3022 (1988).

^{6/}See, e.g., Westchester County Medical Center and Westchester County, 13 PERB ¶3038 (1980).

negotiations, we find no need to order any remedial relief other than a posting of notice of violation.

For the reasons set forth above, we deny CSEA's exceptions, and affirm the ALJ's decision to the extent it finds CSEA to have violated the Act.

IT IS, THEREFORE, ORDERED that CSEA post notice in the form attached in all locations within the Town in which it ordinarily posts notices of information to unit employees.

DATED: August 25, 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 Riverhead (Town) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Town of Riverhead Unit of Local 852 (CSEA) that CSEA has been found to have violated §209-a.2(b) of the Public Employees' Fair Employment Act by refusing to negotiate in good faith with the Town.

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, TOWN OF RIVERHEAD
UNIT OF LOCAL 852

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.

2J-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**NORWICH FIRE FIGHTERS ASSOCIATION,
LOCAL 1404, IAFF,**

Charging Party,

-and-

CASE NO. U-12332

CITY OF NORWICH,

Respondent.

**WYSSLING, SCHWAN & MONTGOMERY (RUSSELL J. SCIANDRA of
counsel), for Charging Party**

**ROEMER AND FEATHERSTONHAUGH, P.C. (JAMES W. ROEMER, JR. and
SCOTT W. GOLLOP of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Norwich (City) to a decision by an Administrative Law Judge (ALJ) on a charge filed against the City by the Norwich Fire Fighters Association, Local 1404, IAFF (Association). In relevant part, the ALJ held after a hearing that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when its Mayor, Marjorie Chomyszak, refused to execute a writing embodying the agreements reached by the parties in collective negotiations.

The City argues in its exceptions that the record establishes that the parties were not engaged in collective

negotiations, only informal discussions, to which the statutory duty to execute a written agreement upon demand never attached.^{1/} It argues additionally that the parties did not reach an agreement in fact. Finally, the City alleges that the Association understood that any agreements which were reached were subject to the Common Council's acceptance. As the Common Council rejected the agreement, the City argues that its Mayor had no duty to execute a written document. The Association argues in response that the ALJ's findings of fact and conclusions of law are correct. Having reviewed the record and the parties' briefs, and having heard oral argument, we affirm the ALJ's decision.

As to the City's first exception, our review of the record persuades us that, notwithstanding the informality of the parties' meetings, they were plainly negotiating for a collective bargaining agreement. The City's argument to the contrary rests upon a hand-written note drafted by Chomyszak and signed by Robert Wightman, the Association's president, at the parties' first meeting. The writing states as follows:

If the "kitchen table" process does not result in a contract agreement, further negotiations shall be treated as though this never happened.

^{1/}Section 204.3 of the Act defines the duty to negotiate in good faith to include "the execution of a written agreement incorporating any agreement reached if requested by either party"

This stipulation cannot reasonably be read to mean that the parties were not engaged in negotiations within the meaning of the Act. The Act does not necessitate any degree of formality in collective negotiations nor does it impose any specific format for them. The parties' ground rule agreement merely gave them an escape hatch. If their meetings were unsuccessful and did not lead to a collective bargaining agreement, their earlier discussions and tentative agreements would be totally disregarded in any more formal, subsequent negotiations. However, as discussed below, the meetings did produce an agreement and the parties were never put in a position to use the escape hatch afforded them by their ground rule.

Contrary to the City's arguments in support of its second exception, the meetings between the Mayor and the Association's representatives also plainly resulted in an agreement within the meaning of the Act.^{2/} There can be no reasonable argument to the contrary if for no other reason than the Mayor's repeated

^{2/}An agreement is defined in §201.12 of the Act as follows:

The term "agreement" means the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract, for the period set forth therein, except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval.

admissions during her testimony that she had reached an agreement with the Association.

Having admittedly reached an agreement with the Association, the Mayor was obligated to execute, upon the Association's demand, a document embodying the agreements reached unless that duty was conditioned, in this case, upon the Common Council's acceptance of the agreement.

The parties' arguments in this latter respect once again require us to differentiate between ratification and legislative approval. As we explained recently in some detail in Board of Education of the City School District of the City of Buffalo,^{3/} a right to ratify belongs to the negotiators and stems from the negotiators' reservation of that right. The right and duty of a legislative body to legislatively approve certain terms of an agreement arises by statute and exists independently of any action by the negotiators. The chief executive officer's duty to execute can be conditioned upon ratification or legislative approval by agreement to that effect.^{4/} Therefore, the Mayor could properly decline to execute a document containing the agreements reached with the Association only if she had conditioned her duty to execute by a course of conduct or understanding, either express or implied, which makes clear that

^{3/}24 PERB ¶3033 (1991) (appeal pending).

^{4/}Watkins Glen Cent. School Dist., 23 PERB ¶3035 (1990).

"the parties were fully aware of the condition and acquiesced in it."^{5/} The ALJ thoroughly considered this issue in her decision and concluded that the Mayor had not conditioned the contract upon ratification or other approval by the Common Council.

Having reviewed this aspect of the City's exceptions, we affirm the ALJ's findings for the reasons stated in her decision.

Whether and to what extent, however, the parties' agreements are now subject to legislative approval and whether they are binding in whole or in part are not issues for our consideration in the context of this improper practice charge because they concern only the enforceability of the document.^{6/} The City satisfies its statutory duty to negotiate in good faith by the execution by the Mayor of a document embodying the terms of the parties' agreements reached in their meetings which concluded on October 30, 1990.

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

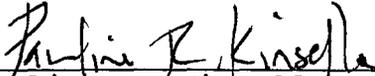
IT IS, THEREFORE, ORDERED that, upon the Association's demand, the City's chief executive officer shall execute a collective bargaining agreement embodying the terms reached with the Association on October 30, 1990 and the attached notice be signed and posted at all locations ordinarily used to post

^{5/}Capital Dist. Regional Off-Track Betting Corp., 20 PERB ¶3020, at 3034 (1987).

^{6/}City of Dunkirk, 25 PERB ¶3029 (June 2, 1992).

informational notices to the employees in the unit represented by the Association.

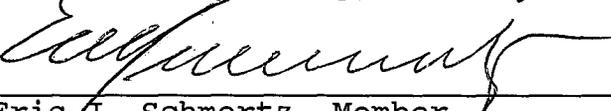
DATED: August 25, 1992
Albany, New York



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 of the City of Norwich within the unit represented by the Norwich Fire Fighters' Association, Local 1404, IAFF that, upon the Association's demand, the City's chief executive officer shall execute an agreement embodying the terms reached with the Association on October 30, 1990.

CITY OF NORWICH

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.

2K-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUFFOLK COUNTY COURT EMPLOYEES ASSOCIATION,

Charging Party,

-and-

CASE NO. U-12614

STATE OF NEW YORK-UNIFIED COURT SYSTEM,

Respondent.

SCHLACHTER AND MAURO (DAVID SCHLACHTER of counsel), for
Charging Party

HOWARD A. RUBENSTEIN, ESQ. (NORMA MEACHAM of counsel), for
Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Suffolk County Court Employees Association (Association) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the Association's charge against the State of New York- Unified Court System (UCS) which alleges that UCS violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it reduced from four to three the number of officers assigned to jury sequestration detail. Although the staffing reduction caused a proportionate reduction in the amount of unassigned time available to each officer on the detail, the ALJ held that the staffing reduction was not mandatorily negotiable. The ALJ held in that respect that the officers' time, although specifically unassigned, was still work time, and that within

that work time, UCS was entitled to change the officers' assignments^{1/} both as a matter of statutory and contractual right.^{2/} The ALJ also rejected the Association's allegation that the staffing reduction caused a safety hazard, finding no evidence to support that contention.

The Association's exceptions rest entirely on arguments that the ALJ erred in concluding that the officers' unassigned time is work time as opposed to duty-free time, which an employer may not alter unilaterally.^{3/} As no exceptions were taken to the ALJ's findings of fact or conclusions of law regarding the safety implications of the staffing reduction, we do not consider that aspect of the ALJ's decision. The UCS argues in response that the ALJ's decision is correct in relevant respect and should be affirmed. We agree with UCS.

Having reviewed the record and the parties' arguments, we affirm the ALJ's decision. The ALJ's decision thoroughly addresses the issues raised by the Association's exceptions. His findings of facts regarding the nature of the officers' unassigned time are consistent with the record in all material

^{1/}Savona Cent. School Dist., 20 PERB ¶3055 (1987).

^{2/}The management rights clause in the parties' contract gives the UCS the right to "determine the ... number of personnel required for the conduct of state judiciary programs ... [and] to direct, deploy and utilize the workforce;"

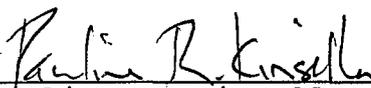
^{3/}See, e.g., Addison Cent. School Dist., 16 PERB ¶3099 (1983).

respects and his conclusions of law as applied to those specific facts are also correct.

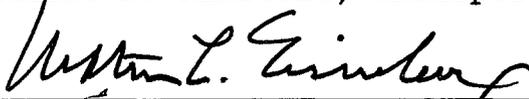
The Association's exceptions are accordingly denied and the ALJ's decision is affirmed.

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

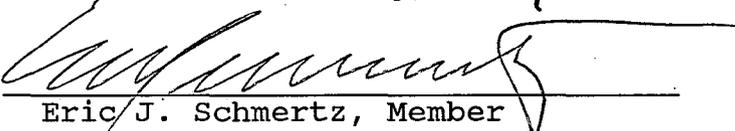
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2L-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LAWRENCE CARP,

Charging Party,

-and-

CASE NO. U-12210

OSWEGO CITY SCHOOL DISTRICT,

Respondent.

LAWRENCE CARP, pro se

MICHAEL J. STANLEY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Lawrence Carp to a decision by an Administrative Law Judge (ALJ). The ALJ dismissed Carp's charge against the Oswego City School District in which he alleges that the District violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when he was discharged from his employment in September 1990. At the relevant time, Carp was working for the District tutoring a student who was an inpatient at a local hospital. Carp alleges that he was discharged because he tried to form a union to assist him with complaints he had about the presence of tobacco smoke in the employees' break room. After a hearing, the ALJ held that Carp was terminated because Marc Kuehn, the Educational Coordinator for an adolescent unit at the hospital at which Carp was tutoring,

determined that Carp's services were no longer therapeutic for his student.

Carp alleges in his exceptions that it was the District's burden to establish that his discharge was proper because his work was satisfactory, that the ALJ improperly relied on Kuehn's hearsay testimony regarding a conversation Kuehn had with the student, and that he was wrongly denied a subpoena for other persons who could testify about his efforts to form a union. The District in a brief response urges affirmance of the ALJ's decision. We concur and affirm the ALJ's decision.

The ALJ credited Kuehn's testimony that he was unaware of Carp's efforts to form a union, and that this played no part in his decision to end Carp's services. Having reviewed the record, we find no basis on which to reverse the ALJ's credibility resolution. Therefore, the District satisfied the burden of proof Carp ascribed to it.

Whether or not Kuehn's testimony regarding his conversation with the student is characterized as hearsay, the ALJ was entitled to rely upon it as one of the bases for his decision. The ALJ's denial of a subpoena also cannot be the basis for a successful appeal in this case. Carp wanted a list of the names, addresses and phone numbers of all teachers the District had sent to work at the hospital from September 12 to September 20, 1990. Carp gave no indication to the ALJ of facts which these unidentified persons might

provide at a hearing. Rather, as the ALJ ruled, Carp intended to use the list as a discovery device through which he could investigate whether there was any evidence in support of his claims of impropriety.

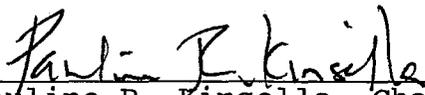
Carp alleges in his exceptions that the ALJ erred in denying the subpoena for the teacher list for two reasons. First, he alleges that there were persons he had spoken to about a union who could testify in that regard at the hearing. The ALJ, however, did not dismiss the charge because Carp failed to prove involvement in protected activities. Therefore, the ALJ's ruling denying him the subpoena was not prejudicial to Carp on the first basis alleged by him. In addition, Carp alleges for the first time in his exceptions to us that these persons "could have testified to the spying done by Mark [sic] Kuehn." Carp never alleged this to the ALJ. In such circumstances, not having made the "spying" allegation to the ALJ, Carp's request for the subpoena was properly denied.^{1/}

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

^{1/}See Nanuet Union Free School Dist., 17 PERB ¶3005 (1984).

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

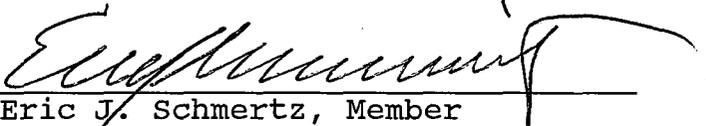
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2M-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12083

STATE OF NEW YORK (DEPARTMENT
OF CORRECTIONAL SERVICES),

Respondent.

JAMES P. KEMENASH, for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (LAUREN DeSOLE of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Public Employees Federation, AFL-CIO (PEF) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed PEF's charge against the State of New York (Department of Correctional Services) (State), which alleges that the State violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it terminated the probationary employment of Russell Armato, a PEF officer. PEF alleges that Armato, an employee at the maximum security Sullivan Correctional Facility, was terminated because he protested the assignment of a nonunit employee to certain summer work reserved to PEF unit employees. The ALJ found, however, that Armato was terminated because he had a history of security violations and had displayed

a negative attitude regarding the seriousness of those violations.

PEF has filed two exceptions to the ALJ's decision. First, it alleges that, contrary to the ALJ's finding, a June 19, 1990 memorandum from Armato to Edward Tucker, Deputy Superintendent of Programs, did not and could not play any role in the State's decision to terminate him.^{1/} PEF also alleges that the ALJ dismissed the charges because there was no demonstrated union animus and that this was error because animus is not required to establish a violation of §209-a.1(a) or (c).

The State argues in response that the ALJ's findings of fact and conclusions of law are correct and that her decision should be affirmed. We agree.

Having reviewed the record, we affirm the ALJ's finding that the June 19, 1990 memorandum from Armato to Tucker was a factor in the State's decision to terminate Armato. Tucker's July 29, 1990 memorandum to Robert H. Kuhlmann, Superintendent of the Sullivan Correctional Facility, in which he recommends Armato's termination attaches the June 19, 1990 memorandum, which was also included in the packet of information Kuhlmann sent to the central office in Albany which was reviewing Kuhlmann's recommendation for Armato's termination.

^{1/}As summarized by the ALJ, Armato expresses in the memorandum his "'frustration' and 'anger' ... stating that [a correction officer's complaint] was 'an insult to his intelligence' ... costly 'nonsense' and that the correction officer who filed the report of the breach [should] be designated 'Lock-Box Officer'."

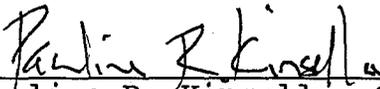
PEF alleges that the State should not be permitted to use Armato's June 19, 1990 memorandum to support his discharge because the memorandum was not part of his official personal history folder. The issue under this charge, however, is the State's motivation for its termination. The ALJ found that the State was motivated to discharge Armato, in part, by his attitude as exemplified by the June 19, 1990 memorandum. The alleged inadmissibility of that document in a contract disciplinary proceeding is immaterial to the ALJ's consideration of it in assessing the State's motivation.

In regard to PEF's second exception, the ALJ found that neither Kuhlmann nor Tucker had any union animus. The ALJ, however, did not dismiss the charge on this basis. The charge was dismissed because Armato's protected activities were found not to be the reason for his termination. As PEF correctly argues, it is possible for an employee's discharge to violate §209-a.1(a) or (c) of the Act even if the actors responsible for the discharge bear no union animus, either generally or specifically. An animus finding is essentially evidentiary. A finding of animus helps to establish the requisite causation. On the other hand, the absence of animus can help to negate an inference or finding that an action was motivated improperly by the employee's exercise of statutorily protected rights. In this case, the ALJ's finding that neither Tucker nor Kuhlmann had animus merely buttressed her ultimate conclusion that Armato's termination was not caused by his exercise of statutorily protected rights.

For the reasons set forth above, PEF'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: August 25, 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, GREENE COUNTY
LOCAL 820, CAIRO-DURHAM CENTRAL SCHOOL
DISTRICT UNIT,

Charging Party,

-and-

CASE NO. U-12449

CAIRO-DURHAM CENTRAL SCHOOL DISTRICT,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MAUREEN SEIDEL
of counsel), for Charging Party

RUBERTI, GIRVIN & FERLAZZO (JAMES E. GIRVIN of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Cairo-Durham Central School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed against the District by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Greene County Local 820, Cairo-Durham Central School District Unit (CSEA). CSEA alleges in its charge that the District violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it eliminated several food service positions in CSEA's unit and hired a food service contractor to perform those duties.

The ALJ dismissed the §209-a.1(e) allegation for failure of proof and no exceptions have been filed to this aspect of his decision. The ALJ held, however, that the District had violated §209-a.1(d) of the Act as alleged when it subcontracted the daytime student cafeteria program to a private contractor. In reaching this conclusion, the ALJ found that CSEA had not waived its bargaining rights.

The District argues that the ALJ erred by finding jurisdiction over the §209-a.1(d) allegation. Alternatively, the District argues that the ALJ should have required CSEA to file a grievance, thereby deferring consideration of the merits of the charge to the parties' grievance procedure. Assuming the merits are to be reached, the District argues that the ALJ erred when he fashioned a discernible boundary to the unit work. The District argues in this respect that food preparation and service appropriately defines unit work and that CSEA's nonexclusivity over evening banquets destroyed its exclusivity over the daytime cafeteria program. The District's several remaining exceptions concern the ALJ's conclusion that CSEA had not waived any further bargaining over subcontracting. It argues that the language of the parties' contract and the negotiating history of the relevant contract clause show that CSEA understood and agreed that the District could subcontract the cafeteria operation in whole or in part under certain circumstances.

CSEA argues in its response that the ALJ's procedural rulings and substantive findings of fact and law are correct in all material respects.

Preliminarily, we affirm the ALJ's decisions on jurisdiction and deferral for the reasons set forth in his decision. The contract has not been arguably violated by the subcontract. CSEA's rights in this respect, therefore, do not stem from the contract nor is there anything in the contract which it could grieve. The contract's relevancy is confined to the District's waiver defense, a claim which rests plainly within our jurisdiction to decide.

We similarly affirm the ALJ's exclusivity determination. CSEA's exclusivity over the daytime cafeteria operation is established in the record. Although the unit work may generally be defined as food preparation and service, there can be boundaries within that perimeter within which CSEA may have maintained exclusivity. The ALJ's determination that there was a discernible boundary between the regular cafeteria program for students and evening banquets is one consistent with discernible boundaries we have recognized in other cases.^{1/} We find it particularly persuasive in this respect that banquet work is considered extra duty work under the parties' contract. By this

^{1/}See, e.g., Spencer-VanEtten Cent. School Dist., 21 PERB ¶3015 (1987); Town of West Seneca, 19 PERB ¶3028 (1986).

differentiation, it appears that the parties themselves have recognized that there is a distinction between the student cafeteria program and the evening banquets. Banquets fall within one boundary of the unit work; daytime cafeteria in another. Nonexclusivity over the former does not impair the exclusivity established and maintained over the latter.

The District's waiver defense as raised in its answer is premised specifically upon a waiver by agreement, in this case Article XXII of the parties' 1990-93 agreement captioned "Cafeteria". That clause provides as follows:

Salary increases given to the cafeteria workers are dependent upon the cafeteria operating at a profit without any increase in the cost of lunches to the students attributable to salaries. In the event that the cafeteria fails to operate at a profit during any calendar month of the school year, the Board of Education reserves the right to close the cafeteria and layoff the employees or to layoff any number of employees so as to maintain the cafeteria at a self-sustaining basis.

There is no dispute that the cafeteria has not operated at a profit for some time. Nor is there any dispute that Article XXII gives the District at least two options. It is agreed that the District can close the cafeteria and lay off all of the cafeteria employees. It is also agreed that the District may keep the cafeteria open, running it with a fewer number of District employees. The District argues, however, that Article XXII also gives it the right to keep the cafeteria open and operating under other means, including a subcontract, with the concomitant right

to lay off all of its employees in favor of that subcontracting relationship. CSEA denies that the parties' contract, as either written or intended, reserves a right to the District to subcontract the cafeteria operation.

The ALJ held that Article XXII did not confer upon the District the right to subcontract. Finding that this right was clearly denied it by Article XXII, the ALJ invoked the parol evidence rule^{2/} and refused to consider any testimony offered to establish the meaning of the contract language. Therefore, the ALJ did not resolve a possible conflict in the testimony of the parties' several witnesses concerning whether and to what extent subcontracting was discussed during negotiations as an option available under Article XXII. Continuing his analysis thereafter, however, the ALJ held that the requisite clear and unmistakable waiver^{3/} was not established even if the credibility dispute were resolved in favor of the District's witnesses. In that respect, the ALJ stated that CSEA was merely silent in the face of an articulated opinion about a hypothetical event.

^{2/}The parol evidence rule provides that a contract which is clear in its terms and purports to express the parties' entire agreement cannot be contradicted, varied or explained by evidence of the parties' prior or contemporaneous communications. See 58 N.Y. Jur.2d Evidence and Witnesses §§555-618 (1986); Fisch, New York Evidence, §§41-64 (2d ed. 1977).

^{3/}CSEA 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).

We do not agree that Article XXII is so plain and clear regarding the District's subcontracting rights as to warrant the exclusion of testimony concerning the negotiating history of that provision.^{4/} For example only, the District's right to lay off "any" number of employees, is arguably consistent with the right to lay off all employees.^{5/} The second half of the last sentence of Article XXII contemplates that the cafeteria would remain open in conjunction with a layoff of "any" unit employees. A subcontract may have been contemplated as one of the means through which the cafeteria could remain open despite the layoff of all unit cafeteria staff. We do not suggest that this is necessarily the correct interpretation of Article XXII, only that such a construction is not so plainly precluded by the language of Article XXII as to entitle the ALJ to exclude from consideration the relevant negotiating history in its interpretation.

Although the ALJ gave an alternative basis for the rejection of the District's waiver defense in which he assumes the truth of his summary of the testimony of the District's witnesses, we do not consider this sufficient to avoid the necessity for a remand. Having rejected any consideration of the parties' negotiating

^{4/}For example, in Village of Port Chester, 18 PERB ¶3058 (1985), the Board held that the term "laborer" in an agreement was not so plain and clear as to prohibit parol evidence.

^{5/}The word "any" has been regarded as an all-exclusive word meaning "all" or "every". Randall v. Bailey, 288 N.Y. 208 (1942); Shilbury v. Bd. of Supervisors, 54 Misc.2d 979 (1967).

history, the ALJ's summary of the relevant negotiating history does not necessarily reflect all of the evidence with respect to the question of whether there was an agreement between the parties which permitted the District to subcontract the cafeteria operation. That evidence may properly include not only statements made by the parties during negotiations, but the context in which those negotiations took place, including actions the parties may or may not have taken. The District's brief refers to several examples of what it considers relevant negotiating history, but certain of these are not reflected in the ALJ's decision. The case is, therefore, appropriately remanded for consideration of all relevant facts in light of the negotiating history of Article XXII.

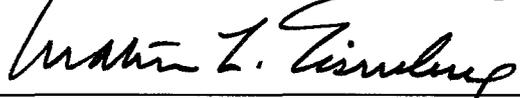
Having determined that a remand is appropriate, the remand should also include a resolution of the credibility issue which the ALJ left open. This will permit the case to be reviewed and decided on the basis of specific findings of fact. Although the case might eventually be decided on the law, a remand without a directive for a credibility resolution would present the possibility of a third appeal. The parties' interests argue strongly against that result.

For the reasons set forth above, IT IS HEREBY ORDERED that the case be remanded to the ALJ for decision in accordance with the terms of our decision herein.

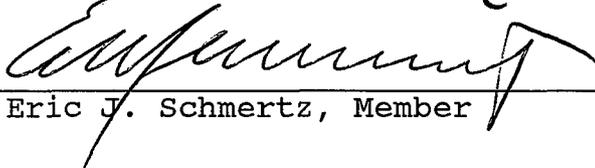
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AUBURN EDUCATIONAL SECRETARIES AND AIDES
ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12320

AUBURN ENLARGED CITY SCHOOL DISTRICT,

Respondent.

HARRY SLYWIAK, for Charging Party

MATTHEW R. FLETCHER, for Respondent

BOARD DECISION AND ORDER

The Auburn Enlarged City School District (District) has filed exceptions to an Administrative Law Judge's (ALJ) determination on a charge filed by the Auburn Educational Secretaries and Aides Association, NYSUT, AFT, AFL-CIO (Association) which alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally amending its health insurance policy regarding retirees.

The exceptions raise no questions of fact, only that the ALJ misapplied existing law. Specifically, the District asserts that the ALJ applied too narrow a contract waiver standard; that the ALJ erred by finding a reduction in benefits because no unit

employee had been adversely affected to the date of the hearing; that the charge is untimely;^{1/} and that the ALJ incorrectly extended the duty to negotiate in good faith to legislative action. The District also excepts to the ALJ's remedy. In that respect, the District argues that PERB is without authority to order the rescission of a resolution adopted by the District's legislative body and it objects to the reimbursement order on the basis that no current unit employee was shown to have been harmed.

Having reviewed the record and considered the District's exceptions, we affirm the ALJ's decision.

The District and the Association are parties to a collective bargaining agreement effective July 1, 1989 to June 30, 1992. The District bases its contract waiver defense on Articles XIII and XII^{2/} of that agreement, respectively entitled Duration and Signatory and Management's Rights, most specifically, the

^{1/}The District has filed a separate exception claiming that the record facts also show a waiver by conduct. However, in the brief accompanying its exceptions, the District refers to such a waiver only in support of its timeliness defense, which is the same context in which it appeared in the brief to the ALJ. No waiver by conduct defense was raised in the District's answer to the charge and we do not consider it except in the context of the timeliness defense.

^{2/}Although Article XII is not specifically raised in the District's answer to the charge, both parties addressed that clause in the contract waiver context in their briefs to the ALJ and the ALJ dealt with it in his decision.

following language:

...the District and the Association, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to negotiate collectively with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement.^{3/}

and:

The Association recognizes the exclusive right and authority of the school district to manage its operations including, but not limited to, the following rights: to supervise all employees and determine reasonable standards of performance; to assign work and transfer employees; to determine the hours of work, shift schedules and amounts of overtime.^{4/}

We rejected a contract waiver defense based upon similar clauses in Onondaga-Madison BOCES^{5/} and we find no material difference in language warranting a different result here. The District's reliance on Sweet Home Central School District^{6/} and Sachem Central School District^{7/} is misplaced. The contract language in those cases explicitly reserved to the employer the right to make changes unilaterally during the duration of the

^{3/}From Section 1 of Article XIII.

^{4/}Section 1 of Article XII.

^{5/}13 PERB ¶3015 (1980), conf'd, 82 A.D.2d 691, 14 PERB ¶7025 (3d Dep't 1981).

^{6/}14 PERB ¶4585 (1981).

^{7/}21 PERB ¶3021 (1988).

collective bargaining agreement.^{8/} No such specific reservation of right exists here, either in the language quoted or in Articles XIII and XII when viewed in their entirety, either separately or together. Article XIII sets forth a waiver of the right of either party to negotiate on demand for the duration of the agreement on matters not covered by the agreement. It does not establish a waiver of the right to object to a unilateral change in practice involving a mandatory subject of negotiation in effect when the contract was negotiated.^{9/} Article XII's preservation of management rights in certain defined areas, none related to health insurance, is no more a waiver than Article XIII because a general contract right to manage operations does not extend to a right to make unilateral changes in mandatorily negotiable employment practices.

The District's exception to the ALJ's invocation of CSEA v. Newman^{10/} is rejected. The ALJ properly cited CSEA v. Newman regarding the legal standard for waiver in general. In any event, the ALJ did not cite that case in the context of his discussion

^{8/}The relevant language in both cases reserved to the employer the "direction and control" of noncontractual terms and conditions of employment. See Sweet Home Cent. School Dist., supra note 6 at 4679 and Sachem Cent. School Dist., supra note 7 at 3041.

^{9/}Onondaga-Madison BOCES, supra note 5.

^{10/}88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982), aff'd, 61 N.Y.2d 1001, 17 PERB ¶7007 (1984).

of the District's contractual waiver defense.^{11/} Therefore, the District's distinction of CSEA v. Newman on its facts is unavailing.

The ALJ's determination that the unit has suffered a loss of benefit is also correct, it being undisputed that employees retiring under the existing bargaining agreement would receive reduced health insurance benefits as a result of the District's change in policy. Neither allegation nor proof of actual harm to a specific employee on or before the charge is filed or heard is required; it is sufficient that an identifiable reduction in an available economic fringe benefit has occurred.^{12/}

As to timeliness, the District does not argue that the charge is untimely filed with respect to the at-issue December 10, 1990 board of education resolution, which falls clearly within PERB's four-month filing period,^{13/} but argues that it is untimely as to the board of education's resolutions of February 12 and July 2, 1990. As the ALJ found, however, the charge objects only to the December 10, 1990 resolution, which is admittedly different from the earlier resolutions. The charge is, therefore, timely filed as to the December 10, 1990 change.

^{11/}The case was cited by the ALJ in his discussion of whether the unit president's failure to demand negotiations after the District's refusal to respond to her inquiries constituted a waiver.

^{12/}See, e.g., Niagara Frontier Transportation Auth., 18 PERB ¶3083 (1985).

^{13/}Rules of Procedure, §204.1(a)(1).

The District's attempt to support its timeliness defense with arguments related to waiver by conduct is without merit. Waiver and timeliness are unrelated concepts. An improper practice charge is not rendered untimely because a charging party might be found to have previously waived its right to negotiate. Rather, the waiver would, if properly raised in defense to timely allegations of impropriety, cause the charging party to lose the case on the merits. As the District did not raise a waiver by conduct defense before the ALJ, it is not properly before us here. We note, however, that the resolutions on which the District relies do not evidence such a waiver. The February 12, 1990 resolution and its July 2, 1990 readoption merely cover contractual health insurance provisions, not health insurance past practices as are involved in this case. The record testimony, which indicates that before December 10, 1990 the District paid 100% of the health insurance premiums for which unit retirees would otherwise be responsible, and the District's passage of the December 10, 1990 resolution itself, support the conclusion that the earlier resolutions did not waive any rights associated with the December 10, 1990 resolution. Even assuming that the District had intended the language of those earlier resolutions to effectuate the loss of benefits at issue here, their wording would not put the Association on notice of that intent and there is no claim or record evidence that such intent was otherwise communicated to the Association. Under such

circumstances, the Association's lack of response to those resolutions would not constitute a waiver by conduct.

The District's apparent claim that the legislative body's initiation of the at-issue change and its historical grant of health insurance benefits for retirees defeats the charge is also rejected.^{14/} This claim was not raised before the ALJ and it is, therefore, not properly before us. Even if considered on its merits, it would be rejected. It is undisputed that the District implemented the board of education's December 10, 1990 resolution, going so far as to call a meeting of all employees eligible to retire, where, with other administrative personnel present, the superintendent of schools notified them of the implementation. Having implemented the board of education's resolution, the District cannot disassociate itself from it for purposes of the Act.

As to remedy, we need not treat with the District's argument that the rescission of a legislative resolution is beyond PERB's authority.^{15/} The ALJ's order ran to the executive, not the

^{14/}Any claim that the charge must be dismissed because it alleges merely that the legislative resolution violated the Act would be rejected. The charge, filed after the effective date of the resolution, alleges that the resolution resulted in a change in retirees' health insurance, and the parties understood the charge to have addressed the resolution as implemented because they litigated and briefed the case on that basis.

^{15/}As to orders regarding legislative resolutions, see, e.g., County of Suffolk, 15 PERB ¶3021 (1991), where, pursuant to a determination that the legislative body had violated §209-a.1(a) of the Act, it was ordered to cease passing legislative resolutions granting step advancements.

legislative, branch and contemplates only that the District cease implementation of the resolution. Clarification of that portion of the order in response to the District's exceptions, however, is warranted. The ALJ's order must also be modified^{16/} because not all relevant portions of the December 10, 1990 resolution were addressed.^{17/}

The District's claim that the earlier 1990 resolutions control such benefits is rejected. As stated infra, for purposes of the Act, those resolutions cover contractual benefits only, not, as here, health insurance benefits established pursuant to past practice.

Finally, the District's exception to the ALJ's reimbursement order is rejected on the same grounds as set forth in State of New York (DMNA).^{18/}

Based on the above, the District's exceptions are denied, the decision of the ALJ is affirmed and the remedial order modified as follows below.

^{16/}Rules of Procedure §204.14(a)(1) permits us to review the remedial order on our own motion. That power to review is necessary to ensure that any order fully remedies the violation found and that it otherwise satisfies the policies of the Act as required by §205.5(d) of the Act.

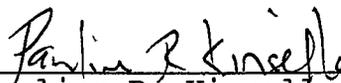
^{17/}The ALJ did not include in his order paragraph four of the resolution, which repealed not only a June 25, 1973 board of education resolution covering unit retirees' health insurance benefits, but also other prior board of education policies which may affect such benefits.

^{18/}24 PERB ¶3024 (1991).

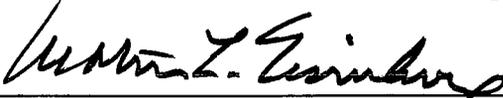
IT IS, THEREFORE, ORDERED that the District:

1. Immediately cease implementation of all portions of the December 10, 1990 resolution of its board of education which reduced the health insurance benefits of unit employees who retired or may retire during the duration of the District/Association 1989-1992 collective bargaining agreement and restore to them for the duration of that agreement the health insurance benefits they previously enjoyed.
2. Reimburse any unit employees who have retired since January 1, 1991 for any monies expended by them for maintenance of health insurance benefits because of the implementation of the December 10, 1990 resolution, with interest at the maximum legal rate.
3. Sign and post the attached notice at all locations ordinarily used by the District to post written communications to unit employees.

DATED: August 25, 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 Auburn Educational Secretaries and Aides Association, NYSUT, AFT, AFL-CIO (Association), that the Auburn Enlarged City School District (District) will:

1. Immediately cease implementation of all portions of the December 10, 1990 resolution of its board of education which reduced the health insurance benefits of unit employees who retired or may retire during the duration of the District/Association 1989-1992 collective bargaining agreement and restore to them for the duration of that agreement the health insurance benefits they previously enjoyed.
2. Reimburse any unit employees who have retired since January 1, 1991 for any monies expended by them for maintenance of health insurance benefits because of the implementation of the December 10, 1990 resolution, with interest at the maximum legal rate.

AUBURN ENLARGED CITY SCHOOL DISTRICT.....

Dated

By (Representative) (Title)

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

-and-

CASE NOS. U-12394 &
U-12452

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

Respondent.

RICHARD E. CASAGRANDE, GENERAL COUNSEL (STEVEN M. KLEIN of
counsel), for Charging Party

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

JAMES R. SANDNER, GENERAL COUNSEL (FREDERICK K. REICH of
counsel), for Amicus Curiae New York State United Teachers,
New York City Office

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Public Employees Federation, AFL-CIO (PEF) to a decision by the Director of Public Employment Practices and Representation (Director) on two charges PEF filed against the State of New York (Governor's Office of Employee Relations) (State). In the first charge (U-12394), PEF alleges that the State failed to continue Article 10 (Employee Benefit Fund) (EBF) of the parties' 1989-91 contract in violation of §209-a.1(e) of the Public Employees' Fair Employment Act (Act). PEF alleges in that same charge that the State failed despite request to inform it regarding its intent to continue funding of

the EBF in violation of §209-a.1(d) of the Act. The totality of the State's conduct is alleged to have violated §209-a.1(b) of the Act. PEF alleges in its second charge (U-12452) that the State repudiated Articles 7.9 (Performance Advances) and 7.10 (Performance Awards) of the 1989-91 contract in violation of §209-a.1(d) and (e) of the Act. The timing and totality of the State's action in these respects is alleged to have violated §209-a.1(a), (b) and (d).

The Director dismissed both charges in their entirety. He held that the State had no obligation to continue Articles 10, 7.9 or 7.10 beyond the stated term of the contract because the benefits expired or "sunsetted"^{1/} according to the contract. In reaching this conclusion, the Director cited and relied upon only the language of the contract, denying PEF an opportunity to offer proof regarding the meaning or history of the contract. Although he found that the State had admittedly delayed making those few performance award payments which became fixed on March 31, 1991, the last day of the stated term of the 1989-91 contract, the Director held that this was an arguable contract breach, not a

^{1/}A sunset clause is one which we have held terminates a benefit at a specific time or upon a specified condition, most often expiration of the stated term of the contract. A sunsetted benefit does not form part of the status quo which an employer is obligated to maintain under either §209-a.1(d) or (e). Yonkers City School Dist., 12 PERB ¶3127 (1979); Suffolk County, 18 PERB ¶3030 (1985), appeal dismissed as moot sub nom. Faculty Ass'n of Suffolk Community College v. PERB, 18 PERB ¶7016 (Sup. Ct. Suffolk County, 1985), aff'd, 125 A.D.2d 307, 20 PERB ¶7002 (2d Dep't 1986).

repudiation, which was not within our jurisdiction under §205.5(d) of the Act. The Director dismissed the refusal to bargain allegation premised upon PEF's demand for information on a finding that the State's responses to PEF's inquiries were not proven to be false.

PEF takes exception to every aspect of the Director's decision which addresses its §209-a.1(e) allegations, including his refusal to allow evidence regarding the meaning and history of the disputed contract provisions. PEF excepts also to the Director's dismissal of its allegations regarding the demand for information about the continued funding of the EBF and the repudiation of Articles 7.9 and 7.10. Certain incidental determinations made by the Director are also made the subject of PEF's exceptions, but these do not require elaboration in this decision.

The State argues in response that the Director correctly dismissed all of PEF's allegations and arguments. The State has, however, filed a cross-exception contingent upon our reversal of the Director's decision regarding the State's obligation to continue either Article 7.9 or 7.10. The State argues under its exception that the Director erred in dismissing its defense grounded upon 1972 N.Y. Laws, ch. 282, §63(2).^{2/} The State argues

^{2/}That statute provides as follows:

Notwithstanding any inconsistent provision of this Act or of any other law, after March 31, 1973, all increases of salary and compensation based on time in service shall be negotiated pursuant to article 14 of the civil service law.

that this statute is inconsistent with the obligations PEF would impose upon the State under its interpretation of §209-a.1(e) of the Act. The inconsistency is irreconcilable according to the State, such that the former statute must prevail over the latter.

The New York State United Teachers (NYSUT), through its Office of General Counsel, New York City Office, has filed an amicus curiae brief urging that the Court of Appeals' recent decision in Association of Surrogates and Supreme Court Reporters v. State of New York^{3/} (hereafter Surrogates II) necessitates a reevaluation of our §209-a.1(e) case law, including that involving sunset provisions. PEF and the State also rely upon Surrogates II in support of their arguments on the merits of PEF's allegations against the State.

Administrative Law Judges (ALJ) have recognized in certain recent decisions^{4/} that Surrogates II raises preliminary questions regarding our jurisdiction over §209-a.1(e) allegations generally and over those §209-a.1(d) allegations which are premised upon

^{3/}79 N.Y.2d 39, 25 PERB ¶7502 (1992).

^{4/}Three ALJs have held that Surrogates II divests us of jurisdiction over refusal to bargain charges filed pursuant to §209-a.1(d) of the Act which are premised upon a unilateral change in a mandatory subject of negotiation which is incorporated into a contract which has expired according to its terms. Watkins Glen Cent. School Dist., 25 PERB ¶4610 (August 4, 1992); New York City Transit Auth., 25 PERB ¶4584 (June 5, 1992); Baldwinsville Cent. School Dist., 25 PERB ¶4582 (June 3, 1992). The ALJ in New York City Transit Auth. also opined in dicta that Surrogates II does not affect the Board's improper practice jurisdiction under §209-a.1(e) of the Act.

unilateral changes in the mandatorily negotiable terms contained in a contract which has expired according to its terms. PEF's §209-a.1(d) allegations, however, which are based upon a refusal to provide information and a repudiation of contract, do not raise any relevant jurisdictional issues. Therefore, we need not consider in this case the effect of Surrogates II upon our unilateral change jurisdiction under §209-a.1(d) of the Act.

Surrogates II also has implications for purposes of assessing whether a cognizable cause of action can still be pleaded under §209-a.1(e). The issue Surrogates II poses for the improper practice defined in §209-a.1(e) is raised by the definition of the violation itself. Section 209-a.1(e) makes it improper for an employer to refuse to continue all terms of an "expired agreement" until a new agreement is negotiated. As Surrogates II holds that §209-a.1(e) of the Act keeps the parties' contract in effect beyond its stated term, at least for certain purposes, an argument can be made that the parties' contract in this case has not "expired" such that PEF cannot establish the element of an "expired agreement" which is necessary to the cause of action under §209-a.1(e) as the Legislature has defined that violation.^{5/} The parties, however,

^{5/}The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) has filed a proposed amicus curiae brief on these issues. PEF opposes CSEA's participation as an amicus. It has, however, separately briefed the threshold Surrogates II issues after having received CSEA's amicus brief in anticipation of the possibility that we would reach these issues at this time.

did not raise this issue to the Director and he did not address the question. Moreover, the exceptions to the Director's decision do not raise this issue. Although it may, nonetheless, be necessary and appropriate at a later date to consider the effect of Surrogates II upon causes of action pleaded under §209-a.1(e) of the Act, it is not necessary to decide that issue now because we must remand the case to the Director for further hearing and decision.

Having reviewed PEF's exceptions, we grant those concerning the Director's exclusion of evidence regarding the history and meaning of the contract articles in issue. Unlike the Director, we do not consider any of the contract provisions in this case to be so clear and unambiguous regarding the parties' intent to continue those benefits post-expiration of the contract as to prohibit the introduction of relevant parol evidence.^{6/} We do not address any of the parties' other exceptions or arguments.^{7/} New exceptions and such of the present exceptions as remain relevant after the Director's decision following remand may be raised to us at the appropriate later date, as necessary.

^{6/}Compare Hempstead Public School Dist., 25 PERB ¶3025 (1992).

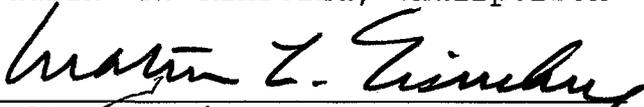
^{7/}In view of our disposition of the exceptions, we do not now decide whether to permit CSEA's participation as an amicus. CSEA may renew its request after issuance of the Director's decision on remand.

For the reasons set forth above, IT IS ORDERED that the cases are remanded to the Director for the conduct of a hearing consistent with this decision and for the preparation of such decision as is then appropriate.

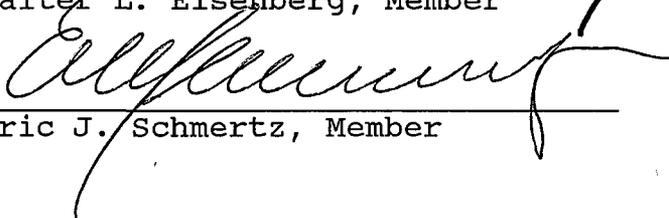
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3A-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VICTOR ADMINISTRATORS AND SUPERVISORS
ASSOCIATION, SCHOOL ADMINISTRATORS
ASSOCIATION OF NEW YORK STATE,

Petitioner,

-and-

CASE NO. C-3911

VICTOR CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

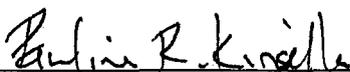
IT IS HEREBY CERTIFIED that the Victor Administrators and Supervisors Association, School Administrators Association of New York State has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time and part-time employees in the following titles: Principals, Assistant Principals, Language Arts Coordinator, Pupil Personnel Services Director, Transportation Supervisor, Food Service Director, Supervisor of Buildings and Grounds, Director of Physical Education and Athletics.

Excluded: Director of Finance and Operations, Assistant Superintendent for Instruction, Administrative Assistant for Personnel, and all other employees.

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

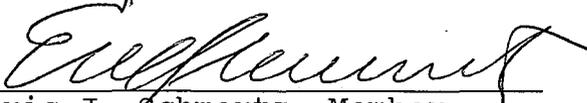
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**UNITED INDUSTRY WORKERS,
LOCAL 424,**

Petitioner,

-and-

CASE NO. C-3947

NORTH SHORE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 1000, AFSCME, AFL-CIO,**

Intervenor.

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 United Industry Workers, Local 424, 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

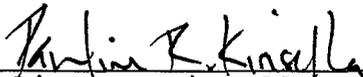
settlement of grievances.

Unit: Included: Custodial Workers, Mechanics, Bus Drivers and Maintenance Personnel.

Excluded: Part-time and Summer employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Industry Workers, Local 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

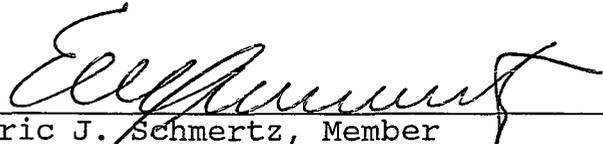
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

30-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 182, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3978

TOWN OF NEW HARTFORD,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

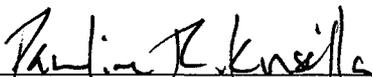
IT IS HEREBY CERTIFIED that Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Dispatchers.

Excluded: All other employees in any other classification.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

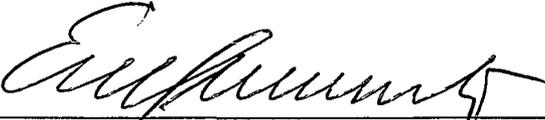
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3D-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3967

VILLAGE OF BRONXVILLE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

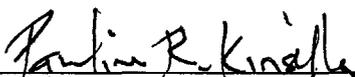
Unit: Included: Equipment operator, laborer, meter enforcement officer, parking meter repairman, village hall custodian, and all other regular full-time and

regular part-time blue collar employees currently or hereafter employed by the Village of Bronxville in the Public Works Department, Parking Commission Department, and Village Hall Department.

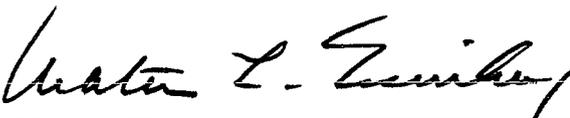
Excluded: Confidential, managerial, supervisory, summer (seasonal), temporary, white collar, and all other employees employed by the Village.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

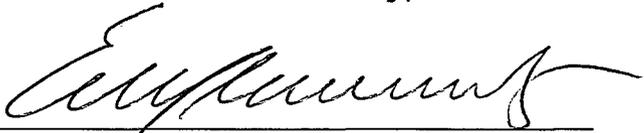
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3E-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 182,

Petitioner,

-and-

CASE NO. C-3962

VILLAGE OF LIVERPOOL,

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,

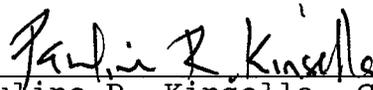
IT IS HEREBY CERTIFIED that Teamsters Local 182 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Motor Equipment Operator 1, Maintenance I, and Laborer.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 182. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

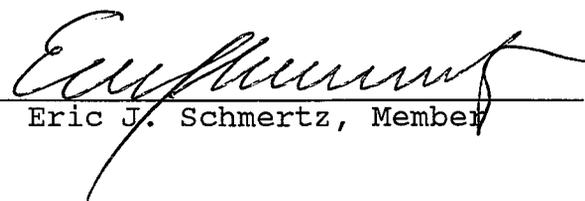
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3F-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WAYNE COUNTY SHERIFF'S EMPLOYEES
ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3960

COUNTY OF WAYNE,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 859,

Intervenor.

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,

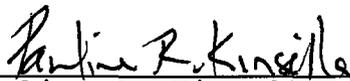
IT IS HEREBY CERTIFIED that the Wayne County Sheriff's Employees Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Criminal Investigator, Sergeant, Deputy Corrections Officer, Dispatcher, Account Clerk, Sr. Account Clerk, Records Clerk, and Sr. Records Clerk.

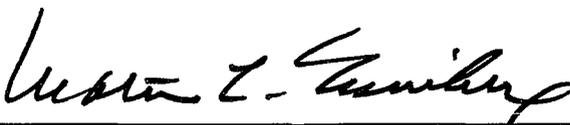
Excluded: Sheriff, Undersheriff, Chief Deputy, and Lieutenants.

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

DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3G-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL UNION 693, I.B.T.

Petitioner,

-and-

CASE NO. C-3958

TOWN OF WALTON,

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,

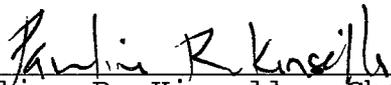
IT IS HEREBY CERTIFIED that Teamsters Local Union 693, I.B.T. has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time employees in the following titles: M.E.O., H.E.O., Laborer.

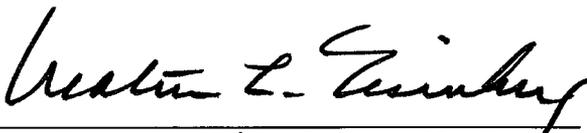
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local Union 693, I.B.T. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

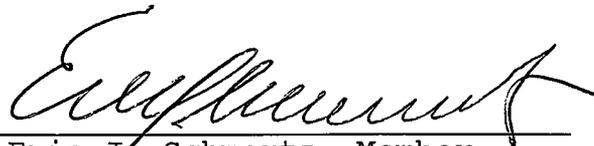
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3H-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED INDUSTRY WORKERS, LOCAL 424,

Petitioner,

-and-

CASE NO. C-3952

NORTH SHORE CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Industry Workers, Local 424 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: Part-time bus drivers.

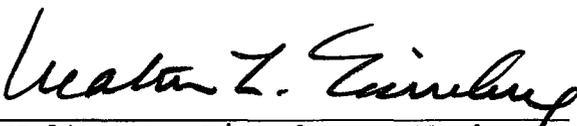
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Industry Workers, Local 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

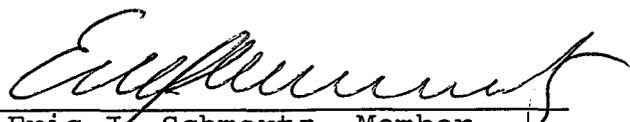
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

31-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORANGE COUNTY CORRECTION OFFICERS
BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3846

COUNTY OF ORANGE AND ORANGE COUNTY
SHERIFF,

Employer,

-and-

ORANGE COUNTY DEPUTY SHERIFF'S
ASSOCIATION,

Intervenor.

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 Orange County Correction Officers Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Building Maintenance Mechanic (Sheriff),
Correction Officer, Corrections Sergeant,
Deputy Sheriff, Deputy Sheriff and Recruit,
Deputy Sheriff and Sergeant, Head Jail Cook,
Jail Cook, Maintenance Mechanic Assistant
Supervisor (Sheriff), Maintenance Mechanic
Supervisor (Sheriff), Principal Account Clerk
(Sheriff), Senior Account Clerk (Sheriff),
Telephone Operator and Cashier.

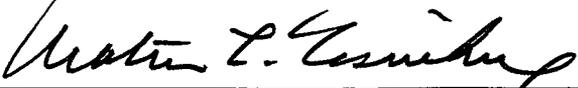
Excluded: Sheriff, Undersheriff, Jail Administrator,
Correction Supervisor, Assistant Correction
Supervisors, Chief Communications Officer,
Chief Transportation Officer, Supervisor of the
Civil Service Division and all other employees.

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

DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3J-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHOOL ALLIANCE OF SUBSTITUTES IN EDUCATION,
NYSUT, AFT,

Petitioner,

-and-

CASE NO. C-3941

GALWAY CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

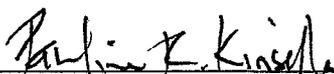
IT IS HEREBY CERTIFIED that the School Alliance of Substitutes in Education, NYSUT, AFT has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of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

Unit: Included: All per diem substitute teachers who received a notice of reasonable assurance of continued employment for the 1991-92 school year.

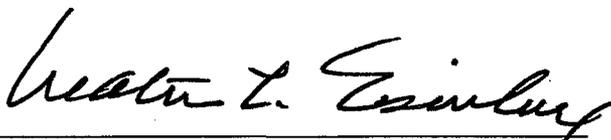
Excluded: All other employees.

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

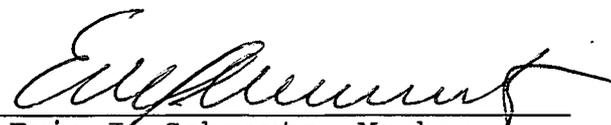
DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

3K-08/25/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 294, IBT,

Petitioner,

-and-

CASE NO. C-3937

WASHINGTON COUNTY SEWER DISTRICT II,

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,

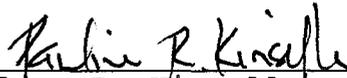
IT IS HEREBY CERTIFIED that Teamsters, Local 294, IBT has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Sewage treatment plant operator, sewer maintenance worker, sewer line and pump station maintainer and laborer.

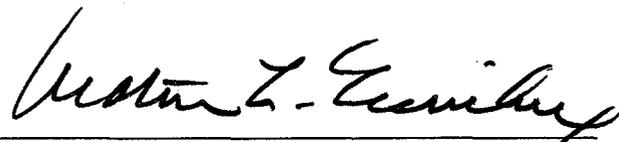
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters, Local 294, IBT. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 25, 1992
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member