



Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Board Decisions - NYS PERB

New York State Public Employment Relations
Board (PERB)

10-19-1993

State of New York Public Employment Relations Board Decisions from October 19, 1993

New York State Public Employment Relations Board

Follow this and additional works at: <https://digitalcommons.ilr.cornell.edu/perbdecisions>

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

This Article is brought to you for free and open access by the New York State Public Employment Relations Board (PERB) at DigitalCommons@ILR. It has been accepted for inclusion in Board Decisions - NYS PERB by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.

If you have a disability and are having trouble accessing information on this website or need materials in an alternate format, contact web-accessibility@cornell.edu for assistance.

State of New York Public Employment Relations Board Decisions from October 19, 1993

Keywords

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

Comments

This document is part of a digital collection provided by the Martin P. Catherwood Library, ILR School, Cornell University. The information provided is for noncommercial educational use only.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED UNION OF ROOFERS, WATERPROOFERS,
AND ALLIED WORKERS, LOCAL NO. 22,

Petitioner,

-and-

CASE NO. C-4045

TOWN OF MARION,

Employer.

RICHARD D. FURLONG, ESQ., for Petitioner

BRENT D. COOLEY, ESQ., for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Marion (Town) to a decision by the Director of Public Employment Practices and Representation (Director) finding that the United Union of Roofers, Waterproofers, and Allied Workers, Local No. 22 (Union) should be certified without an election pursuant to §201.9(g)(1) of our Rules of Procedure (Rules).

The Town argues that our Rules, which permit a union to be certified without an election if it has otherwise established its majority status, are undemocratic and inconsistent with the recommendations of the Taylor Commission, which allegedly expressed a preference for a determination of a union's majority status by an election.

As the Town recognizes, we previously have considered similar challenges to our Rules regarding certification without

an election, most recently and most comprehensively in Bethlehem Public Library.^{1/} In that case, we held that our certification without election Rules are consistent with the Public Employees' Fair Employment Act (Act), which requires an election only "if necessary" to ascertain the employees' choice of representative (Act §207.2). The Union was entitled to certification without election under our Rules as written and consistently applied.

For the reasons set forth above, the Town's exceptions are denied and the Director's decision is affirmed. We, therefore, issue the following 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 Union of Roofers, Waterproofers, and Allied Workers, Local No. 22 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

^{1/23} PERB §3009 (1990).

purpose of collective negotiations and the settlement of grievances.

Unit: Included: All mechanical equipment operators employed in the Highway Department, including the foreman.

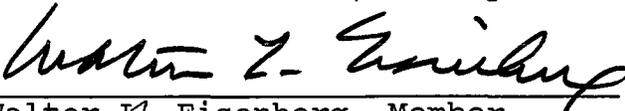
Excluded: The highway superintendent and all others.

FURTHER, IT IS ORDERED that the above-named public employer shall negotiate collectively with the United Union of Roofers, Waterproofers, and Allied Workers, Local No. 22. 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.

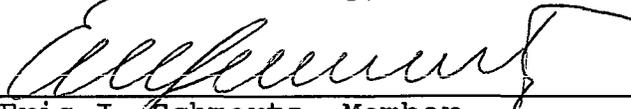
DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WATERLOO CENTRAL SCHOOL DISTRICT

CASE NO. DR-038

Upon a Petition For Declaratory Ruling

MURRY SOLOMON, for Petitioner

WILLIAM R. SELL, for Waterloo Education Association

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Waterloo Education Association (Association) on a declaratory ruling by the Director of Public Employment Practices and Representation (Director) issued on a petition filed by the Waterloo Central School District (District). The Director ruled that two proposals still in dispute in the parties' negotiations are nonmandatory subjects of negotiation.

The proposals in issue, next set forth, are from the General Information article of the parties' expired 1989-91 contract.

- G. Except as required by this Agreement, both parties shall maintain at least the present standards affecting the terms and conditions of employment of the members of the Association.
- H. This Agreement should not be interpreted or applied in any manner which will deprive Unit Members of professional and/or employment benefits and/or advantages heretofore enjoyed.

The Director held that both proposals are nonmandatory because they are broad enough to include nonmandatory subjects of negotiation.

The Association argues in its exceptions that the Director erred in his statements regarding the origination of the demands, in his application of the Public Employees' Fair Employment Act (Act), and his construction of the contract language. The District, in its response, urges affirmance of the Director's decision.

Having considered the parties' arguments, we affirm the Director's decision.

The Director opened his decision by observing that the demands were proffered by the Association. The Association disputes the accuracy of that statement, but it is not material to the disposition of the petition. No matter how raised, the demands are plainly in dispute. Indeed, they are the only remaining open issues in an otherwise settled agreement. The context in which the demands are presented is sufficient for purposes of a declaratory ruling procedure.^{1/}

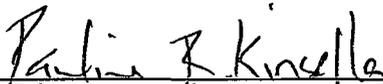
The Association's two remaining exceptions are directed to the merits of the Director's ruling. We affirm that ruling for the reasons stated in the Director's decision. In affirming, we reject the Association's argument that because "terms and conditions of employment" are, by definition, mandatorily

^{1/}See Seneca Falls Teachers Ass'n., 23 PERB ¶3032 (1990).

negotiable, it necessarily follows that any and all actions affecting those terms and conditions of employment must also be mandatorily negotiable. The conclusion is simply not a necessary corollary of the stated proposition. As to paragraph H, although many of the "professional and/or employment benefits and/or advantages" may be mandatory subjects of bargaining, the language would also restrain the District from making changes in those "benefits or advantages" which are not mandatorily negotiable such as, for example, class size or duty assignments.

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

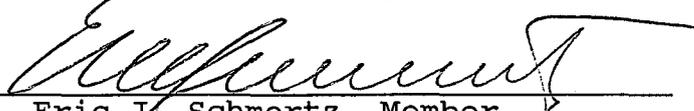
DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

20-10/19/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PAID FIREMEN'S ASSOCIATION OF PEEKSKILL,
NEW YORK, INC., LOCAL 2343, IAFF,

Charging Party,

-and-

CASE NO. U-11089

CITY OF PEEKSKILL,

Respondent.

In the Matter of

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Charging Party,

-and-

CASE NOS. U-11095
& U-11096

CITY OF PEEKSKILL,

Respondent.

In the Matter of

PEEKSKILL POLICE ASSOCIATION,

Charging Party,

-and-

CASE NO. U-11097

CITY OF PEEKSKILL,

Respondent.

THOMAS F. DeSOYE, ESQ., for Charging Party in U-11089

BRIAN M. LUCYK, ESQ., for Charging Party in U-11095 & U-11096

WILSON & FRANZBLAU (KENNETH J. FRANZBLAU of counsel) and
THOMAS P. HALLEY, ESQ., for Charging Party in U-11097

RAINS & POGREBIN, P.C. (DAVID M. WIRTZ and SHARON N. BERLIN
of counsel), for Respondent

BOARD DECISION AND ORDER

These cases, which we have consolidated for decision, are before us on either exceptions or cross-exceptions from all parties, except the charging party in U-11097, to decisions by an Administrative Law Judge (ALJ).

Case No. U-11089 is a charge filed by the Paid Firemen's Association of Peekskill, New York, Inc., Local 2343, IAFF (Firemen's Association) against the City of Peekskill (City).

Case Nos. U-11095 and U-11096 are charges filed by Local 456, International Brotherhood of Teamsters (IBT) against the City. Case No. U-11095 is filed on behalf of IBT's blue-collar unit; Case No. U-11096 concerns IBT's white-collar unit.

Case No. U-11097 is a charge filed by the Peekskill Police Association (Police Association) against the City.

The charges are substantially similar. Each alleges that the City violated §209-a.1(d)^{1/} of the Public Employees' Fair Employment Act (Act) when, on April 24, 1989, it changed its practice to require current employees in all units who retire on or after January 1, 1990 to pay a portion of their health insurance premiums upon their retirement. Each of the cases was submitted to the ALJ for decision on the pleadings and an exchange of correspondence.

^{1/}The Firemen's Association also alleged in U-11089 that the City violated §209-a.1(a) and (c) of the Act. The ALJ dismissed those allegations for lack of proof and no exceptions have been taken to his decision in that respect.

The ALJ dismissed the Firemen's Association's charge in U-11089 and IBT's charges in U-11095 and U-11096 for the same reason. When the City first required the health insurance contribution from retirees, both the Firemen's Association and IBT were without collective bargaining agreements, their contracts having expired December 31, 1988. The ALJ concluded that the existence of a collective bargaining agreement was necessary for there to be any right to bargain retiree health insurance contributions.

The Police Association, however, had a contract in effect when the premium contribution was first required of its unit employees who retired on and after January 1, 1990. That contract for the first time required a health insurance premium contribution from active police officers under different formulas for 1989, 1990 and 1991. According to the ALJ, the existence of that contract entitled the Police Association to bargain regarding the health insurance benefits of those police officers who retired during the term of the 1989-91 contract for the term of that contract. The ALJ also found in that case that the City's practice was to pay 100% of the premium for health insurance for retirees despite the premium contribution required of active employees under the Police Association's 1989-91 contract. The ALJ treated the retirees and the active employees as two separate classes and held that the contribution required of the active employees by agreement did not entitle the City to impose that same contribution on the retirees.

The Firemen's Association and IBT argue in their exceptions that the stated term of a collective bargaining agreement neither defines nor limits bargaining rights or obligations regarding retirees. The ALJ's dismissal of the Firemen's Association's and IBT's charges is assertedly contrary to prior decisions of this Board and the policies of the Act.

The City's cross-exceptions in U-11089, U-11095 and U-11096 are related to the exceptions it filed in U-11097. The City argues in its exceptions and cross-exceptions that none of the unions proved a unilateral change in practice regarding health insurance premium contributions by retirees. The City argues in that respect that the record is at least equally susceptible to an interpretation that retirees were always subject to the same level of premium contribution as the active employees. According to the City, a contribution in the same amount as that required of active employees in the retiree's former unit is not a change in practice but the continuation of a practice.

Having reviewed the record and considered the parties' arguments, including those made at oral argument, we dismiss the charges filed by IBT as moot. We also dismiss the charges filed by the Firemen's Association and the Police Association, albeit on other grounds. The Police and Firemen's Associations' charges are dismissed because we are persuaded that they have not satisfied their burden to prove a change in practice.

All of the charges were filed with respect to an April 24, 1989 City resolution. That resolution required a health

insurance premium contribution from all City retirees, regardless of their unit placement, according to the contribution required of current employees in the Police Association's unit under the then existing 1989-91 contract with the Police Association. In September 1990, however, the City promulgated a new resolution that requires a health insurance premium contribution from a retiree only to the same extent and degree as that required of the active employees in the retiree's former bargaining unit. As a result of contract negotiations with the City, active employees in IBT's units do not contribute toward their health insurance and, accordingly, neither do the retirees from those units.

The April 24, 1989 resolution has been effectively rescinded as to IBT. We have no evidence that any health insurance contributions have been taken from the retirees from IBT's units. As the issues raised by IBT's charges are academic, we do not consider that the policies of the Act would be served by our consideration of IBT's charges. The same factors which led us very recently to approve the parties' discontinuation of an appeal in New York City Transit Authority,^{2/} lead us to dismiss IBT's exceptions on this ground. In doing so, we decline to follow so much of any prior decisions which hold or suggest that traditional mootness concepts may not be applied in any of our improper practice proceedings.^{3/} Our decision in this respect

^{2/}26 PERB ¶3037 (1993).

^{3/}See, e.g., City of New York, 10 PERB ¶3077 (1977), aff'g 9 PERB ¶4507 (1976).

is limited to the facts and circumstances of this case. We recognize that the application of a mootness concept is controlled by the particular facts of the case and applied only to the extent consistent with the policies of the Act.

By contrast, neither the Police Association's charge nor the Firemen's Association's charge is moot. The Police Association and the employees it represents are no differently situated under the September 1990 resolution than they were under the April 1989 resolution. In effect, the September resolution merely carried forward the April resolution unchanged as to the Police Association. The circumstances involving the Firemen's Association are not precisely the same as either those affecting the Police Association or IBT. Unlike IBT, as a result of its contract negotiations with the City, active members of the unit represented by the Firemen's Association are making a health insurance premium contribution. Accordingly, pursuant to the September resolution, retirees from the Firemen's Association unit are compelled to make the same health insurance contribution as made by the active members of that unit. Unlike the Police Association, the September resolution effected a different change in contribution than that effected by the April resolution as to the Firemen's Association. We do not consider this difference to dictate dismissal of the Firemen's Association's charge as moot. The Firemen's Association's charge, like the Police Association's, is grounded upon the requirement of a health insurance premium contribution from retirees in any amount. The Firemen's Association alleges that the prevailing practice is

free health insurance for retirees. A contribution in any amount, therefore, allegedly violates that practice. As the April resolution has been effectively rescinded as to the Firemen's Association, however, we can only assess the propriety of the City's action under the second resolution.

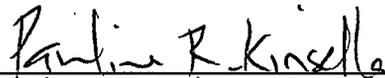
Turning to the merits, we dismiss the Police and Firemen's Associations' charges. Unlike the ALJ, we do not find that the contribution admittedly required of the retirees from the Police and Firemen's Associations' units by itself establishes a unilateral change in practice. The ALJ's decision on this point hinges entirely on his having treated the retirees and the active employees as members of two different classes for purposes of the receipt of health insurance benefits. There is nothing in the record, however, to suggest that the parties ever treated retirees differently from active employees with respect to this benefit. In short, the fact that both active and retired employees had 100% of the health insurance premium paid by the City is at least equally susceptible to a conclusion that a health insurance premium contribution required of retirees in an amount equal to that required of active employees in the retirees' former unit left the parties' practice with respect to retiree health insurance unchanged. The evidence being in equipoise, neither the Police Association nor the Firemen's Association has carried its burden of proof to establish a change in practice.

In reaching his decision on this issue, the ALJ relied upon our decision in State of New York (Division of Military and Naval

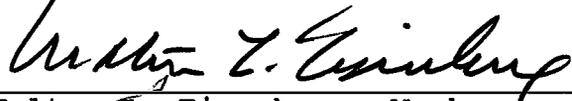
charges on these bases, we do not express any opinion regarding IBT's or the Firemen's Association's exceptions or the parties' arguments regarding the negotiability of retiree health insurance benefits.

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

DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

Affairs)^{4/} (hereafter DMNA). DMNA, however, does not compel or warrant the decision reached by the ALJ. In DMNA, we held that a union had established a change in practice on proof that the computation of certain leave benefits had been changed to the detriment of unit employees. In defense to this admitted change in practice, the employer argued that its practice was qualified or conditioned, a defense as to which the employer had the burden of proof and failed to carry. Unlike DMNA, the question here is not whether the City had a defense to a unilateral change, but whether there has been a demonstrated change in practice. The record here does not establish anything more than that retirees and active employees have never been treated differently. That historical identity of treatment has been continued. From the simple fact of the retirees' payment of a health insurance premium contribution, we cannot conclude as a matter of law that there has been a change in established practice. Something more evidencing a practice of distinguishing the health care benefits for retirees and current employees is required and it is not present on this limited record.

For the reasons and on the bases set forth above, all of the charges must be dismissed.^{5/} The City's exceptions in U-11097 are granted to the extent consistent with our decision and the ALJ's decision in that case is reversed. In dismissing the

^{4/}24 PERB ¶3024 (1992), conf'd, 187 A.D.2d 78, 26 PERB ¶7001 (2d Dep't 1993).

^{5/}Our rationale for the dismissal of the Police and Firemen's Associations' charges would apply equally to IBT's charges were we to reach their merits.

20-10/19/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-12476

TOWN OF HEMPSTEAD,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (PAMELA BRUCE of counsel),
for Charging Party

RONALD J. LEVINSON, ESQ. (FRANCESCA M. CAPITANO of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed CSEA's charge against the Town of Hempstead (Town), which alleges that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by subcontracting unit work to a private company. The ALJ dismissed the charge as untimely pursuant to §204.7(1) of our Rules of Procedure (Rules), which provides:

A motion may be made to dismiss a charge, or the administrative law judge may dismiss a charge on the ground that the alleged violation occurred more than four months prior to the filing of the charge, but only if the failure of timeliness was first revealed during the hearing. An objection to the timeliness of the charge, if not duly raised, shall be deemed waived.

Based upon facts first disclosed at the hearing, the ALJ concluded that CSEA had actual notice that the subcontractor was doing bargaining unit work in October 1990. As the charge was not filed until May 1991, the ALJ held that it was plainly untimely under Rules §204.1(a)(1), which establishes a four-month filing period.

CSEA argues in its exceptions that §204.7(1) does not permit the ALJ to raise timeliness on his own motion because the facts establishing the untimeliness of the charge were either known to or could have been discovered by the Town before the hearing. CSEA argues that §204.7(1) only applies in instances in which a respondent does not have or could not have discovered facts before the hearing which support an affirmative defense of untimeliness, which is required to be raised in a respondent's answer by Rules §204.3(c)(2).^{1/}

The Town in its response argues that the ALJ's decision is correct on the facts and the interpretation of the Rules and should be affirmed.

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

Section 204.7(1) and the amendment to §204.3(c)(2), requiring untimeliness to be pleaded in a respondent's answer,

^{1/}That section of the Rules requires a respondent's answer to include a "specific, detailed statement of any affirmative defense, including but not limited to an allegation that the violation occurred more than four months prior to the filing of the charge."

were effective the same date in 1977. These amendments were intended to clarify and modify our consideration of the timeliness of charges. The amendments to the applicable Rules sprang from the Board's decision in Town of Haverstraw,^{2/} decided on December 1, 1976. In that case, the Board held that a union had failed to negotiate in good faith.^{3/} On motion for reargument and reconsideration, the union established that its misconduct occurred more than four months before the charge was filed. Reversing its original decision and dismissing the charge as untimely, the Board rejected the charging party's arguments that timeliness was strictly in the nature of an affirmative defense that had to be raised or waived. The Board, however, observed that the charging party had made persuasive arguments favoring amendments to the Rules which the Board promised to study.

Section 204.2(a), pertaining to the Director's initial processing of a charge, was also amended simultaneously with the amendments to §204.7(1) and §204.3(c)(2). Under the amendment to §204.2(a), the Director is specifically instructed to dismiss a charge if it is determined "that the alleged violation occurred more than four months prior to the filing of the charge."

The interrelationship between and among these three timeliness provisions was explained in Westbury Teachers

^{2/9} PERB ¶13082 (1976).

^{3/9} PERB ¶13063 (1976).

Association.^{4/} The Director is to dismiss a charge when untimeliness is apparent on the face of the charge. In this case, untimeliness was not apparent from the charge as filed. To the contrary, based upon CSEA's pleading that it did not learn of the subcontracting until April 1991, the charge was plainly timely on its face. Therefore, it was properly processed by the Director pursuant to Rules §204.2(a).

The requirement imposed upon the Director to dismiss an untimely charge in advance of any answer from a respondent preserved that aspect of many of PERB's earlier decisions under which timeliness is not exclusively an affirmative defense. The amendments to §204.7(1) and §204.3(c)(2) clarified, however, that a lack of timeliness is not strictly jurisdictional. Therefore, timeliness under the amended Rules could not be raised by anyone at any time, even after decision, as occurred in Town of Haverstraw, supra. If timeliness was not raised in a respondent's answer, it could be raised either by the respondent or an ALJ, but only if the untimeliness of the charge was first revealed during the hearing. Section 204.7(1) was clearly intended to permit an ALJ to dismiss an untimely charge under a limited circumstance apart from any action taken or not taken by a respondent to preserve the agency's separate interest in preventing or discouraging the litigation of untimely charges. As we said in Westbury Teachers Association, in promulgating

^{4/}15 PERB ¶3099 (1982).

§204.7(1), we intended to retain "both the Director's and the [ALJ's] authority to raise [timeliness] on their own initiative".^{5/}

We have, as correctly recognized by the ALJ, approved an ALJ's dismissal of a charge after a hearing where the facts establishing the untimeliness of the charge were first revealed to the ALJ during the hearing in circumstances in which those facts were unquestionably either known to or could have been reasonably discovered by a respondent which had failed to raise untimeliness in its answer.^{6/} Even assuming the truth of CSEA's assertion that the Town knew or should have known that CSEA's charge was untimely, that circumstance has not been regarded as relevant to an ALJ's invocation of existing §204.7(1).

It is perhaps arguable that a respondent's ability to ascertain before the hearing the facts establishing the untimeliness of a charge should bar the respondent from raising untimeliness by motion in response to facts disclosed on the record at a hearing. Whatever arguable misfeasance there may be in a respondent's failure to investigate adequately a charge for purposes of preparing its defense, the right specifically reserved to an ALJ in §204.7(1) to dismiss a charge if the ALJ

^{5/}Id. at 3151.

^{6/}Wells Cent. Sch. Dist., 16 PERB ¶3107 (1983).

first becomes aware at a hearing that the charge is, in fact, untimely, remains intact.

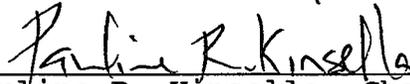
CSEA also argues that an ALJ should not be allowed to dismiss a charge as untimely after a hearing closes. It is after a hearing and receipt and review of the transcript and the parties' briefs, however, that an ALJ may be best prepared to rule on any issue. In this case, after his review of the record, the ALJ put the parties on notice of the timeliness issue, they each briefed that issue without offer of further evidence and CSEA has not taken any exceptions to the ALJ's finding that the charge is, in fact, untimely. We find nothing in §204.7(1) that would permit and require an ALJ to dismiss an untimely charge only during the hearing process and no prejudice to CSEA in the ALJ's making that dispositive ruling by post-hearing decision after notice.

Our dismissal of this charge does not mean that consideration should not be given to amending the Rules further to permit dismissals for untimeliness, after the Director's initial screening, only pursuant to an affirmative defense properly raised by a respondent, as CSEA argues. However, the Rules as presently written and consistently interpreted necessitate a dismissal of this charge.

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

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

DATED: October 19, 1993
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

ONEONTA POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-12760

CITY OF ONEONTA,

Respondent.

CHRISTOPHER GARDNER, ESQ., for Charging Party

DAVID S. MERZIG, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Oneonta (City) to a decision by an Administrative Law Judge (ALJ) sustaining a charge filed by the Oneonta Police Benevolent Association, Inc. (PBA) alleging that the City had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally imposing upon certain unit members a new physical examination procedure, which included a Physical Efficiency Battery (PEB), a physical fitness testing procedure.

The ALJ found that the City had violated the Act as alleged and ordered the procedure rescinded.

The City excepts to the ALJ's determination on several grounds, the main two of which are that the charge is untimely and that the procedure, as implemented, relates to its mission.

Since 1986, the City has had an interest in requiring some sort of physical fitness testing or evaluation of unit employees.^{1/} In December 1990, the City and the PBA began discussions at their monthly labor-management meetings regarding a physical fitness evaluation method. These discussions continued for several months on the premise that employees hired before March 12, 1990, would not be required to participate in the PEB. During this time frame, the parties also completed negotiations for a collective bargaining agreement for the term January 1, 1991 to December 30, 1993. The contract was executed on February 21, 1991. It contains the following provision as Article XXX:

FITNESS STANDARDS

The purpose of the Article is to set forth minimum fitness standards which must be met by all employees covered by this Agreement hired on or after March 12, 1990. It is agreed and understood that employees covered by this agreement hired before March 12, 1990 are exempt from this or any other fitness requirement, such as MPTC standards.

^{1/} In 1986, the PBA filed an improper practice charge (Case No. U-8599) alleging that the City had unilaterally imposed an assessment test. That charge was withdrawn after certain agreements were made between the PBA and the City regarding the use of the test results and further testing. In 1990, a second improper practice charge (Case No. U-11790) was filed after the City passed a local law requiring that minimum fitness standards be met by unit members. That charge was also withdrawn, after the City conceded that it was obligated to negotiate in good faith regarding both fitness and discipline procedures.

Covered employees will be tested on an annual basis for fitness levels in the following categories:

- A.) Flexibility
- B.) Body Composition
- C.) Strength
- D.) Cardiovascular (Aerobic)
- E.) Agility

These tests will be administered and rated in accordance with the fitness levels as developed by the Federal Law Enforcement Training Center (FLETC). The covered employees must meet the minimum of 50% as established by FLETC.

Covered employees who fail to meet these minimum standards will be retested within six months. It is understood that covered employees who do not meet the minimum standards after retesting shall be subject to the protections of due process as granted under the Civil Service Law.

Modifications of this Article will be made only as the result of mutual agreement among the members of the Labor-Management Committee.

At the April 15, 1991 labor-management meeting, John Insetta, the City's Personnel Director, announced for the first time that the City wanted the PEB to be mandatory for all unit members. Allen Taylor, the PBA President, so advised PBA members, who voted to reject such a plan. At the May 7, 1991 labor-management meeting, Taylor told Insetta that the PBA had rejected the City's PEB proposal. Insetta proposed the following language at that meeting:

The assessment component of the physical will be mandatory for all members of the police department during the 1991 physical. Subsequent annual physicals will contain an optional assessment component for all police officers hired prior to March 1990. The assessment component will remain mandatory for police officers hired after March 1990.

It is understood that the assessment component could remain mandatory for all police officers, however the employer elects to make this component of the physical optional after 1991. The employer hopes that all members will continue to avail themselves of the benefits of the assessment component of the physical.

It is understood that all police officers, for whom the assessment component will become optional, will exercise a reasonable effort to determine a clear picture of their physical state. If an officer is not exercising a reasonable effort that officer will repeat the assessment annually until a reasonable effort is obtained. (A reasonable effort will be defined as the attainment of 50%).

No agreement between the City and the PBA was reached at that meeting. On May 30, 1991, the Chief of Police issued a memorandum which stated:

DATE: MAY 30, 1991

TO: ALL OFFICERS HIRED BEFORE MARCH 1990

FROM: CHIEF DONADIO

SUBJECT: PHYSICAL EXAMINATION

MESSAGE: IN AN EFFORT TO PROVIDE FOR A MORE COMPREHENSIVE PHYSICAL EXAMINATION, AND AFTER CONSULTATIONS WITH MEMBERS OF THE DEPARTMENT, THE FOLLOWING PROCEDURE WILL BE IMPLEMENTED ON OR ABOUT SEPTEMBER 1, 1991.

A SCHEDULE OF OFFICERS WILL BE ESTABLISHED IN ORDER TO PROVIDE FOR AN ORDERLY PROCESS OF ADMINISTERING THE PHYSICAL EXAMINATION, AS MANDATED BY ARTICLE XVII SECTION C OF THE BUREAU OF POLICE DUTIES RULES & REGULATIONS MANUAL AND AS SUGGESTED BY THE MUNICIPAL POLICE TRAINING COUNCIL OF DCJS.

AT THE REQUEST OF MEMBERS OF THE DEPARTMENT, AND THE PBA AND SBA, THE PHYSICAL EXAMINATION WILL BE ADMINISTERED ON AN ANNUAL BASIS, SUBJECT TO THE POLICE CHIEF'S APPROVAL. THE PHYSICAL EXAMINATION WILL INCLUDE:

- A MEDICAL HISTORY QUESTIONNAIRE TO BE COMPLETED BY EACH OFFICER;
- A PRELIMINARY EXAMINATION CONDUCTED BY A MEDICAL DOCTOR ON EACH OFFICER;
- A SERIES OF TESTS ADMINISTERED TO EACH OFFICER TO INCLUDE:
 - a. BLOOD TEST
 - b. URINALYSIS
 - c. ASSESSMENT (PHYSICAL EFFICIENCY BATTERY, PEB);
- THE MEDICAL DOCTOR WILL ADVISE THE POLICE CHIEF AS TO WHETHER THE OFFICER IS CLEARED TO PERFORM ALL OR PART OF THE PEB;
- THE RESULTS OF ALL THE TESTS WILL REMAIN WITH THE DEPARTMENT DOCTOR AND WILL BE DISCUSSED DIRECTLY WITH THE OFFICER.
- ANY DISABLING ILLNESS OR INJURY WILL BE REPORTED TO THE PERSONNEL OFFICER FOR FURTHER ACTION.

The new procedure, which made the assessment component applicable to all unit members, contains an implementation date of September 1, 1991. However, pending the outcome of these proceedings, the procedure has not been enforced.

For the reasons set forth below, the ALJ's decision must be reversed and the charge dismissed for lack of jurisdiction.

Although not pled as an affirmative defense and while no exceptions were filed regarding jurisdiction, "we are obliged to reach that issue because it concerns our power to entertain the [§209-a.1(d) allegation set forth in the charge and litigated by

the parties]".^{2/} Section 205.5(d) of the Act provides that the Board

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

Article XXX of the contract, which was attached to the amended charge, and which was part of the contract entered into evidence at the hearing, provides that employees hired before March 12, 1990, are exempt from the physical assessment component of the City's physical examination procedure. The Article further provides that modifications of the Article will be the result of agreements reached by the labor-management committee. Although not pled by the parties nor raised by the ALJ, it is clear that the PBA's claim of right in this case is plainly and firmly grounded in the specific language of the parties' current collective bargaining agreement. Indeed, the agreement includes not only the exemption for the employees hired before March 12, 1990, but also an agreed-upon mechanism for the modification of the physical examination-physical assessment procedure. To the extent that the May 30, 1991 memorandum from the Chief of Police extends the coverage of the procedure to all unit members, it raises only a breach of contract claim, which the PBA would have us remedy by enforcing the terms of the agreement. It is clear that the parties have already bargained and reached agreement on

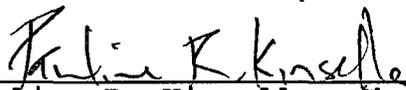
^{2/} City of Albany, 25 PERB ¶3006, at 3020 (1992).

the subject matter of the charge and the allegations set forth therein cannot, in light of the contract language, be read to set forth a separate violation under the Act. As such, the charge must be dismissed for lack of jurisdiction, without prejudice to the parties' rights and obligations under the contract.

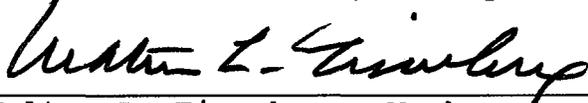
Having decided that we do not have jurisdiction, we do not consider the City's exceptions.

IT IS, THEREFORE, ORDERED that the charge be, and it hereby is, dismissed for lack of jurisdiction.

DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2F-10/19/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LONG BEACH CLASSROOM TEACHERS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-13047

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF LONG BEACH,

Respondent.

CLAUDIA SHACTER, for Charging Party

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA (ANNA M. SCRICCA and MARY ANNE SADOWSKI of
counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions and cross-exceptions filed, respectively, by the Long Beach Classroom Teachers Association, NYSUT (Association) and the Board of Education of the City School District of the City of Long Beach (District) to a decision of an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the Association's improper practice charge which alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally subcontracting its driver education program to a private contractor (SCOPE).

The ALJ dismissed the Association's charge upon his conclusion that the District did not subcontract its driver

education program to SCOPE but, rather, exercised its managerial prerogative to abolish the program altogether.^{1/} According to the ALJ, SCOPE's program is independent of the District. The Association's exceptions and the District's response thereto are directed to the ALJ's findings of fact and conclusions of law on this point. The ALJ also found that the District's driver education program was exclusive unit work to the extent unit employees were available to teach. The District's cross-exceptions and the Association's responses are directed to the ALJ's findings of fact and conclusions of law on this issue.

FACTS

Section 507.1 of the New York State Vehicle and Traffic Law (VTL) provides, inter alia, that persons who are seventeen years old may be issued a class D or class M driver's license upon the successful completion of an approved driver education course "in a high school or college." Pursuant to the VTL, such driver education programs consist of two elements: classroom instruction and on-the-road or "behind-the-wheel" training. Classroom instruction must be taught by a person who has been approved by the State Education Department and the Commissioner of Motor Vehicles. "However, a school district may contract with one or more licensed drivers schools to provide behind-the-wheel training, pursuant to regulations promulgated by the Commissioner [of Motor Vehicles]." The VTL also provides that "every student

^{1/}City Sch. Dist. of the City of New Rochelle, 4 PERB ¶3050 (1971).

who successfully completes such course in a day, evening or summer school program offered by a public or private school shall receive certification of such completion on a certificate prescribed by the Commissioner [of Motor Vehicles]."

Until September 1991, the District offered a driver education program in accordance with §507.1 of the VTL. However, according to Dorothy McGarvey, Assistant Superintendent of Schools, "SCOPE approached our school district . . . during the '90-'91 school year offering to furnish this program for us." Thereafter, on August 23, 1991, the District's Board of Education adopted a resolution entitled "Adoption of SCOPE Driver and Traffic Safety Education Program: 1991-92 School Year."

The school board's resolution authorized SCOPE "to provide a driver and traffic safety education program in the . . . District [from] September 1, 1991 to August 31, 1992, with the understanding that SCOPE will provide the program utilizing sponsorship funds generated from the public." In other words, the students, not the District, pay SCOPE for the program.

The school board's resolution further charges the high school principal "with the responsibility of overseeing the quality of the program and submitting all appropriate forms to the New York State Education Department including MV 285 'blue cards.'" The "MV 285" form is the form prescribed by §507.1 of the VTL and is the District's certification to the New York State Education Department that the students passed the course. Once

the certification is filed, the students are entitled to greater driving privileges than they would have otherwise.

A description of SCOPE's driver education program was given to Frank Volpe, President of the Association, by the District's Superintendent of Schools in response to Volpe's request for information concerning the program SCOPE would be providing. The description shows that SCOPE's arrangement with the District is on an annual basis "for as long as the program will be required." SCOPE requires that the District "appoint a principal or other appropriate school person to act as a liaison with SCOPE and to supervise the program for the school district." While SCOPE hires the teachers, "the District or District liaison will confirm their qualifications." The District is to "cooperate with SCOPE to provide promotion of the program to the families of eligible students." Moreover, "in cooperation with the District, SCOPE will provide limited 'scholarship' funds for students who cannot afford to pay the fees." These students are to be "identified and confirmed by the District involved."

Pursuant to its arrangement with the District, the classroom element of SCOPE's driver education program is taught in District classrooms and the road work departs from and terminates at the school building. This "behind-the-wheel" training is provided by Bell Auto School, apparently a private drivers school, as authorized by §507.1 of the VTL. Unlike the District's driver education program, all of SCOPE's classes are taught after school

hours.^{2/} Students receive no high school credit for successfully completing the course, and they must pay SCOPE for the program.

Until the District entered into its arrangement with SCOPE, the classroom element of the District's driver education program was exclusively taught by one unit teacher as part of his regular salaried teaching load. The "behind-the-wheel" classes were treated as extracurricular classes and compensated on an hourly basis. The District has consistently offered unit employees the opportunity to teach the "behind-the-wheel" classes at the negotiated wage rate of \$35 per hour. Only if there were an insufficient number of qualified unit employees to teach did the District offer the work outside of the bargaining unit.^{3/} Thus, according to McGarvey, during two of the three years preceding the arrangement with SCOPE, one of the three teachers of the "behind-the-wheel" element was not a unit employee.^{4/} These nonunit employees were also paid \$35 per hour to teach.

^{2/}When the District was offering the program, classroom instruction was taught during school hours, while behind-the-wheel instruction was provided after school hours.

^{3/}Article VI of the parties' collective bargaining agreement, entitled "Vacancies," provides: "nothing contained in this agreement shall limit or restrict the Board from considering concurrently applications from other than staff or from making appointments of such new applicants" so long as notices of vacancies are posted.

^{4/}During the school year immediately preceding the arrangement with SCOPE, a nonunit employee taught one of the "behind-the-wheel" classes, and during one of the two years prior to that, another nonunit teacher taught one of these classes.

When the District entered into its arrangement with SCOPE, two qualified unit employees who were available to teach for the District were offered employment with SCOPE. One accepted, and he is now teaching the classroom element for SCOPE at a significantly lower rate of pay than the District had paid.

DISCUSSION

In dismissing the charge, the ALJ held that the District has no control over the program that SCOPE now offers. He also determined that the role of the principal in certifying the successful completion of the course to the New York State Education Department is merely a "ministerial" function. We disagree with these conclusions.

From our review of the record, we find that the District has not discontinued the delivery of driver education to its constituency. Simply put, SCOPE offered to provide the same service as before at no cost to the District and the District accepted. SCOPE is merely the District's agent for the delivery of the same service the District had previously provided itself. The high school principal's responsibility to ensure that the program meets the District's standards and to certify to the New York State Department of Education the successful completion of SCOPE's program establish that the District has retained control over the educational service that SCOPE is providing. Moreover, such certification shows that the educational program is still offered in accordance with §507.1 of the VTL. Finally, that the District's arrangement with SCOPE is renewable annually

shows that SCOPE is not independent of the District. Indeed, absent this symbiotic relationship, SCOPE could not offer driver education in accordance with §507.1 of the VTL, which requires that such programs be offered through a public or private high school or college.

The description of SCOPE's program, given to Volpe, further supports our conclusion that SCOPE is providing driver education on behalf of the District. The role of the District in certifying the qualifications of the teachers whom SCOPE hires and its identification of students in need of scholarship funds clearly show that SCOPE's relationship with the District is, at least, interdependent.

Based upon the foregoing, we find, contrary to the ALJ, that the District is continuing to offer driver education to its constituency through SCOPE. The facts that the students pay SCOPE and receive no high school credit for the program are not dispositive. Many programs offered by a school district, such as athletics, are not for credit, and other programs, such as food services, are paid for by students.

Having determined that the District is still providing driver education to its constituency, we now turn to whether the assignment of such work to SCOPE violated the Act.

The District's exclusive utilization of a unit employee to teach the classroom element of its driver education program and its annual offer to unit employees of the opportunity to teach the roadwork element establish its recognition that the work

primarily belongs to bargaining unit personnel. Indeed, we find that its annual offer of such employment before hiring nonunit personnel is an affirmation of this recognition. Moreover, under these circumstances, we find that the utilization of nonunit personnel when an insufficient number of unit employees was available to teach was at the Association's sufferance and, therefore, does not constitute an elimination of the work from the bargaining unit nor a relinquishment of its rights to negotiate concerning the work involved.^{5/} Indeed, the nonunit personnel whom the District utilized from time to time to teach the roadwork portion of its driver education program could not even become members of the unit because they did not work the minimum number of hours necessary to meet the contractual definition of a unit employee.^{6/}

Because both parties understood the teaching of the District's driver education program to be unit work, we find that the District's unilateral discontinuance of the use of unit employees to perform the work, to the extent such employees were available, constitutes a violation of §209-a.1(d) of the Act.

^{5/}Compare County of Erie, 17 PERB ¶3067 (1984), aff'g 17 PERB ¶4551, at 4607 (1984), where "there [was] no record evidence that the respondent was obligated, by practice or contract, to appoint unit employees to the nonunit . . . positions."

^{6/}According to Stephen Broncatello, one of the driver education teachers, a roadwork teacher would teach a total of 384 hours during the school year, or approximately ten hours each week. The contractual recognition clause provides a threshold definition for unit employees as those who work a minimum of twenty hours per week.

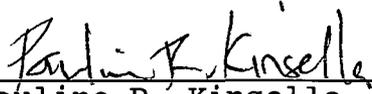
For the reasons set forth above, the Association's exceptions are granted, the District's cross-exceptions are dismissed, and the ALJ's decision is reversed.

NOW, THEREFORE, WE ORDER the District to:

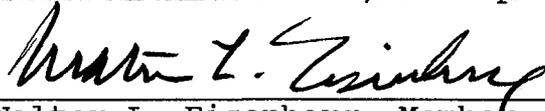
1. Restore its practice of exclusively using unit employees to teach the classroom element of its driver education program, should it continue to provide driver education to its constituency.
2. Restore its practice of utilizing qualified unit employees to teach the roadwork portion of its driver education program, to the extent such employees are available, should it continue to provide driver education to its constituency.
3. Make those unit employees who were available to teach, and who would have taught driver education for the District, whole for any wages or benefits lost as a result of the District's utilization of SCOPE, with interest on any sums owing at the currently prevailing maximum legal rate.

4. Sign and post the attached notice at all locations customarily used to post communications to unit employees.

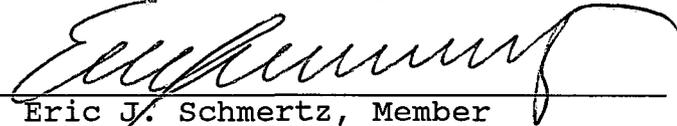
DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the City School District of the City of Long Beach in the bargaining unit represented by the Long Beach Teachers Association that the District:

1. Will restore its practice of exclusively using unit employees to teach the classroom element of its driver education program, should it continue to provide driver education to its constituency.
2. Will restore its practice of utilizing qualified unit employees to teach the roadwork portion of its driver education program, to the extent such employees are available, should it continue to provide driver education to its constituency.
3. Will make those unit employees who were available to teach, and who would have taught driver education for the District, whole for any wages or benefits lost as a result of the District's utilization of SCOPE, with interest on any sums owing at the currently prevailing maximum legal rate.

Dated

By
(Representative) (Title)

City School District of the City of Long Beach . .

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION
INC., LOCAL 1000, AFSCME, AFL-CIO,
SUFFOLK COUNTY LOCAL 852, TOWN OF
BROOKHAVEN BLUE COLLAR UNIT,

Charging Party,

-and-

CASE NO. U-13165

TOWN OF BROOKHAVEN,

Respondent.

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

COOPER, SAPIR AND COHEN (DAVID M. COHEN of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Suffolk County Local 852, Town of Brookhaven Blue Collar Unit (CSEA) and the Town of Brookhaven (Town) to a decision by an Administrative Law Judge (ALJ). As filed, CSEA's charge alleges that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it subcontracted the transportation of garbage and trash from certain transfer stations to the disposal point. During the hearing, CSEA moved to amend its charge to allege a violation of §209-a.1(c), which the ALJ granted in his decision. He denied, however, CSEA's post-hearing request to substitute a violation of

§209-a.1(a) for the alleged violation of §209-a.1(c) as alleged in its motion to amend.

The ALJ dismissed the §209-a.1(d) allegation on a finding that the work performed by the employees of the private contractor, Star Recycling, Inc. (Star), was not substantially similar to that performed by CSEA's unit employees. He dismissed the §209-a.1(c) allegation on a finding that there was not sufficient evidence to establish that the subcontracting was improperly motivated, a finding, he noted, which would equally necessitate dismissal of the §209-a.1(a) allegation, even had the charge been amended in that respect.

CSEA argues in its exceptions that the ALJ erred in denying its motion to add a §209-a.1(a) allegation and in finding, alternatively, that there was insufficient evidence in support of that allegation. It also argues that the ALJ was mistaken in finding that Star transports the ash from incinerated garbage and trash back to the Town. CSEA claims that Star only transports garbage and trash to the Town of Hempstead where it is incinerated. Lastly, CSEA argues that the ALJ erred in finding that the work performed by Star employees was not substantially similar to the work performed by unit employees.

The Town, in cross-exceptions, argues that the ALJ erred in granting the amendment to add the §209-a.1(c) allegation and in not deciding whether the contract with Star, as performed, represented a change in the Town's level of services which the Town need not have bargained with CSEA. In its response to

CSEA's exceptions, the Town admits that Star does not haul ash back to the Town, but argues that the ALJ's findings of fact are otherwise correct, as is his conclusion regarding the dissimilarity of the work, despite his one factual error.

CSEA, in its response to the Town's cross-exceptions, argues that the ALJ properly granted the motion to add the §209-a.1(c) cause of action and was correct in not finding that the Town had changed its level of services.

We consider first the exceptions to the ALJ's rulings on the amendments. The decision to grant or deny an amendment to a charge is normally a matter reserved to an ALJ's discretion,^{1/} to be exercised consistently with basic due process considerations and within certain limits we have fixed by case law.^{2/} In that regard, we affirm the ALJ's ruling granting the amendment to add the §209-a.1(c) allegation. That motion, based upon facts brought out for the first time by the Town's own witnesses, was made during the hearing and merely conformed the pleading to the record evidence. Moreover, the charge as filed gave the Town notice of the transactions or occurrences which are the subject of the granted amendment.^{3/} Being limited to the

^{1/}Village of Johnson City, 12 PERB ¶3020 (1979).

^{2/}For example, we have held generally that an amendment may not be granted if it adds a time barred cause of action. Public Employees Fed'n (Muragali), 14 PERB ¶3036 (1981); Brookhaven-Comsewoque Union Free Sch. Dist., 9 PERB ¶3012 (1976).

^{3/}See, e.g., State of New York (Dep't of Transp.), 23 PERB ¶3005 (1990), conf'd, 174 A.D.2d 905, 24 PERB ¶7014 (3d Dep't 1991).

evidence in the record which, in relevant respect, was in the Town's sole possession, the ALJ's granting of the amendment adding the §209-a.1(c) allegation was not error.

The Town's reliance upon another recent decision involving it is misplaced.^{4/} In that case, we denied a motion to amend a charge which would have added an untimely cause of action entirely different from the one pleaded. Unlike this case, to have granted the amendment in the other case would have necessitated a reopening of the hearing because the facts supporting the amendment were completely different from the facts supporting the charge as filed. In effect, we did not consider the granting of an amendment in that case to be consistent with due process or the orderly litigation of the charge. The circumstances of this case, as already noted, are simply different and readily distinguished.

We also affirm the ALJ's ruling denying the §209-a.1(a) amendment. Both the §209-a.1(a) allegation and the §209-a.1(c) allegation are based upon the Town's alleged improper motivation. The addition or substitution of an interference allegation for the discrimination allegation would not have affected the analysis of fact or law in this case nor would it have affected the potential remedy. In effect, the second motion to amend was redundant of the first. In such circumstances, we cannot

^{4/}Town of Brookhaven, 25 PERB ¶13077 (1992).

conclude that the ALJ erred by denying the post-hearing motion. For this reason, CSEA's exception in this regard is denied. Moreover, we are concerned, as was the ALJ, by the delay in making the second motion. A review of the record does not disclose that there was any reason why the motion to add or substitute the §209-a.1(a) allegation could not have been made during the hearing as was the first motion. Fairness requires that parties make any motion concerning the causes of action in a charge at the first available opportunity and we would not lightly disturb an ALJ's declination to accept a post-hearing motion without evidence of good cause for the delay.

We further affirm the ALJ's dismissal of the §209-a.1(c) allegation.^{5/} CSEA's argument that the Town was improperly motivated in entering the contract with Star rests entirely upon certain testimony by Frank Faber, the Town's Deputy Supervisor, regarding the reasons which factored into the Town's decision to subcontract. Faber testified that, among other benefits, the contract with Star afforded it more flexibility in the sense that it could immediately terminate the services of an undesirable driver for Star, something it did not have the latitude to do with CSEA unit employees, except during their probationary periods. From this alone, CSEA would have us draw the inference that the Town subcontracted with Star because the Town's employees had chosen to organize and had collectively bargained

^{5/}Our rationale would equally necessitate the dismissal of the §209-a.1(a) allegation under the theory offered here by CSEA.

for certain job security provisions. The record, however, shows that the Town had several reasons for subcontracting. The record as a whole simply does not warrant a conclusion that the contract with Star would not have been entered into but for the fact the Town's employees had exercised their statutorily protected rights to organize and to bargain collectively through CSEA.

This brings us to the ALJ's dismissal of the §209-a.1(d) allegation. As noted, the ALJ held that the work performed by Star personnel is not substantially similar to the work performed by unit employees. Substantial similarity of the work is an element to be established by the charging party in a charge grounded upon a unilateral transfer of unit work.^{6/} The ALJ concluded that unit employees had only transported garbage and trash within Town limits. According to the ALJ, the "transport of trash outside of Town limits, to a final point of destination in another municipality, and the transfer of the residue ash to the Town, is not the type of work which had been previously performed by unit employees."

The ALJ's conclusion in this respect is based in part upon a mistake of fact. The parties agree that Star does not haul residue ash back from Hempstead to the Town. We do not consider this error, however, to be material to our disposition of the charge because we disagree with the ALJ's conclusion in this respect even on the facts as found by the ALJ.

^{6/}Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

In agreement with CSEA, we find the unit work to be simply the tasks associated with the transportation of garbage and trash. The tasks involved in the transportation of garbage and trash and the qualifications for the performance of those tasks have not been changed by virtue of the fact that garbage and trash is now taken outside the Town lines.^{7/} There is no demonstrable relationship between the particular geographic location to which garbage and trash is taken and the employees' job duties which are associated with the tasks of hauling that material. Therefore, the ALJ incorrectly held that the hauling of garbage and trash outside Town lines is a component of either the definition of the unit work or a factor in assessing the substantial similarity of employees' tasks.^{8/}

Given the basis for the ALJ's disposition of the §209-a.1(d) allegation, he did not consider whether CSEA had exclusivity over the work subcontracted nor did he decide whether the record facts supported the Town's claim that it changed its level of services or otherwise made a managerial decision in entering the contract with Star. The resolution of these fact questions, including any necessary credibility resolutions, and any conclusion based thereon, are appropriately made in the first instance by the ALJ.

^{7/}See, e.g., Town of Smithtown, 25 PERB ¶3081 (1992).

^{8/}City of Buffalo, 24 PERB ¶3043 (1991). We do not suggest, however, that the change in the location to which garbage and trash is taken is necessarily irrelevant for all purposes. That is a determination to be made initially by the ALJ in considering the parties' other arguments pursuant to our remand.

It is, therefore, necessary to remand the case in relevant part to the ALJ for subsequent decision.

For the reasons set forth above, the ALJ's rulings regarding the §209-a.1(a) and (c) allegations are affirmed and the charge in those respects is dismissed. The ALJ's decision dismissing the §209-a.1(d) allegation is reversed. The portion of the charge alleging a §209-a.1(d) violation is remanded to the ALJ for subsequent decision consistent with our decision herein. SO ORDERED.

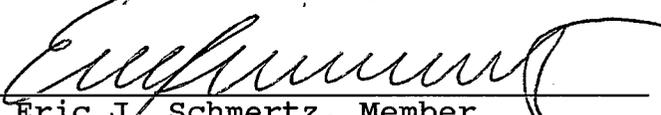
DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2H-10/19/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-13345

VILLAGE OF GREENPORT,

Respondent.

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

**INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA (NEIL M. BLOCK of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Village of Greenport (Village) to a decision by an Administrative Law Judge (ALJ). The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) alleges in its charge that the Village violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it discharged unit employee Mark Begora because he filed contract grievances.^{1/}

^{1/}The ALJ's decision also covered a second charge filed by CSEA against the Village. The ALJ held under that charge (U-13351) that the Village abolished a position held by unit president Dennis Dowling because, as unit president, he exercised statutorily protected rights to represent unit employees in negotiations and grievances. The District has reinstated Dowling to his position and, accordingly, it has withdrawn the exceptions it had filed to the ALJ's decision in U-13351.

After a hearing, the ALJ found that the Village had violated the Act as alleged. In doing so, the ALJ rejected the Village's defense that Begora was discharged on directive from the local civil service commission because he had not obtained a necessary license within the allotted time.

The Village argues in its exceptions that the record does not support the ALJ's finding of a violation and that his remedial order is inappropriate. In its response, CSEA argues that the ALJ's decision and order are correct and should be affirmed.

For the reasons set forth below, we affirm the ALJ's decision, but modify the remedial order.

The facts in this case are largely undisputed. Accordingly, the parties' arguments are focused upon the reasonableness of the conclusions which the ALJ drew from those facts.

We agree with the ALJ that the Village's actions regarding Begora were patterned around and coincided with his grievances. For example, the Village had not investigated his status with the civil service commission until after his first grievance was filed on September 23, 1991 seeking a salary increase for having completed a correspondence course in the operation of wastewater treatment plants. This course, however, did not result in Begora's certification by the Department of Environmental Conservation as the civil service commission said was required by the State Sanitary Code. The County civil service commission by letter dated November 1 informed the Village that Begora had to

be terminated immediately because he lacked the necessary certificate. The Village, however, decided not to terminate Begora and instead informed him by letter dated November 22, 1991, that it would seek an extension to enable him to remain in his position until the next licensing examination, for which he would have to assume all related expenses. Only two relevant events occurred after that date. Based upon a claimed contractual entitlement to reimbursement, CSEA demanded that the Village pay for Begora's training and examination, costs estimated at approximately \$1,600, a demand which was incorporated into a formal grievance dated December 16, 1991. In that respect, we further agree with the ALJ that the Village, through its Mayor, William Pell, knew on December 16, 1991 that a grievance had been filed. The second event is a letter, dated December 16, written by Allen Smith, the Village's attorney, that recommends Begora's immediate termination for his failure to comply with the licensing requirements. CSEA argues that the second grievance ultimately caused the Village to terminate Begora. The Village argues that it relied on the advice of its attorney and the local civil service commission to terminate Begora.

The question before us and the ALJ is simply which of these events caused the Village on December 30, 1991, to meet in special session and vote to terminate Begora, effective thirty days later. Of the two, the first is by far the more likely.

The Village's vote on December 30 reflects that it was based on the letter from the local civil service commission of November 1, 1991. The Village, however, was fully aware of that letter, which was not subject to misinterpretation, when it decided to permit Begora to remain in his position until he could get the necessary license. It is extremely implausible that the Village, on December 30, would have been persuaded to act based on the same advice it had disregarded shortly before. As Pell knew about the December 16 grievance, it is immaterial whether Smith knew about it when he wrote to inform CSEA that he was recommending Begora's termination. We are left, therefore, only with the conclusion that Begora had established himself by the first and second grievances as a person who was willing to contest the Village's employment decisions and the Village ridded itself of that burden.

Our conclusion in this respect is strongly buttressed, as was the ALJ's, by Pell's comment to Dowling in February 1992 when Dowling presented Pell with yet a third grievance from Begora protesting his termination. According to Dowling's unrebutted testimony, Pell laughed, and said that he thought he had already taken care of all of Begora's grievances. Pell's laughter and his reference to "all grievances" are not consistent with an innocent reference to the fact that one of Begora's grievances had been settled in late November by the extension of a pay raise he had sought. Rather, we see Pell's conduct and remarks as Pell's attempt to ensure that Dowling understood that he and the

Village had unburdened themselves of an employee who had demonstrated a determination to hold the Village to its obligations under contract and law.

The Village also excepts to the ALJ's remedial order as it applies to Begora. The ALJ ordered the Village to offer Begora reinstatement to a position substantially equivalent to his former position, if one were available. The ALJ also ordered back pay from the date of Begora's termination to the date the Village offers him reinstatement.

Our remedial orders are guided by the primary and simple philosophy that an employee is to be placed as nearly as possible in the position he or she would have been had it not been for whatever improper conduct is found. The appropriate remedy in this case is complicated because on the information available to us on this record, Begora lacks the necessary license or certificate for appointment to his former position. The ALJ ordered Begora appointed to a substantially equivalent position because, being unqualified for his former position, we could not order him reinstated to it. We do not consider, however, this to be either necessary or appropriate to remedy the Village's violation of the Act. There is nothing in the record which would suggest that the Village ever had any intention of continuing Begora in a different position if he failed to obtain the necessary license. We have found, however, that but for his protected activities, the Village would have kept Begora in his former position until the results of the next licensing examining

were announced. Covering the several possible contingencies, we believe that the following order is most appropriate.

If Begora is now licensed in accordance with applicable law and regulation, the Village is ordered to offer him immediate reinstatement to his former position with full back pay. If Begora is not currently licensed in accordance with applicable law and regulation, the Village is ordered to pay him back pay from the date of his termination through the date the test results are announced for the next scheduled and available examination. Should Begora obtain the necessary license as a result of that examination, the Village is ordered to reinstate him to his former position with the accompanying back pay. Should Begora refuse or decline to take the next scheduled and available examination, the reinstatement and back pay order shall terminate on the date of the declination or refusal. If he should fail to obtain the necessary license after having taken that examination, then on the date the results of that examination are announced, the reinstatement and back pay order shall terminate. The Village is also ordered to process Begora's grievance regarding payment for the costs and expenses associated with the licensing examination in accordance with the parties' contract and practice. The order framed below is intended to incorporate these terms and is to be interpreted and applied in accordance therewith.

For the reasons set forth above, the ALJ's decision finding the Village in violation of §209-a.1(a) and (c) of the Act is

affirmed and the Village's exceptions in that respect are denied. The ALJ's remedial order is modified and the Village's exceptions in that respect, to the extent consistent with our decision and order, are granted.

IT IS, THEREFORE, ORDERED that the Village:

1. Forthwith offer Begora reinstatement to his former position if, on the date of this order, he has obtained the certificate(s) currently necessary for a Sewage Treatment Plant Operator (3C) or he obtains such certificate(s) pursuant to the next scheduled and available examination.
2. Make Begora whole for any wages and benefits lost by reason of his termination from the date of his termination through the date of the offer of reinstatement pursuant to paragraph 1 above, less any earnings derived as a result of his termination, with interest at the currently prevailing maximum legal rate. If Begora is not offered reinstatement in accordance with paragraph 1 above, then he is to be made whole for any wages and benefits lost by reason of his termination from the date of his termination through either the date Begora declines or refuses to take the next scheduled and available examination or the results of such examination for acquisition of the above-referenced certificate(s) are announced, whichever occurs first, less any earnings derived as a

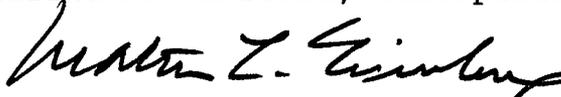
result of his termination, with interest at the currently prevailing maximum legal rate.

3. Process the grievance filed by or on behalf of Begora in December 1991 concerning payment for the costs and expenses incurred or to be incurred in conjunction with the examination for the above-referenced certificate(s).
4. Cease and desist from terminating Begora, should he be reinstated, for the filing of grievances dated September 23, 1991 and December 16, 1991.
5. Sign and post notice in the form attached at all locations customarily used to post notices of information to unit employees.^{2/}

DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

^{2/}We recognize that circumstances may have changed since the record was closed, that there may be issues affecting our order of which we have not been apprised, and that the scheduling and conduct of the necessary examination may not be within the Village's control. If any part of the remedial order cannot be implemented within a reasonable period of time, either party may move the Board for reconsideration or modification of the remedial order.

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 represented by the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, that the Village of Greenport will:

1. Forthwith offer Begora reinstatement to his former position if, on the date of this order, he has obtained the certificate(s) currently necessary for a Sewage Treatment Plant Operator (3C) or he obtains such certificate(s) pursuant to the next scheduled and available examination.
2. Make Begora whole for any wages and benefits lost by reason of his termination from the date of his termination through the date of the offer of reinstatement pursuant to paragraph 1 above, less any earnings derived as a result of his termination, with interest at the currently prevailing maximum legal rate. If Begora is not offered reinstatement in accordance with paragraph 1 above, then he is to be made whole for any wages and benefits lost by reason of his termination from the date of his termination through either the date Begora declines or refuses to take the next scheduled and available examination or the results of such examination for acquisition of the above-referenced certificate(s) are announced, whichever occurs first, less any earnings derived as a result of his termination, with interest at the currently prevailing maximum legal rate.
3. Process the grievance filed by or on behalf of Begora in December 1991 concerning payment for the costs and expenses incurred or to be incurred in conjunction with the examination for the above-referenced certificate(s).
4. Not terminate Begora, should he be reinstated, for the filing of grievances dated September 23, 1991 and December 16, 1991.

Dated

By

(Representative)

(Title)

VILLAGE OF GREENPORT

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.

2A-10/19/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 2110, UNITED AUTO WORKERS, NEW
YORK STATE HOUSING FINANCE AGENCY
EMPLOYEES ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4043

STATE OF NEW YORK MORTGAGE AGENCY,

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 2110, United Auto Workers, New York State Housing Finance Agency 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.

Included: All employees.

Excluded: All seasonal employees, and the following titles: president; vice-president; AVP personnel, SVP/CFO, first deputy controller; SVP/counsel - MIF; SVP-MIF; V.P.- SFH; director - intergovernmental relations; director - marketing; deputy counsel - MIF; V. P.- research & program development; deputy director - MIF; director - operations & program development MIF; V.P. - portfolio management; V.P. - debt issuance; V.P. - deputy CFO; V.P. - treasurer; V.P. - comptroller; SVP-COO; deputy personnel director; AVP - budget director; V.P. intergovernmental relations & external communications; V.P. - management information systems; V.P. - facilities and administration; SVP - general counsel; deputy counsel; associate counsel; SVP - housing; director of equal opportunity programs; director of public affairs; director of intergovernmental relations.^{1/}

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 2110, United Auto Workers, New York State Housing Finance Agency 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

^{1/}The positions of v.p. portfolio management, v.p. treasurer, v.p. management information systems, and v.p. - facilities & administration, pursuant to the parties consent agreement, are part of the bargaining unit while the present incumbents remain in those positions.

agree to a proposal or require the making of a concession.

DATED: October 19, 1993
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

TEAMSTERS LOCAL 264,

Petitioner,

-and-

CASE NO. C-4125

TOWN OF GRAND ISLAND,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 264 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 regular full-time and regular part-time, hourly paid recreation department employees.

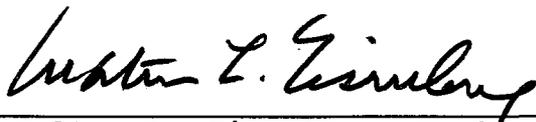
Excluded: Office clerical, professional, seasonal, supervisory and all other employees of the Town of Grand Island.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 264. 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: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

30-10/19/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCKLAND COMMUNITY COLLEGE ADJUNCT
FACULTY ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4136

ROCKLAND COMMUNITY COLLEGE AND COUNTY
OF ROCKLAND,

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 Rockland Community College Adjunct Faculty 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.

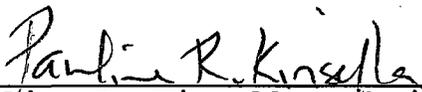
Unit: Included: All Adjunct Faculty Employees.

Excluded: All other employees including elected Rockland

County Officials, other employees already members of another Rockland County bargaining unit, and Rockland Community College managerial/confidential employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Rockland Community College Adjunct Faculty 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.

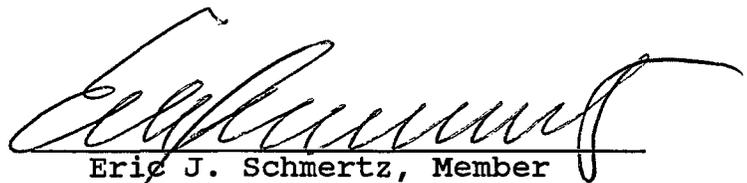
DATED: October 19, 1993
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

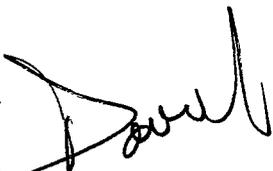


5A-10/19/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
80 WOLF ROAD
ALBANY, NEW YORK 12205-2604

MEMORANDUM

October 14, 1993

TO: John Crotty
FROM: David Quinn 
RE: Revised Rules of Procedure

Revisions to the Rules of Procedure were first proposed in February 1993. A Notice of Proposed Rule Making was published in the State Register in April. At its June 29, 1993 meeting, the Board made revisions to one of the proposed rules concerning withdrawals of improper practice charges. Because all of the proposed rules were submitted as a package, the revision to the one rule required publication of a Notice of Revised Rule Making concerning all of the rules. Moreover, due to concerns raised by the Office of Regulatory and Management Affairs, additional changes were made to the rules concerning the filing of pleadings other than exceptions, cross-exceptions and responses thereto. With these changes, on September 8, 1993, the State Register published the package of revised rules. The 30-day comment-period has elapsed, and the rules are, again, ready for formal adoption by the Board at its October 19 meeting. Upon formal adoption by the Board, a Notice of Adoption will be published in the State Register. The rules will become effective upon publication of the Notice of Adoption.

DQ:cw

STATE OF NEW YORK

PUBLIC EMPLOYMENT RELATIONS BOARD

1. Amend Section 200.10 as follows:

200.10 Filing; service. (a) The term filing, as used in this Chapter, shall mean delivery to the board or an agent thereof, or the act of mailing to the board[.], or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery.

(b) The term service, as used in this Chapter, shall mean delivery to a party or the act of mailing to a party[.], or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery.

(c) Overnight delivery service means any delivery service which regularly accepts items for overnight delivery to any address in the state.

2. Subdivision (4) of Section 201.5(a) is repealed and subdivisions (5) (6) (7) (8) (9) (10) and (11) are renumbered to subdivisions (4) (5) (6) (7) (8) (9) and (10).

3. Subdivision (3) of Section 201.5(b) is repealed and subdivisions (4) (5) (6) (7) (8) (9) and (10) are renumbered to (3) (4) (5) (6) (7) (8) and (9).

4. Amend Section 201.12(c) as follows:

(c) Within seven working days after receipt of exceptions, any party may file with the board an original and four copies of a response thereto, or cross-exceptions and a brief in support thereof, together with proof of service of a copy thereof upon each party to the proceeding. Within seven

Overnight delivery italicized

working days after receipt of cross-exceptions, any party may file an original and four copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding. No pleading other than exceptions, cross-exceptions or a response thereto will be accepted or considered by the board unless it is requested by the board or filed with the board's authorization. Such additional pleadings will not be requested or authorized by the board unless the preceding pleading properly raises issues which are material to the disposition of the matter for the first time. If any additional pleading is requested or authorized by the board, the board shall notify the parties regarding the conditions under which that pleading will be permitted.

5. Amend Subsection (4) of Section 204.1(b) as follows:

(4) if the charge alleges a violation of section 209-a.1(d) or section 209-a.2(b) of the act, whether the charging party has notified the board in writing of the existence of an impasse pursuant to section [205.2] 205.1 of this Chapter; and

6. Amend Section 204.1(d) as follows:

(d) Amendment and withdrawals. The director or administrative law judge designated by the director may permit a charging party to amend the charge before, during or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process. The charge may be withdrawn by the charging party before the issuance of [a final] the dispositive decision and recommended order based thereon upon approval by the director. Thereafter, the improper practice proceeding may be discontinued only with the approval of the board. Requests to the director to withdraw an improper practice charge or to the board to discontinue an improper practice proceeding will be approved unless to do so would be

in bold type

inconsistent with the purposes and policies of the Act or due process of law. Whenever the director approves the withdrawal of a charge, or the board approves the discontinuation of a proceeding, the case will be closed[.] without consideration or review of any of the issues raised by the charge.

7. Amend caption and text of Section 204.11 as follows:

responses

Section 204.11 Cross exceptions [.] responses; replies. Within seven working days after receipt of exceptions, any party may file an original and four copies of a response thereto, or cross-exceptions and a brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and four copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding. No pleading other than exceptions, cross-exceptions or a response thereto will be accepted or considered by the board unless it is requested by the board or filed with the board's authorization. Such additional pleadings will not be requested or authorized by the board unless the preceding pleading properly raises issues which are material to the disposition of the matter for the first time. If any additional pleading is requested or authorized by the board, the board shall notify the parties regarding the conditions under which that pleading will be permitted.

8. Subsection (9) of Section 207.4(b) is amended as follows:

(9) the following language, quoted verbatim:

"THE UNDERSIGNED, A PARTY TO A WRITTEN AGREEMENT WHICH PROVIDES FOR ARBITRATION AS DESCRIBED HEREWITH, HEREBY DEMANDS ARBITRATION. YOU ARE HEREBY NOTIFIED THAT COPIES OF THIS DEMAND FOR ARBITRATION ARE BEING FILED

WITH THE DIRECTOR OF CONCILIATION, NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, [50] 80 WOLF ROAD, ALBANY, NEW YORK 12205 WITH THE REQUEST THAT THE ADMINISTRATION OF THE VOLUNTARY ARBITRATION RULES OF PROCEDURE BE COMMENCED.

PURSUANT TO THE NEW YORK ARBITRATION LAW, ARTICLE 75, SECTION 7503, CIVIL PRACTICE LAW AND RULES, YOU HAVE TWENTY (20) DAYS FROM DATE OF SERVICE OF THIS DEMAND TO APPLY TO STAY THE ARBITRATION OR BE PRECLUDED FROM SUCH APPLICATION."

9. Amend Subsections (b) (c) and (d) of Section 208.2 as follows:

(b) A request to inspect any record shall be made either orally or in writing to the board's executive director at [50] 80 Wolf Road, Albany, NY 12205, who will make suitable arrangements for such inspection during regular office hours at the offices of the board in Albany, New York City or Buffalo, unless the location of a particular record may require its inspection at a particular office, in which case inspection shall occur at such office.

(c) Copies of documents previously prepared for distribution and in stock are available [without charge] by either writing to the board's executive director or requesting such documents at the board's principal offices at [50] 80 Wolf Road, Albany, NY 12205.

(d) [Except as provided in subdivision (c) of this section, a] A fee of 25 cents per page will be charged for all copies made upon request by anyone other than a representative of a public employer or employee organization or a member of a board panel, to whom one copy of a document may be given without charge. The board will make every effort to comply with requests for such copies as expeditiously as possible.

10. Amend subdivisions (a) and (b) of Section 209.2 as follows:

(a) Privacy compliance officer means the board's executive director, whose business address is Public Employment Relations Board, [50] 80 Wolf Rd., Fifth Floor, Albany, NY 12205.

(b) Privacy compliance appeals officer means the chairperson of the board, whose business address is Public Employment Relations Board, [50] 80 Wolf Road, Fifth Floor, Albany, NY 12205.