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9-21-1992

## State of New York Public Employment Relations Board Decisions from September 21, 1992

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from September 21, 1992

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**BUFFALO TEACHERS FEDERATION, INC.,**

Charging Party,

-and-

CASE NO. U-11506

**BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF BUFFALO,**

Respondent.

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**ROBERT D. CLEARFIELD, GENERAL COUNSEL (ROBERT W.  
KLINGENSMITH, JR. of counsel), for Charging Party**

**JOSEPH CARNEY, for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Buffalo Teachers Federation, Inc. (BTF) to a decision by an Administrative Law Judge (ALJ). The BTF alleges in its charge that the Board of Education of the City School District of the City of Buffalo (District) violated §209-a.1(a), (b), (c) and (d) of the Public Employees' Fair Employment Act (Act) by repudiating the parties' contractual grievance procedure by intentionally and systematically delaying the processing of grievances. After a hearing, the ALJ granted the District's motion to dismiss, which was made at the close of the BTF's direct case. The ALJ held that the evidence did not show that the District had abandoned the grievance procedure or otherwise treated it as a nullity and, therefore, that there was no repudiation.

BTF argues in its exceptions that the ALJ erred factually and legally in dismissing the charge pursuant to the District's motion. BTF argues that the record evidences a pervasive pattern of delay attributable to the District in the scheduling or rescheduling of grievance meetings at appellate stages of the grievance procedure sufficient to withstand a motion to dismiss. The District has not filed a response to the exceptions.

For the following reasons we affirm the ALJ's decision.

BTF's theory of violation rests on an alleged repudiation of the contractual grievance procedure. In several decisions, we have distinguished a contract repudiation, which is cognizable as an improper practice, from a contract breach or a contract enforcement, which is not. In making that distinction, we have emphasized that a meritorious repudiation claim arises only in "extraordinary circumstances"<sup>1/</sup> in which a party to the contract denies the existence of an agreement or acts in total disregard of the contract's terms without any colorable claim of right.<sup>2/</sup> In the one case in which we held that an employer had repudiated the contract grievance procedure, the record established that the employer wholly ignored the grievance procedure to the point of

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<sup>1/</sup>State of New York (SUNY College at Potsdam), 22 PERB ¶3045, at 3103 (1989).

<sup>2/</sup>Monticello Cent. School Dist., 22 PERB ¶3002 (1989); Connetquot Cent. School Dist., 21 PERB ¶3049 (1988); City of Buffalo, 19 PERB ¶3023 (1986); Copiague Union Free School Dist., 13 PERB ¶3081 (1980).

abandonment and deliberately treated that procedure as a nullity.<sup>3/</sup> The record in this case considered in the light most favorable to the BTF falls far short of that repudiation standard. The District is processing grievances, it has made efforts to expedite that processing, and it has tried to clear the grievance backlog. Although the pace of processing may still be slower than the BTF might prefer, certain of its own actions have contributed to some of the delays and, in any event, the processing speed is not wholly unreasonable given the number of grievances filed annually and the several steps through which a grievance is passed. In summary, the evidence does not establish the intentional disregard of the grievance process which is necessary to a viable repudiation cause of action. Therefore, the ALJ did not err in dismissing BTF's charge at the close of its case.

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

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

DATED: September 21, 1992  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

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

  
\_\_\_\_\_  
Eric J. Schmertz, Member

<sup>3/</sup>Addison Cent. School Dist., 17 PERB ¶3076, aff'g 17 PERB ¶4566 (1984).

2B-09/21/92

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

COUNTY ASSOCIATION OF PATROL OFFICERS,

Petitioner,

-and-

CASE NO. C-3682

COUNTY OF ERIE and ERIE COUNTY SHERIFF,

Joint Employer,

-and-

TEAMSTERS, LOCAL 264,

Intervenor.

---

SAPERSTON & DAY, P.C. (THOMAS S. GILL of counsel),  
for Petitioner

DONALD EHINGER, for Joint Employer

RONALD L. JAROS, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County Association of Patrol Officers (CAPO) to a decision by the Director of Public Employment Practices and Representation (Director). The Director dismissed CAPO's petition which seeks to fragment an existing unit of sheriff's department employees employed jointly by the County of Erie (County) and the Erie County Sheriff (Sheriff) (collectively Employer). CAPO seeks to represent in a separate unit all road patrol deputies, including criminal deputies and ranking officers assigned to road patrol

services, who are presently included in a unit which is represented by Teamsters, Local 264 (Local 264).

In dismissing the petition, the Director found insufficient evidence of the type of conflict of interest or inadequate representation we have required to warrant fragmentation of an existing unit.<sup>1/</sup>

CAPO makes two basic arguments in support of its exceptions. The first argument is that Local 264 discriminated against and failed to represent the road patrol deputies by adopting and maintaining a negotiating strategy which sought to obtain wage parity for all deputies despite a wage offer from the Employer which would have paid the road patrol deputies more than other unit deputies. Second, CAPO argues that fragmentation should be granted in recognition of the road patrol's separate community of interest because the Employer took a neutral position on the appropriate uniting. In this latter respect, CAPO argues that Local 264's opposition to the fragmentation should be disregarded because it is not an interested party.

Local 264 argues in response that the Director's decision is factually and legally correct and should be affirmed.

Having reviewed the record and the parties' arguments, we affirm the Director's decision.

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<sup>1/</sup>See, e.g., State of New York (Long Island Park, Recreation and Historical Preservation Comm'n), 22 PERB ¶3043 (1989).

CAPO filed a petition to fragment road patrol deputies from the existing unit in May 1988. By decision dated October 31, 1989, we affirmed the Director's decision dismissing that petition.<sup>2/</sup> In our decision, we denied fragmentation based upon the alleged uniqueness of the road patrol even though the Employer was similarly neutral in that proceeding. There being no relevant demonstrated change in factual basis or other circumstances in relevant respect since the date of our last decision, we consider our decision in that earlier proceeding to be dispositive of CAPO's second exception.

Relevant to the consideration of the CAPO's first exception is the parties' unanimous recognition that all deputies were underpaid in comparison to others in similar positions elsewhere. In response to this underpayment, Local 264 sought to raise the salaries of all deputies in the unit by approximately 23%. Although it wanted to maintain wage parity until that goal was obtained to avoid internal "whipsawing", Local 264 told representatives of the road patrol that it would be willing thereafter to consider different wage rates for the road patrol and other deputies. When contract negotiations deadlocked and the fact finder's report issued, the County Executive recommended to the County Legislature a one-year imposition which effectively would have given the road patrol a 12% pay increase and other deputies a 5.3% increase. Thereafter, however, a three-year

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<sup>2/22</sup> PERB ¶13055, aff'g 22 PERB ¶14036 (1989) (appeal filed).

contract was reached providing all deputies a 23% pay increase over its term.

CAPO argues that Local 264's wage parity strategy is inherently unfair to the road patrol, who are more underpaid, comparatively, to the other deputies in the unit. CAPO also finds discrimination in Local 264's rejection of the wage offer actually made by the Employer. We cannot, however, fragment units on the basis that some within a unit could or would at a particular point in time establish a comparatively greater entitlement to increases or other benefits if they were permitted separate negotiations. Such claims have often formed the basis for fragmentation requests. They have just as regularly been denied in recognition of and adherence to the Act's preference for the continuation of the uniting status quo absent a compelling need for change.

We view our decision in State of New York (Long Island Park and Historical Preservation Commission)<sup>3/</sup> when applied to the facts of this case to be dispositive of CAPO's first exception. As there, we do not find established here Local 264's "systematic and intentional disregard"<sup>4/</sup> for the road patrol nor neglect or indifference to their collective interests. We note, however, that although we are cognizant of and sensitive to the "realities

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<sup>3/</sup>Supra note 1.

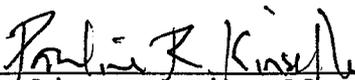
<sup>4/</sup>22 PERB ¶3043, at 3099 (1989).

of the collective negotiation process",<sup>5/</sup> our uniting policy will not require the continuation of a bargaining unit in circumstances in which the interests of a particular subgroup are disregarded or ignored out of hand. If Local 264 is to preserve its present unit, it must remain responsive within reason to the interests of all in its unit. Were we to detect a pattern in which the road patrol's interests were routinely subordinated to the interests of the majority, we would be inclined to reconsider a petition for fragmentation. At present, however, we do not find evidence of such a pattern and, for that reason, we must deny the petition.

Based upon the foregoing, the Director's decision is affirmed and the exceptions are denied.

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

DATED: September 21, 1992  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

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

  
\_\_\_\_\_  
Eric J. Schmertz, Member

<sup>5/</sup>Id.

20-09/21/92

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

JOHN J. CULKIN,

Charging Party,

-and-

CASE NO. U-11413

STATE OF NEW YORK (STATE INSURANCE FUND),

Respondent.

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JOHN J. CULKIN, pro se

BOARD DECISION AND ORDER

John J. Culkin requests that we consider his objection to a ruling made by an Administrative Law Judge (ALJ) in July 1992 during the processing of a charge against the State of New York (State Insurance Fund) (State).<sup>1/</sup> The ALJ currently assigned to the case reaffirmed a different ALJ's<sup>2/</sup> earlier ruling that only the allegation in the charge regarding an unsatisfactory job rating could be processed because the other allegations of impropriety raised in the charge are untimely. Culkin argues to us that these other allegations are timely and should be heard together with the allegation regarding the unsatisfactory rating.

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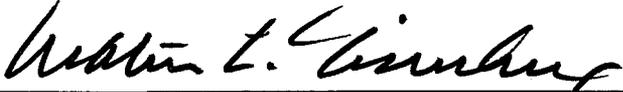
<sup>1/</sup>The charge was filed by the Public Employees Federation on behalf of Culkin. When PEF withdrew from its prosecution of the charge, the ALJ permitted Culkin to intervene and to continue with the prosecution of the charge.

<sup>2/</sup>The current ALJ was substituted for the ALJ originally assigned who has left employment with the Board.

Pursuant to §204.7(h) of PERB's Rules of Procedure, review of the ALJ's ruling may be had at this point in the proceedings only with our express authorization. We conclude that the ALJ's ruling can be properly reviewed on exceptions or cross-exceptions to the ALJ's decision and order when it is rendered and that no extraordinary basis has been established for review of the ALJ's timeliness ruling at this time. In such circumstances, we will not entertain an interlocutory appeal.<sup>3/</sup> Accordingly, we decline to consider Culkin's objections at this stage of the proceedings. SO ORDERED.

DATED: September 21, 1992  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

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

  
\_\_\_\_\_  
Eric J. Schmertz, Member

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<sup>3/</sup>State of New York (Div. of Parole) and Council 82, AFSCME, 25 PERB ¶3007 (1992); United Univ. Professions, 19 PERB ¶3009 (1986).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

RICHARD W. GLASHEEN,

Charging Party,

-and-

CASE NO. U-12818

SUFFOLK COUNTY and SUFFOLK COMMUNITY  
COLLEGE,

Respondents.

---

RICHARD W. GLASHEEN, pro se

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

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) on a charge he filed against his employer, Suffolk County and Suffolk Community College (respondents). Glasheen alleges that the respondents violated §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) by deliberately failing to execute a contract<sup>1/</sup> reached with Glasheen's bargaining agent, the Guild

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<sup>1/</sup>The contract, covering the period from September 1, 1988 through October 31, 1991, was reached in late 1989. It appears from the exceptions and the response that the contract was signed in December 1991.

of Administrative Officers (Guild), to prevent him from pursuing a grievance he had filed and to dissuade others from filing grievances.<sup>2/</sup>

The Director dismissed Glasheen's charge because, despite several amendments in response to notices that the charge was deficient, he concluded that there were no facts alleged from which it could reasonably be concluded that the respondents refrained from signing the contract to interfere with either Glasheen's or others' protected rights to pursue contract grievances.

Glasheen argues in his exceptions that the Director's decision should be reversed. The respondents argue in their response that the Director correctly dismissed the charge. Glasheen has filed a reply to the respondent's response, which the respondents contend is not permitted by our Rules of Procedure (Rules). The respondents have, however, filed a sur reply for our consideration should Glasheen's reply be considered. Glasheen, in turn, has filed a reply to the respondents' sur reply.

Our Rules do not specifically permit a reply to a response to exceptions. The Board, however, will consider a reply to a

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<sup>2/</sup>In summarizing Glasheen's allegations, we do not suggest that he has any standing to pursue the respondents' alleged violation of the rights of other employees. Our disposition of the charge makes it unnecessary for us to reach this issue.

response to exceptions under limited circumstances.<sup>3/</sup> The respondents' response to Glasheen's exceptions, however, does not raise any new facts or arguments which Glasheen could not reasonably have anticipated. We will not permit a reply to a response to exceptions under such circumstances and, therefore, we have not considered Glasheen's or the respondents' various replies<sup>4/</sup> in our disposition of Glasheen's exceptions.<sup>5/</sup>

Having reviewed Glasheen's exceptions and the respondents' response, we affirm the Director's dismissal of the charge. In reviewing Glasheen's charge, it is clear that he is concerned with the effects the absence of a signed contract might have upon his grievance. It is also clear that Glasheen believes that his grievance was not processed expeditiously and that disciplinary action taken against him was inappropriate. Glasheen's concerns and complaints in these respects do not mean, however, that an improper practice charge is the appropriate means by which they should be redressed. A delay in the execution of a contract is, of course, cognizable under a refusal to bargain charge filed by the bargaining agent. Notably, however, the Guild has not

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<sup>3/</sup>See Board of Educ. of the City School Dist. of the City of New York, 16 PERB ¶3048, at 3072 n.1 (1992).

<sup>4/</sup>The number of replies filed in this case suggests the need for a rule change which would clarify the limitations which are appropriately placed upon the exchange of pleadings in order to avoid a perceived need for continuing rebuttals of supplemental arguments.

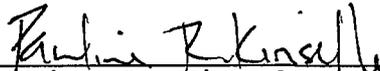
<sup>5/</sup>There is, however, nothing in these papers which would change our disposition of Glasheen's exceptions.

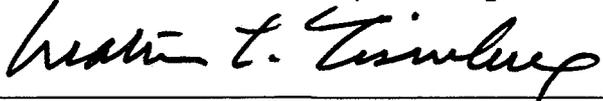
charged that the respondents' delayed execution of the agreement violates their statutory duty to bargain. Even if Glasheen had the standing to pursue such a charge, his allegation of violation is of a different type. Glasheen's allegation is that the respondents' failure to execute the agreement was improperly motivated as a means to deprive him and others of the opportunity to process grievances. However, as the Director correctly observed, there are no facts set forth in the charge as filed, clarified or amended which, if proven, would establish that the respondents deliberately delayed the execution of a formal collective bargaining contract to deny Glasheen or other employees an opportunity to file or pursue grievances. To the contrary, Glasheen himself concludes his charge with the allegation that the delay was "engineered" by the respondents to protect the reputations of their "key management personnel". Even assuming this allegation to be true, it would not establish or evidence a violation of the Act. Glasheen's remaining allegations are equally conclusory or unrelated to matters regulated by the Act.

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

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

DATED: September 21, 1992  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

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

  
\_\_\_\_\_  
Eric S. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

GREENLAWN FIRE DISTRICT EMPLOYEES  
ASSOCIATION,

Charging Party,

-and-

CASE NO. U-13223

GREENLAWN FIRE DISTRICT,

Respondent.

---

DOUGLAS K. MC NALLY, ESQ., for Charging Party

KAUFMAN, NANESS, SCHNEIDER & ROSENSWEIG, P.C.  
(CLIFFORD P. CHAIET of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Greenlawn Fire District Employees Association (Association) to a decision by the Director of Public Employment Practices and Representation (Director). The charge, filed on February 7, 1992, alleges, as amended, that the Greenlawn Fire District (District) violated §209-a.1(a), (b), (c) and (d) of the Public Employees' Fair Employment Act (Act) by paying one firehouse attendant in the Association's bargaining unit substantially more than other unit employees in the same title and by refusing during negotiations to bargain the Association's demand for equal pay for all such employees.

The Director dismissed the first aspect of the charge as untimely<sup>1/</sup> because the payment of the salary differential in question predated the Association's recognition, in September 1991, by at least nine months and continued unchallenged for more than four months after the Association's recognition. The Director dismissed the second aspect of the charge because the Association's allegations did not evidence a refusal to negotiate in good faith regarding the Association's demand for the elimination of the wage differential.

The Association's exceptions focus on the second aspect of its charge. It is unclear whether it excepts to the Director's disposition of the first aspect of the charge. Assuming, however, that the Association's exceptions extend to the Director's dismissal of the allegation concerning the payment of a higher wage to one employee, we affirm the Director's dismissal. That aspect of the charge is plainly untimely whether the alleged misconduct is measured from the date the wage differential was first established or first maintained after the Association's recognition.

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<sup>1/</sup>Section 204.1(a)(1) of PERB's Rules of Procedure requires that an improper practice charge be filed within four months of the alleged misconduct.

We similarly affirm the Director's dismissal of the second aspect of the charge. As the Director correctly noted, the Association's own pleading sets forth that the District explained its reasons for wanting to maintain the wage differential. Although the Association does not consider those reasons to be correct or reasonable, the parties' disagreement in this regard relates to the respective merits of their positions, which are not for us to judge in the context of this charge. Although the Association appears to believe otherwise, the District was not obliged to accept its demand to eliminate the wage differential to satisfy its duty to bargain. To the contrary, the duty to bargain as defined specifically provides that it does not compel agreement to any particular proposal or the making of a concession.<sup>2/</sup> Other than the refusal to accede to the Association's demand, there is nothing set forth in the charge which would evidence a refusal to bargain in good faith and, therefore, the Director properly dismissed it.<sup>3/</sup>

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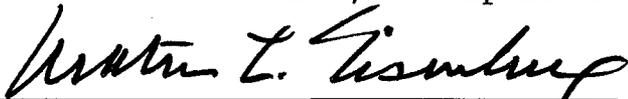
<sup>2/</sup>Act §204.3.

<sup>3/</sup>Whether equal pay is otherwise required by the state or federal constitutions, different statute or public policy is immaterial to the disposition of this charge.

For the reasons set forth above, the Association's exceptions are denied and the Director's decision is affirmed. IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed.

DATED: September 21, 1992  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

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

  
\_\_\_\_\_  
Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Charging Party,

-and-

CASE NO. U-11993

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

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In the Matter of

SUFFOLK COUNTY COURT EMPLOYEES  
ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-11997

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

---

NANCY HOFFMAN, ESQ., GENERAL COUNSEL (WILLIAM HERBERT  
of counsel), for Charging Party in Case No. U-11993

SCHLACHTER & MAURO (DAVID SCHLACHTER of counsel), for  
Charging Party in Case No. U-11997

NORMA MEACHAM, ESQ. (LEONARD KERSHAW of counsel), for  
Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Civil  
Service Employees Association, Inc. Local 1000, AFSCME, AFL-CIO  
(CSEA) and the Suffolk County Court Employees Association, Inc.  
(Association) to a decision by an Administrative Law Judge (ALJ).

The ALJ held on a stipulated record that the State of New York - Unified Court System (UCS) had not violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it changed the promotion units for the unified court system, including those for the employees represented by CSEA and the Association. The ALJ held that Matthew Crosson, Chief Administrator of the Courts, was acting in a civil service capacity when he issued an administrative order which abolished the existing promotion units for the New York City courts and the third through the tenth judicial districts and created in their place a single promotion unit, excluding the promotion units for the Court of Appeals and the four Appellate Divisions, which were not changed.

Both CSEA and the Association argue that the change in the promotion units is mandatorily negotiable and that the ALJ erred in concluding otherwise. UCS argues in response that the determination of promotion units is either a prohibited or nonmandatory subject of negotiation for several different reasons such that the ALJ's decision must be affirmed.

Having reviewed the record and the parties' arguments, we affirm the ALJ's decision to dismiss the charges, although on a different basis.

Promotion units are basically geographic subdivisions of the unified court system within which employees are tested, ranked

and selected for promotion.<sup>1/</sup> Until the change at issue, the names of employees who achieved a passing score on a promotion examination were entered on a general eligible list in the order of their examination ratings. Separate eligible lists were created for each promotion unit. Employees on the separate promotion eligible lists were certified for promotional positions within those promotion units before those on the general eligible list, even though they may have had a lower score on the examination than employees on the general eligible list. Only when the pool of eligibles on each separate promotion list was exhausted were the employees on the general eligible list certified for appointment to a position within a particular promotion unit. In principal net effect, the creation of a single promotion unit for all courts and court-related agencies, excluding the Court of Appeals and the Appellate Divisions, causes all employees within and without CSEA's and the Association's units to compete for promotion against a greater number of employees than when there were many separate promotion units.

We are of the opinion that the Chief Administrator's redefinition of promotion units within the unified court system

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<sup>1/</sup>The parties' contracts use a promotion unit for additional purposes. For example, CSEA's agreements use a promotion unit as a reference for defining employees' rights for purposes such as reassignments, transfers, sick leave donation and reappointments following a leave of absence. Promotion units also have relevance to the transfer and reassignment of employees under the Rules of the Chief Judge.

is a nonmandatory subject of negotiation because the decision is inextricably intertwined with the exercise of managerial prerogatives relating to the determination of employment qualifications and staff deployment. Having so found, it is not necessary for us to reach the issue of whether the redefinition of the promotion units is nonmandatory for the reasons specified in the ALJ's decision.

A promotion unit is basically the means by which the nonjudicial employees of the unified court system are screened, ranked and selected for positions within the court system. By redefining the promotion units, the pool of employees eligible for promotion and reassignment was expanded because the new promotion unit covered a larger geographic area and eligible employee population. We cannot separate the decision to reconfigure the promotion unit from other decisions involving, directly or indirectly, the establishment of or changes in qualifications for appointment or promotion, which we have held to be nonmandatory.<sup>2/</sup> Consistent with those cases and others, we view the basic decision to change the definition of a promotion unit for the unified court system to be the type of "personnel management tool" which facilitates UCS' determinations regarding staffing needs, deployment and job qualifications, all

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<sup>2/</sup>Rensselaer City School Dist., 13 PERB ¶3051 (1980), conf'd, 87 A.D.2d 711, 15 PERB ¶7003 (3d Dep't 1982); Fairview Professional Firefighters Ass'n, Inc., 12 PERB ¶3083 (1979); Police Benevolent Ass'n of Hempstead, N.Y., Inc., 11 PERB ¶3072 (1978).

nonmandatory subjects of negotiation.<sup>3/</sup> To compel negotiation of the definition of the appropriate promotion unit would impinge upon UCS's managerial rights in these areas. As such, the Chief Administrator's redefinition of the promotion units was not mandatorily negotiable and the UCS did not violate the Act when the Chief Administrator unilaterally issued and implemented the administrative order which effected the change in the promotion units.

Our determination is confined to the charges as filed which challenge only the decision to change the promotion units. As CSEA and the Association argue, the change in those promotion units may have affected certain terms and conditions of employment established by the parties' contracts or practices. We express no opinion regarding CSEA's or the Association's rights to bargain the effects of the change in the promotion units pursuant to demand, or the merits of any contract grievance or any other action or proceeding which might lie as a result of the change in promotion units. In affirming the ALJ we hold only that the change in the promotion units is not itself mandatorily negotiable.

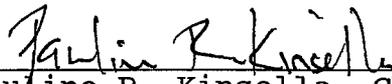
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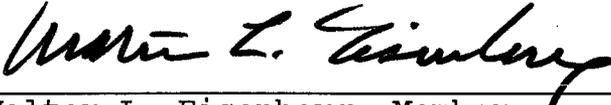
<sup>3/</sup>New York State Court Employees Ass'n, 12 PERB ¶3075 (1979), rev'd in part sub nom. Evans v. Newman, 71 A.D.2d 240, 12 PERB ¶7022 (3d Dep't 1979), aff'd, 49 N.Y.2d 904, 13 PERB ¶7004 (1980).

For the reasons set forth above, the ALJ's decision dismissing the charges is affirmed and the exceptions in each case are denied.

IT IS, THEREFORE, ORDERED that the charges must be, and hereby are, dismissed in their entirety.

DATED: September 21, 1992  
Albany, New York

  
\_\_\_\_\_  
Pauline R. Kinsella, Chairperson

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

  
\_\_\_\_\_  
Eric S. Schmertz, Member

2G-09/21/92

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, SCHENECTADY  
COUNTY LOCAL 847, BURNT HILLS-BALLSTON  
LAKE CSD UNIT,

Charging Party,

-and-

CASE NO. U-12418

BURNT HILLS-BALLSTON LAKE CENTRAL  
SCHOOL DISTRICT,

Respondent.

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NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ  
of counsel), for Charging Party

VAN VRANKEN & LITTLE (ROBERT E. VAN VRANKEN 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, Schenectady County Local 847, Burnt Hills-Ballston Lake CSD Unit (CSEA) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). The Assistant Director held that the Burnt Hills-Ballston Lake Central School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it transferred to nonunit personnel certain duties which were performed exclusively by the unit position of computer operator. The District abolished that position, which was held by Elizabeth

Kotzak, for budgetary reasons. The Assistant Director dismissed, however, that part of the charge which alleges that the unilateral abolition of the position itself violated the District's duty to bargain.

CSEA argues in its exceptions that we should reconsider our prior decisions and hold that a decision to abolish a position for economic reasons is a mandatory subject of negotiation. It also excepts to the Assistant Director's decision that the transfer of unit duties to two employees who had been designated confidential did not violate the Act. The Assistant Director held that there was no violation in that respect because the two employees were still in the unit when the duties were transferred because the confidential designation was not then effective.<sup>1/</sup> CSEA's main exception, however, relates to the Assistant Director's remedy. The Assistant Director ordered the duties which were improperly transferred restored to CSEA's unit. CSEA argues that the remedy is inadequate because it lacks a reinstatement and back pay award for Kotzak.

The District has not taken exception to the Assistant Director's decision and it argues that CSEA's exceptions should be denied.

For the following reasons, we affirm the Assistant Director's decision.

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<sup>1/</sup>The duties were transferred in this respect in June 1991, but the confidential designation did not become effective pursuant to §201.7(a) of the Act until December 1991.

CSEA concedes that a position abolition for economic reasons has been held a nonmandatory subject of negotiation.<sup>2/</sup> In urging us to reverse those prior decisions, CSEA argues that the decision to abolish a position for budgetary reasons should be mandatorily negotiable because it turns on labor costs. Having considered CSEA's arguments, we decline to reverse our long-standing position on this issue. Notwithstanding the obvious impact a position abolition can have, and did have in this case, upon an employee's employment relationship, we remain convinced that a position abolition for economic reasons is primarily mission related and, therefore, a nonmandatory subject of negotiation. Accordingly, we deny CSEA's exceptions in this respect.

We also affirm that part of the Assistant Director's decision which finds no violation in the reassignment of certain of Kotzak's duties pertaining to payroll and accounts receivable to the two confidential employees. When the charge was filed and litigated, the confidential designees were still in the unit because the designation was not in effect. Because there was no transfer of work out of the unit no basis was established to find a violation of the Act. CSEA could have filed a new charge or moved to amend this charge and reopen the hearing on it if on or after the effective date of the confidential designation the

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<sup>2/</sup>Spencer-Van Etten Cent. School Dist., 21 PERB ¶3015 (1988), aff'g 20 PERB ¶4612 (1987); City School Dist. of the City of New Rochelle, 4 PERB ¶3060 (1971).

District had the then nonunit confidential employees perform duties of the abolished position.<sup>3/</sup>

Remaining for our consideration is CSEA's argument that the ALJ should have ordered Kotzak reinstated with back pay.

CSEA is correct that the purpose of our remedial orders is to make parties whole for the wrong sustained by placing them, as nearly as possible, in the position they would have been in had the improper practice not been committed. But CSEA errs by focusing upon the individual most immediately affected by the transfer of duties as the basis for its remedial request. The violation committed runs not to the employee's personal statutory rights, but to the union's right, as representative of the collective unit's interests, to bargain regarding the loss or retention of exclusive unit work. The violation in this case centers on the unilateral transfer of duties out of the bargaining unit which is remedied by restoring the improperly transferred duties to the unit. Notwithstanding this general proposition, unit employees who are severed from employment as a result of the improper transfer of unit work would be entitled to reinstatement and back pay if the improperly transferred work was the equivalent of full-time employment. For example, if the

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<sup>3/</sup> We note, moreover, that this issue has been rendered largely academic by the Assistant Director's remedial order restoring the payroll and accounts receivable duties to the unit.

duties of Kotzak's position which were improperly transferred out of CSEA's unit amounted to the substantial equivalent of full-time employment for her, a reinstatement order with accompanying back pay might very well have been appropriate as it is, for example, in the transfer of unit work effected by subcontract. However, in view of the Assistant Director's finding that a significant portion of Kotzak's duties were not improperly eliminated or transferred, a finding to which CSEA has not taken exception, a reinstatement and back pay order is not appropriate.

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

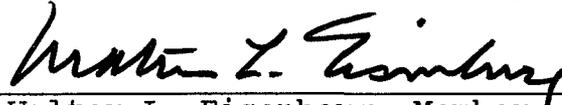
IT IS, THEREFORE, ORDERED that the District:

1. Forthwith restore to a position or positions within the bargaining unit represented by CSEA the following duties which were formerly, and exclusively, performed by the bargaining unit position of computer operator: payroll, accounts payable, student accident reports data input, back-up, voter registration, student database input, trouble-shooting of the administrative data processing system, ordering supplies and security management.

2. Sign and post the attached Notice at all locations normally used to post notices of information to unit employees.

DATED: September 21, 1992  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

  
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Walter L. Eisenberg, Member

  
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Eric J. Schmertz, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE  
NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees of the Burnt-Hills-Ballston Lake Central School District in the bargaining unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Schenectady County Local 847, Burnt Hills-Ballston Lake CSD Unit, that the District:

Will forthwith restore to a position or positions within the unit represented by the CSEA the following duties which were formerly and exclusively, performed by the bargaining unit position of computer operator: payroll, accounts payable, student accident reports data input, back-up, voter registration, student database input, trouble-shooting of the administrative data processing system, ordering supplies and security management.

BURNT HILLS-BALLSTON  
LAKE CENTRAL SCHOOL DISTRICT .....

Dated .....

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

UNITED FEDERATION OF LAW ENFORCEMENT  
OFFICERS,

Petitioner,

-and-

CASE NO. C-3924

NEW YORK CITY TRANSIT AUTHORITY,

Employer,

-and-

SPECIAL INSPECTORS BENEVOLENT ASSOCIATION,<sup>1/</sup>

Intervenor.

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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 Federation of Law Enforcement Officers has been designated and selected by a majority of the employees of the above-named public employer, in

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<sup>1/</sup>Special Inspectors Benevolent Association, the incumbent negotiating agent, has disclaimed any ongoing representational interest.

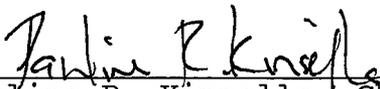
the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

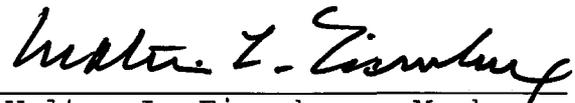
Unit: Included: All Special Inspectors

Excluded: Assistant Chiefs and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Law Enforcement Officers. 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: September 21, 1992  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

  
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Walter L. Eisenberg, Member

  
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Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

BOCES EDUCATIONAL SUPPORT PERSONNEL  
ASSOCIATION, NEA/NEW YORK, NEA,

Petitioner,

-and-

CASE NO. C-3977

DELAWARE-CHENANGO-MADISON-OTSEGO  
BOCES,

Employer,

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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 BOCES Educational Support Personnel Association, NEA/New York, NEA 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.

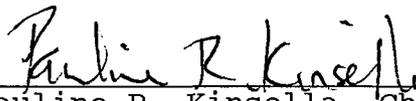
Unit: Included: Helper, Registered Nurse, Braillist, Courier, Interpreter, Typist, Press Operator, Van Driver, Payroll Clerk, Account Clerk Typist, Employment Counselor, Custodial Worker, Secretary, Assistant Fleet Mechanic, AV Manager, Senior Account Clerk Typist, Aide (Teacher, Library, AV), Messenger, Clerk, Composing Typist, AV Repairperson, Stenographer, Account Clerk, Assistant Fleet Mechanic, Access Case Manager, Fleet Mechanic, In-School Suspension Monitor, Receptionist, Technology Specialist, Purchasing Clerk;

Excluded: Administrators, Coordinators, Treasurer, Secretary to the District Superintendent, Secretary to the Coordinator of Employee Relations, Word Processing Manager, Word Processing Specialist, Computer Operator/Programmer, Secretary to the Assistant Superintendent for Management Services, Secretary to the Assistant Superintendent for Instructional Services, Secretary to the Coordinator of Planning and Development, Building Maintenance Mechanic.

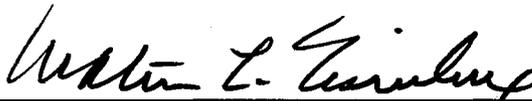
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the BOCES Educational Support Personnel Association, NEA/New York, NEA. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to 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: September 21, 1992  
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED FEDERATION OF LAW ENFORCEMENT  
OFFICERS,**

Petitioner,

-and-

CASE NO. C-3946

**MANHATTAN AND BRONX SURFACE TRANSIT  
OPERATING AUTHORITY,**

Employer,

-and-

**SPECIAL INSPECTORS BENEVOLENT ASSOCIATION,<sup>1/</sup>**

Intervenor.

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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 Federation of Law Enforcement Officers has been designated and selected by a

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<sup>1/</sup>Special Inspectors Benevolent Association, the incumbent negotiating agent, has disclaimed any ongoing representational interest.

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.

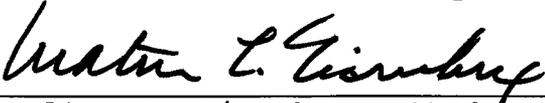
Unit: Included: All Special Inspectors

Excluded: Assistant Chiefs and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Law Enforcement Officers. 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.

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