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Board (PERB)

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3-22-1995

## State of New York Public Employment Relations Board Decisions from March 22, 1995

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from March 22, 1995

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

NEW YORK STATE INSPECTION, SECURITY AND  
LAW ENFORCEMENT EMPLOYEES, DISTRICT  
COUNCIL 82, AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Charging Party,

-and-

CASE NO. U-13210

STATE OF NEW YORK (OFFICE OF PARKS  
AND RECREATION),

Respondent.

---

ROWLEY, FORREST, O'DONNELL & HITE P.C. (DAVID C. ROWLEY  
of counsel), for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Inspection, Security and Law Enforcement Employees, District Council 82, American Federation of State, County and Municipal Employees, AFL-CIO (Council 82) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissing its charge against the State of New York (Office of Parks and Recreation) (State). Council 82 alleges in its charge that the State violated §209-a.1(e) of the Public Employees' Fair Employment Act (Act) when it failed to pay unit employees who had been reallocated in December 1991<sup>1/</sup> to a

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<sup>1/</sup>Park Patrol Officers were reallocated from salary grade (SG) 12 to SG 13 and Park Patrol Sergeants were reallocated from SG 15 to SG 16.

higher salary grade a longevity payment<sup>2/</sup> in the amount set forth in the contractual salary schedule for those higher salary grades. Council 82 argues that employees who are upgraded through reallocation are entitled under §11.7 of the expired 1988-91 contract to receive the longevity amounts at the higher salary grade.<sup>3/</sup>

After considering negotiating history, the Assistant Director concluded that §11.7 of the parties' expired contract called for a salary computation under which a longevity payment retained the dollar value assigned to the salary grade in which the longevity had been earned despite any subsequent change in salary grade, whether by promotion, demotion, reclassification or reallocation.

Section 11.7(a) of the parties' 1988-91 contract provides that "longevity payments as set out in the salary schedule in Appendix 'A' will be provided to employees upon completion of 10, 15 and 20 years of continuous service." Section 11.7(d) provides:

Such longevity payments will be added to and considered part of base pay for all purposes except for determining an employee's change in salary upon movement to a different salary grade and his potential for movement to the job rate of the new grade, after which determination the longevity payments will be restored.

Council 82 argues that although §11.7(d) is an exception to the longevity payment obligation under §11.7(a), the exception does

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<sup>2/</sup>Longevity payments are made for 10, 15 and 20 years of service. The amount of the longevity varies by length of service and salary grade.

<sup>3/</sup>A successor agreement for the period April 1, 1991 through March 31, 1995 was reached in or about July 1992; it continues the relevant terms of the expired agreement.

not apply to reallocations because employees who are receiving a longevity payment when reallocated will always be at or above the job rate of the new salary grade,<sup>4/</sup> such that they do not have any "potential for movement to the job rate of the new grade".

Council 82 argues that the Assistant Director incorrectly ignored this plain and clear language in reaching his decision, one which allegedly effects absurd results, incorrectly relied upon negotiating history, and incorrectly declined to take official notice of a proposal made by the State during negotiations for a successor to the 1988-91 agreement. The State argues that the Assistant Director's ruling and decision are correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, including those made at oral argument, we affirm the Assistant Director's ruling and decision.

We find the controlling provisions of §11.7 of the parties' agreement, and most particularly §11.7(d), to be extremely ambiguous. Resort to the negotiating history which was offered by both parties to clarify that ambiguity was, therefore, necessary and permissible. On this record, that negotiating history is simply not consistent with the interpretation of §11.7(d) urged by Council 82. Indeed, to reach the interpretation urged by Council 82, the State's witness on negotiating history would have to be entirely discredited in relevant respect. There is, however,

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<sup>4/</sup>Although not material to our disposition of the charge, it appears that this statement is not accurate as to 10-year longevity payments.

no basis to disturb the Assistant Director's credibility determination. Given that determination, there is no record evidence that the State discontinued the cited provisions of the 1988-91 contract in its salary calculations for the reallocated positions notwithstanding claims of irrationality of result and, therefore, no basis upon which to premise a violation of §209-a.1(e) of the Act.

Council 82 also excepts to the Assistant Director's declination to take official notice of an exhibit received in evidence during a fact-finding hearing involving Council 82 and the State held as part of the impasse resolution procedure pertaining to negotiations for a successor to the 1988-91 agreement. The taking of such notice was discretionary with the Assistant Director.<sup>5/</sup> The request having first been made of the Assistant Director in Council 82's post-hearing brief, we find no abuse of discretion in his ruling. Moreover, even had notice been taken of the exhibit, it would only have established the fact that the State had made a proposal to modify §11.7(d) by deleting the reference to movement to the job rate. The making of such a negotiating proposal would not, however, conclusively prove that §11.7(d) is inapplicable to reallocations absent evidence supporting that conclusion. The State, for example, might have made the proposal simply to avoid any possibility that §11.7(d) would be interpreted in the way Council 82 urges, rather than as an admission that

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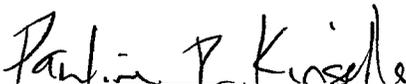
<sup>5/</sup>N.Y. A.P.A. §306(4); Fisch, New York Evidence, §§1048, 1049, 1065 (2d Ed. 1977 & 1994-95 Supp.).

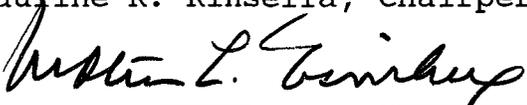
§11.7(d) is inapplicable to reallocations. Additional evidence concerning the history and discussion of the State's proposal conceivably could have established the truth of Council 82's assertion, but receipt of that evidence would necessitate a reopening of the record, which is not warranted<sup>6/</sup> and has not been requested.

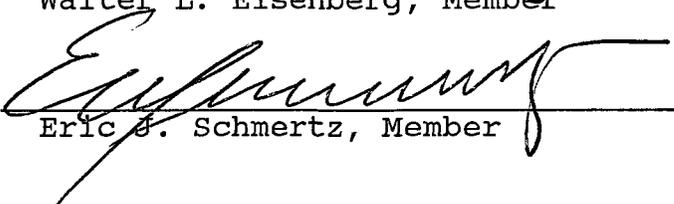
For the reasons set forth above, the Assistant Director's decision and ruling are affirmed and Council 82's exceptions are dismissed.

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

DATED: March 22, 1995  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

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

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

<sup>6/</sup>See, e.g., City of Yonkers, 10 PERB ¶3020 (1977).

20- 3/22/95

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Charging Party,

-and-

CASE NO. U-11820

TOWN OF BROOKHAVEN,

Respondent.

---

NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL S. BAMBERGER of  
counsel), for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Brookhaven (Town) to a decision of an Administrative Law Judge (ALJ) finding that it violated §209-a.1(d)<sup>1/</sup> of the Public Employees' Fair Employment Act (Act). The ALJ held that the Town unilaterally stopped using employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to transport, set up, and dismantle a portable dance floor owned by the Town and used on the occasion in question by the Stony Brook Theatre Dance Guild (Guild). The

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<sup>1/</sup>The ALJ dismissed the allegation that §209-a.1(a) of the Act had been violated. No exceptions were taken to that part of the ALJ's decision.

Guild is a not-for-profit organization which is neither affiliated with nor sponsored by the Town.

The stipulated record establishes that prior to March 1990, whenever the Guild requested the use of the dance floor for one of its programs, the Town would have unit employees, usually a crew of three, transport the dance floor to whatever location the Guild specified, set it up, dismantle it and transport it back to the Town for storage. The Guild requested the use of the dance floor for a March 25, 1990 program. The Town informed the Guild that although it would no longer transport, set up and dismantle the dance floor, it would allow the Guild to borrow the dance floor and return it to the Town after the program was complete. The Guild did so on March 25.

The ALJ found that the Town had violated the Act by unilaterally transferring work that had been exclusively performed by unit members to the Guild or its agents. The Town excepts to the ALJ's determination, arguing that it has the managerial right to stop providing a service that it previously provided. CSEA supports the ALJ's decision.

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

A public employer generally violates the Act by unilaterally reassigning unit work to nonunit personnel when the reassigned work has been performed exclusively by unit employees and the reassigned work is substantially similar to the work previously

performed by the unit.<sup>2/</sup> The stipulated record in this case shows that the at-issue work has always been performed by the employees represented by CSEA. The record further evidences no deviation in the type of or manner in which the work is now being performed, although by the Guild. The analysis of the case does not end there, however, as the Town has asserted that it has made a managerial decision to abolish or curtail a service which it previously offered and that such a decision need not be negotiated.

We have long held that it is a managerial prerogative to abolish a service.<sup>3/</sup> In considering whether a service has been abolished or merely transferred for performance by an agent, we look to the level of control exercised by the public employer.<sup>4/</sup> Here, the Town has retained ownership and possession of the dance floor, at least to the extent that it continues to store it on Town property. However, this record provides no support for a finding that the Town exercises anything but this de minimis control over the dance floor or its use by the Guild. What is involved in this case is a temporary loan of property gratis.

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<sup>2/</sup>Niagara-Frontier Transp. Auth., 18 PERB ¶3083 (1985).

<sup>3/</sup>City Sch. Dist. of the City of New Rochelle, 4 PERB ¶3060 (1971).

<sup>4/</sup>See Saratoga Springs Sch. Dist., 11 PERB ¶3037 (1978), aff'd, 68 A.D.2d 202, 12 PERB ¶7008 (3d Dep't 1979), motion for leave to appeal denied, 47 N.Y.2d 711, 12 PERB ¶7012 (1979). See also Co. of Erie (Erie Co. Med. Ctr.), 28 PERB ¶3015 (March 22, 1995); Bd. of Educ. of the City Sch. Dist. of the City of Long Beach, 26 PERB ¶3065 (1993).

The Town placed no restrictions on the use of the dance floor by the Guild, the manner in which it was to be transported or by whom, the locations where or the purpose for which it could be used. The Guild is unaffiliated with the Town in any way, it receives no support from the Town, it has no contractual relationship with the Town and it does not hold its performances on Town property. The only specific control exercised by the Town on this record is that it has given its permission to the Guild to use the dance floor. The Town has also tacitly approved the presence of the Guild agents on Town property to pick up and return the dance floor. This is a type and level of control markedly different from that exercised by public employers in other cases in which we have held there to have been an improper transfer of unit work.

We have previously found that the use of non-paid volunteers to perform unit work violates the Act when the public employer continues to exercise control over the solicitation and scheduling of the volunteers<sup>5/</sup>. The Town has not solicited assistance from the Guild and it does not schedule the events at which the dance floor is to be used. Unlike County of Chautauqua,<sup>6/</sup> in which the public employer actively facilitated the transfer of unit work to a private, not-for-profit

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<sup>5/</sup>City of Schenectady, 25 PERB ¶13073 (1992).

<sup>6/</sup>21 PERB ¶13057 (1988).

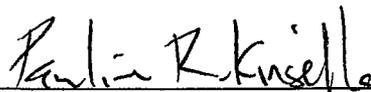
corporation, the only facilitation here is that the Town allows the Guild on its property to gain access to the dance floor.

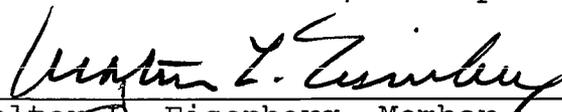
As we view it, the Town has discontinued the delivery of a previously provided service, one that it was under no obligation to undertake in the first place. The Town now exercises no control over the delivery, set-up or return of the dance floor. Under these circumstances, we find that the Town did not unilaterally reassign unit work to nonunit personnel; rather it has discontinued the service altogether. Its decision to do so is not subject to mandatory negotiation. That a private organization is now, through no solicitation by the Town, providing the service to itself, with virtually no facilitation by the Town, does not warrant a contrary conclusion.

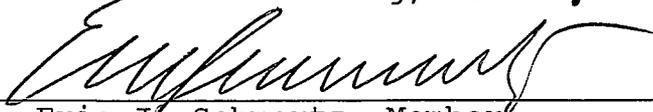
By reason of the foregoing, we grant the Town's exceptions and reverse the ALJ's decision that the Town violated §209-a.1(d) of the Act.

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

DATED: March 22, 1995  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

  
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Walter L. Eisenberg, Member

  
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Eric J. Schmertz, Member

20- 3/22/95

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of  
DOROTHY GERSTENFELD,

Charging Party,

-and-

CASE NO. U-15942

CITY SCHOOL DISTRICT OF THE CITY  
OF NEW YORK AND UNITED FEDERATION  
OF TEACHERS,

Respondents.

---

DOROTHY GERSTENFELD, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Dorothy Gerstenfeld to a decision of the Director of Public Employment Practices and Representation (Director) dismissing an improper practice charge she filed alleging that the City School District of the City of New York (District) and the United Federation of Teachers (UFT) had violated, respectively, §209-a.1(e) and §209-a.2(c) of the Public Employees' Fair Employment Act (Act). The Assistant Director of Public Employment Practices and Representation (Assistant Director) notified Gerstenfeld, on September 12, 1994, that the charge was deficient because she had no standing to allege a violation of §209-a.1(e) of the Act and there were not any facts alleged in support of her conclusory

allegations of violation.<sup>1/</sup> On September 22, 1994, Gerstenfeld informed the Assistant Director that she was seeking corroboration from the District and UFT of the statements set forth in her charge and that she would not withdraw the charge.<sup>2/</sup> By a sworn statement dated September 28, 1994, Gerstenfeld advised the Assistant Director that she was correcting her pleading as to the §209-a.1(e) allegation, but she did not indicate what sections of the Act she was now alleging had been violated by the District. As to both the District and UFT, she reiterated the conclusory allegations contained in the charge, but provided no facts in support of those allegations.<sup>3/</sup>

The Director dismissed the charge, finding that Gerstenfeld had no standing to allege a violation of §209-a.1(e) of the Act and that she had failed to provide specific facts which would establish the violations alleged.

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<sup>1/</sup>Gerstenfeld alleged, inter alia, that the District had improperly "administered" her role as librarian, Chancellor's regulations and established practices and policies; failed to comply with school restructuring regulations; and violated the Act in hiring practices. As against UFT, her allegations included failure to support employee complaints, failure to share grievance decisions, failure to show leadership to preserve terms and conditions of employment and improper collection of agency fees.

<sup>2/</sup>No statements in response to Gerstenfeld's request were received from either the District or UFT.

<sup>3/</sup>Gerstenfeld referred to an "ongoing and continuous pattern and policy of violations of her agency member rights" by UFT and the District's failure to take "any remedial or corrective measures" regarding the denial of her sabbatical leave request and denial of her "protected and professional rights."

Gerstenfeld excepts to the Director's decision, arguing that his decision was premature, that it was in retaliation for her filing of a Freedom of Information Law (FOIL) request with PERB<sup>4/</sup> and that the noted deficiencies in her charge had been corrected.

We affirm the Director's decision to dismiss Gerstenfeld's charge for the reasons set forth below.

We have previously held that an individual bargaining unit employee does not have the right to act in the place of the bargaining agent and file charges relating to alleged violations of the employer's bargaining duties.<sup>5/</sup> Therefore, we affirm the Director's dismissal of the §209-a.1(e) allegation as Gerstenfeld had no standing to allege such a violation of the Act.

Our Rules of Procedure (Rules) require a charging party to supply a clear and concise statement of the facts which support the alleged violations of the Act.<sup>6/</sup> Gerstenfeld's charge

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<sup>4/</sup>On October 3, 1994, Gerstenfeld requested PERB's Records Access Officer to provide her with information pursuant to FOIL about PERB's administration and also all decisions relating to the District, UFT and agency fees. Gerstenfeld was given the information about PERB's structure in an October 5, 1994 letter from PERB's Records Access Officer and was directed to the published volumes of PERB's decisions for the decisions she sought. Gerstenfeld later reviewed those decisions in PERB's Brooklyn office.

<sup>5/</sup>City Sch. Dist. of the City of New York, 22 PERB ¶3012 (1989); Queens College of the City Univ. of New York, 21 PERB ¶3024 (1988).

<sup>6/</sup>Rules §204.1(b)(3).

contains no facts upon which a finding of a violation could be based. The Director afforded Gerstenfeld an opportunity to correct the deficiencies in the charge. Gerstenfeld responded with additional conclusory statements. The Director then properly dismissed the charge. That Gerstenfeld had made a FOIL request to review all previously issued PERB decisions involving the District, UFT and agency fee issues, which could not correct the deficiencies in her charge, does not extend her time to correct the noted deficiencies or require the Director to hold in abeyance his determination that the charge is deficient.<sup>7/</sup> Gerstenfeld's exception alleging in conclusory fashion that the Director's decision was issued in retaliation for her filing a FOIL request is without merit and is simply one more allegation similar to the conclusory allegations which constitute her charge. The Director's decision in this case is consistent with our prior decisions in similar cases and the facts and the law fully support his dismissal of the charge. Further, the Director had no involvement in responding to the FOIL request and, when later apprised of it, facilitated Gerstenfeld's access to the requested information.

Based on the above, the Director's dismissal of the charge is affirmed and Gerstenfeld's exceptions are dismissed.

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<sup>7/</sup>County of Suffolk, 26 PERB ¶13076 (1993).

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

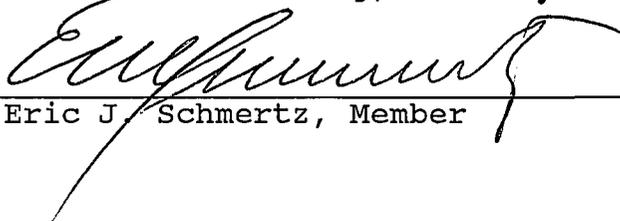
DATED: March 22, 1995  
Albany, New York



Pauline R. Kinsella, Chairperson



Walter L. Eisenberg, Member



Eric J. Schmertz, Member

2D- 3/22/95

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

JOYCE TARTOW,

Charging Party,

-and-

CASE NO. U-16009

BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK and  
UNITED FEDERATION OF TEACHERS,

Respondents.

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JOYCE TARTOW, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Joyce Tartow to a decision by the Director of Public Employment Practices and Representation (Director) dismissing as deficient her charge against the Board of Education of the City School District of the City of New York (District) and the United Federation of Teachers (UFT). Tartow alleges in her charge that the District violated §209-a.1(c) of the Public Employees' Fair Employment Act (Act) and that the UFT breached its duty of fair representation in violation of §209-a.2(c) of the Act.

The Director dismissed the charge after Tartow had amended it and after she had submitted many additional supporting documents. The Director held that the charge was untimely as to

incidents prior to May 30, 1994,<sup>1/</sup> and that Tartow's conclusory allegations failed to set forth any facts which would establish the elements of the violations of the Act alleged.

Having reviewed the record, we affirm the Director's decision. We do so having considered all allegations and supporting documents, including those Tartow alleges should be considered timely.

Tartow's charge against the District requires that facts be alleged evidencing employment discrimination in retaliation for an exercise of rights protected by the Act. Tartow's pleadings, read most favorably to her, evidence only a claim that the District forced her to retire in violation of the collective bargaining agreement, Chancellor's regulations and District policies in the context of a history of personnel problems. Her retirement may have been "wrong", as Tartow alleges, on any of these theories and litigable in other forums, but there is nothing in her charge to evidence that any exercise of rights protected by the Act caused the District to take any action against her.

The charge against UFT requires an allegation of facts which establish arbitrary, discriminatory or bad faith conduct by the UFT in its representation of her employment interests. There is little in the charge or supporting documents related to the UFT, but what there is appears to center on Tartow's conclusory

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<sup>1/</sup>Earlier acts occurred more than four months before the filing date of the charge.

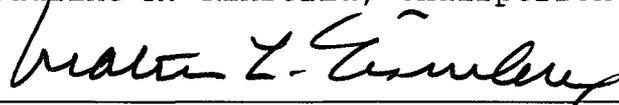
allegation that the UFT did not help her combat perceived contract violations and other abuses by the District. As the Director correctly observed, however, there is nothing in the charge to show that the UFT was ever specifically asked to do anything. Tartow's theory of violation appears to be that the UFT should have initiated grievances for her on its own because it was aware of the adverse circumstances confronting her. However, without evidence of a specific request for assistance and an arbitrary refusal, we cannot find even an arguable violation of UFT's duty of fair representation.

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

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

DATED: March 22, 1995  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

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

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

EASTCHESTER TEACHERS ASSOCIATION,  
NEW YORK STATE UNITED TEACHERS,

Charging Party,

-and-

CASE NO. C-4193

EASTCHESTER UNION FREE SCHOOL DISTRICT,

Respondent.

---

JEFFREY R. CASSIDY, for Petitioner

RAINS & POGREBIN, P.C. (TERENCE M. O'NEIL and CRAIG R.  
BENSON), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Eastchester Union Free School District (District) to a decision by the Director of Public Employment Practices and Representation (Director) on a petition filed by the Eastchester Teachers Association, New York State United Teachers (Association). The Association has petitioned to add teaching assistants to the unit of professional personnel it currently represents. In its response to the petition, the District alleged, inter alia, that the teaching assistants were already represented in a separate unit by the Eastchester Teaching Assistants (ETA).

After a hearing, the Director concluded that although the ETA had represented teaching assistants as an employee organization in the past, it was defunct and/or no longer

interested in representing the teaching assistants on the date of the petition. Upon that finding, the Director determined that the teaching assistants were most appropriately added to the Association's unit.

The District argues in its exceptions that the record does not support the Director's decision that the ETA is defunct or disinterested and that his "novel" unit determination, which allegedly minimizes or disregards the teaching assistants' separate uniting, is inconsistent with our decisions. The Association argues in response that the Director's decision should be affirmed and that we should reject a letter sent to the Director after his decision in which a representative of the ETA expresses a continuing interest in representing the teaching assistants.

The Director's unit determination is premised entirely upon his finding regarding ETA's status and interests. Any review of that unit determination, therefore, must begin with an examination of the bases for his findings in those respects.

The District's response to the petition was the first notice the Director received regarding ETA's representation of the teaching assistants. By letter to two representatives of the ETA dated December 22, 1993,<sup>1/</sup> the Director informed them that the District had raised a question concerning ETA's status as the

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<sup>1/</sup>Although these letters were not introduced into evidence at the hearing, they are documents in this case file of which we may take official notice. N.Y. A.P.A. §306(4); Fisch, New York Evidence, §1065 (2d Ed. 1977 & 1994-95 Supp.).

negotiating agent for the teaching assistants. The Director enclosed a notice of conference to the ETA representatives and then stated: "If you are the negotiating agent for the position of teaching assistant and desire to so remain, please attend the conference. If not, I will assume that your absence evidences a disclaimer of any representation interest." No ETA representatives responded or attended the conference. The Director later sent a notice of hearing to ETA and to one of its representatives, but ETA did not appear at the April 13, 1994 hearing. At the hearing, the Director stated to the District's attorney that he had "contacted the Eastchester Teaching Assistants" and he had been "led to understand that ETA does not wish to represent the [teaching assistant] unit in that it has specifically disclaimed such a representational interest . . . ." Upon inquiry of the District at that time, the District's attorney confirmed that he did not have any information that ETA was then still functioning or that it intended to continue to represent the unit. There is no other correspondence to or from ETA or its representatives in the Director's case file.

In his August 31, 1994 decision, the Director found that ETA "has specifically disclaimed any representational interest in the unit and [it] has apparently been dissolved. Indeed, neither party is contesting that the organization is no longer in existence."

On October 13, 1994, after the Director's decision, Gail DelVecchio, one of the ETA representatives with whom the Director

had earlier corresponded, sent the Director the letter referenced in the District's exceptions and the Association's response. In that letter, DelVecchio denies that any ETA representatives had ever specifically disclaimed a representational interest.

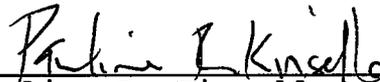
DelVecchio also states that in a conversation she had with the Director after receipt of his December 22, 1993 letter, she "explained that I could not attend [the conference] but was still very much interested in representing [teaching assistants]."

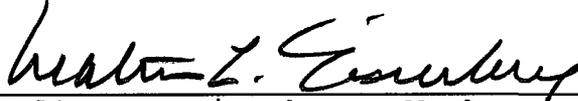
Without regard to DelVecchio's post-hearing letter, we find it appropriate to remand the case to the Director. Confining our review to the record before the Director, we find no evidence to support a finding that ETA was or is defunct. Moreover, as the decision is written, the conclusion that ETA had no interest in representing the teaching assistants appears to have been based upon some affirmative disclaimer of interest actually made by a representative of ETA. The Director's decision is not based upon a deemed disclaimer of interest stemming from ETA's failure to appear or articulate a position on the petition for the record. Therefore, we will not review the appropriateness of the unit determination as if it were made upon such a finding. We are persuaded from our review of the record and the Director's decision that there may have been some confusion regarding ETA's status and interests. As the findings made regarding ETA's status and its representation interests were critical to the Director's unit determination, clarification of those issues is necessary if we are to properly review his unit determination.

The investigatory nature of the representation process and the Legislature's directives in §207 of the Act regarding determinations of the appropriate unit fully warrant a remand in this rather unusual context.

For the reasons set forth above, the case is remanded for further proceedings and decision consistent with our decision and order herein. SO ORDERED.

DATED: March 22, 1995  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

  
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Walter L. Eisenberg, Member

  
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Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

AFSCME NEW YORK, COUNCIL 66, LOCAL 1095  
(ERIE COUNTY BLUE COLLAR EMPLOYEES UNION),

Charging Party,

-and-

CASE NO. U-15026

COUNTY OF ERIE (ERIE COUNTY MEDICAL  
CENTER),

Respondent.

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JOEL M. POCH, ESQ., for Charging Party

MICHAEL A. CONNORS, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by AFSCME New York, Council 66, Local 1095 (Erie County Blue Collar Employees Union) (AFSCME) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed AFSCME's charge against the County of Erie (Erie County Medical Center) (County). AFSCME alleges that the County violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it subcontracted security services at the Women, Infant and Children's Supplemental Food Program (WIC)<sup>1/</sup> at Old School 84, an office located on the Erie County Medical Center (ECMC) campus.

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<sup>1/</sup>WIC is a federally-funded program administered locally by the County under a contract with the State of New York.

The ALJ dismissed the §209-a.1(a) allegation for lack of proof. She dismissed the §209-a.1(d) allegation because AFSCME had not established exclusivity over security work no matter how that unit work might reasonably be defined.

AFSCME's exceptions are directed only to the bargaining allegations resting upon the unilateral subcontract of security services at the WIC office. In that respect, AFSCME argues basically that the ALJ's decision is contrary to existing case law. The County has not responded to the exceptions.

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

Prior to the subcontract in issue, unit employees provided security everywhere on the ECMC campus, except for the Geneva B. Scruggs Intermediate Care Facility (Scruggs). Scruggs, a not-for-profit, State-funded program, has always used a private security force. Security for the other not-for-profit tenant on the ECMC campus is provided by personnel in AFSCME's unit.

AFSCME had the burden to show exclusivity over the unit work.<sup>2/</sup> Security on the ECMC grounds has not, in fact, been rendered exclusively by unit personnel. Had AFSCME shown that the County had no effective control over the use of private security at Scruggs, an argument might have been made that a discernible boundary existed which would have preserved AFSCME's exclusivity over security services elsewhere on the ECMC campus.

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<sup>2/</sup>Niagara Frontier Transp. Auth., 18 PERB ¶13083 (1985).

We simply do not know from this record, however, whether the County ordered private security for Scruggs, permitted it, or had no control over that decision. If Scruggs alone controlled its security decisions, AFSCME's exclusivity over security elsewhere on ECMC grounds might have been preserved. Perhaps the most reasonable conclusion to be drawn from the County's delivery of security services for the one other not-for-profit entity on the ECMC grounds is that the County has power and control over all decisions affecting the security of its premises. Such a conclusion would clearly necessitate dismissal of the charge because it then is the County which effectively decided to use private security at Scruggs and the County's decision in that regard pierced AFSCME's exclusivity even within the boundary AFSCME proposes.<sup>3/</sup> Our conclusion that AFSCME has not proven that the County lacked control over the security decisions at Scruggs necessitates dismissal of the charge. AFSCME's arguments assume the County's lack of control, but we cannot premise a violation of the Act on an assumption about a dispositive issue.<sup>4/</sup> Therefore, there is no factual basis upon which to draw any discernible boundary to the on-campus security which would preserve AFSCME's exclusivity over the security work at the

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<sup>3/</sup>AFSCME would define the unit work as security officer work at ECMC-controlled or administered buildings and grounds on the ECMC campus.

<sup>4/</sup>State of New York (Dep't of Correctional Services), 27 PERB ¶3021 (1994).

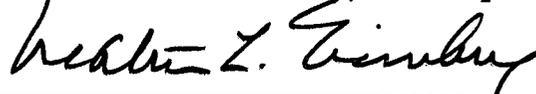
WIC office. There being no showing of exclusivity, the ALJ properly refrained from a discussion of any other issues.

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

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

DATED: March 22, 1995  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

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

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

2G- 3/22/95

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, DUTCHESS  
EDUCATIONAL LOCAL 867, WAPPINGERS CENTRAL  
SCHOOL DISTRICT,

Charging Party,

-and-

CASE NO. U-15176

WAPPINGERS CENTRAL SCHOOL DISTRICT,

Respondent.

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

RAYMOND G. KRUSE, P.C. (RAYMOND G. KRUSE of counsel),  
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Wappingers Central School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge against the District filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Dutchess Educational Local 867, Wappingers Central School District (CSEA). The charge alleges that the District unilaterally subjected a unit employee in the title of health aide-typist to a physical strength test in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act). After a hearing, the ALJ held that the District had violated the Act as alleged because the test imposed was

unrelated to the duties of a health aide-typist as actually performed over time or as could be required.

The District argues in its exceptions that the ALJ's decision is not supported by or is contrary to the record, that her conclusions of law are incorrect, that the Director of Public Employment Practices and Representation, who held the hearing,<sup>1/</sup> either failed to rule or ruled incorrectly with respect to District motions and defenses, and that the Director improperly assisted CSEA by making a motion to amend the charge on its behalf during the hearing.

CSEA argues in its response to the District's exceptions that the rulings at and the conduct of the hearing were correct and proper and that the ALJ's decision should be affirmed on the facts and law as found and applied. CSEA has filed a cross-exception to the Director's ruling denying CSEA's request to reopen the record for the purpose of introducing the job description for the title of health aide, a position which is not in CSEA's unit.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision and dismiss the District's exceptions in all respects.

We turn first to the exceptions concerning the Director's rulings and his conduct of the hearing.

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<sup>1/</sup>The ALJ was substituted after the hearing as permitted under §204.7(a) of the Rules of Procedures.

The Director reserved decision on the District's motions to dismiss as made during the hearing. Those motions were necessarily denied by the ALJ's determination that the District had violated the Act.<sup>2/</sup> The ALJ having denied those motions, the question becomes whether those rulings were correct.

The District first moved to dismiss the charge for failure to state a cause of action. That motion, of course, is directed to the allegations in the charge. The District contends that the charge is deficient as a matter of law because CSEA did not plead in the charge that the strength tests as administered were not reasonably related to the duties which could be assigned to a health aide-typist.

CSEA's charge rests upon a claimed unilateral change in a mandatory subject of negotiation. The charge as filed alleged a change in practice and it identified the subject matter of that change. The relationship, if any, of the test to the duties of the position in issue affects, at most, only the negotiability of the test, an issue for our determination. Moreover, an allegation that the test is not related to the duties of the position is conclusory. CSEA was neither required to plead a conclusion of fact nor to plead an ultimate conclusion of law. A charge need only give fair notice of the actions intended to be

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<sup>2/</sup>See Bd. of Educ. of the City Sch. Dist. of the City of Buffalo, 24 PERB ¶3033 (1991) (motion to dismiss denied by decision finding a violation of the Act) (subsequent history omitted).

proved as violations of the Act<sup>3/</sup> and CSEA's charge was clearly sufficient under that standard.

The District also moved to dismiss the charge after the end of CSEA's direct case for failure to establish a prima facie violation. The District argues in this respect that, apart from its pleading failure, CSEA also failed to prove the absence of a reasonable relationship between the test and the duties of a health aide-typist. On CSEA's direct case, however, there was evidence as to the nature of the test administered, the change in prior practice and to the duties of a health aide-typist. That proof was plainly sufficient to establish a prima facie case of a refusal to bargain premised upon a unilateral change in practice, even without giving CSEA the benefit of all reasonable inferences, as we do in deciding the disposition of such motions to dismiss.<sup>4/</sup>

The Director also denied, upon CSEA's objection, the District's motion to amend its answer to add a timeliness defense which was made for the first time at the beginning of the hearing. The District does not specifically allege in its exceptions that the Director's ruling at the hearing was incorrect, only that the ALJ refused to consider timeliness. However, as the ALJ's decision was limited by the Director's prior ruling, that ruling is indirectly challenged by the

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<sup>3/</sup>Civil Serv. Employees Ass'n (Dennis), 26 PERB ¶3059 (1993).

<sup>4/</sup>Professional Staff Congress/CUNY (Versia), 23 PERB ¶3030, aff'g 23 PERB ¶4501 (1990).

District. Having determined that the correctness of the Director's ruling is before us, we affirm that ruling.

The District had not raised timeliness as a defense to the charge in its answer as required by our Rules<sup>5/</sup> and our decisions.<sup>6/</sup> As to the motion, there was no explanation offered by the District as to why it could not have raised a timeliness defense before the hearing upon facts clearly within the possession and control of the District. Accordingly, there was no abuse of discretion in the Director's refusal to grant the motion made at that time.<sup>7/</sup>

The District's allegation that the Director improperly assisted CSEA by making a motion on its behalf at the hearing is without basis. Following CSEA's examination of a witness, the Director merely inquired of CSEA's attorney as to whether he intended to amend the charge to include facts regarding a physical examination of a second unit employee. The amendment was clear in context and did not in any way change the nature or theory of the charge. Therefore, there was no abuse of discretion in the Director's inquiry to CSEA regarding its intent and similarly no abuse in his granting the amendment.

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<sup>5/</sup>Rules §204.3(c)(2).

<sup>6/</sup>Levittown Union Free Sch. Dist., 13 PERB ¶3014 (1980).

<sup>7/</sup>Town of Brookhaven, 26 PERB ¶3066 (1993).

The District's remaining exceptions are essentially that the decision is incorrect as a matter of fact and law. We disagree and affirm for the reasons outlined below.

The position in issue is a health aide-typist. Apparently in contemplation of using incumbents of this position to physically assist handicapped students, the District required Theresa Chambers, and several other health aide-typists, to submit to physical examinations. During the examination, the employees were subjected by a physician to certain strength tests which were designed to determine each employee's physical ability to perform the tasks associated with assisting handicapped students with their needs. The physician's report on Chambers states that she was being examined for the position of "health aide", a separate position created by the District in 1993 specifically to assist with handicapped students. The physician determined that Chambers was not physically fit to be a health aide. Following that report, Chambers was transferred to another school. Her duties upon transfer, however, were the same as her duties before transfer and did not involve assisting handicapped students.

The test for strength and mobility which the District required of Chambers and other unit employees is arguably not mandatorily negotiable only if the test is to determine the employee's ability to perform duties which either are required or

can be required of the position held by the employee.<sup>8/</sup> The District assumes that it has the right unilaterally to require health aide-typists to assist with the lifting and movement of handicapped students, and because it has that right, it may also unilaterally subject employees to medical tests to determine if they have the physical ability to perform those tasks. The record establishes conclusively, however, that the health aide-typist is a position distinct from a health aide<sup>9/</sup> and that the health aide-typists have never, in fact, assisted with the physical needs of handicapped students.

The District also claims that assisting handicapped students with their physical needs are tasks which can be required of health aide-typists even if those tasks have not actually been performed by them. The record, however, does not support that argument either. The civil service job description for the health aide-typist does not contain anything even suggesting that a health aide-typist is required to, for example, help lift handicapped students from a wheelchair. The position description reflects a position which is primarily clerical with a secondary and minor first aid component. Although the job description specifically requires a "physical condition commensurate with the

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<sup>8/</sup>State of New York, 27 PERB ¶3018 (1994); City of White Plains, 18 PERB ¶3074 (1985).

<sup>9/</sup>Whether the duties of a health aide include assisting with the physical needs of a handicapped student and whether such duties are consistent with the job description of a health aide are issues which are not material to the disposition of this charge.

demands of the position", the strength tests administered were simply not for duties within the demands of the position of a health aide-typist, either as described or as rendered. Without regard to any other rationale which might have rendered the District's test, at least as implemented, mandatorily

negotiable,<sup>10/</sup> the District clearly may not subject an employee unilaterally to a physical examination or strength test in conjunction with duties that have not in fact been performed by the employees and cannot be assigned unilaterally to them.

For the reasons set forth above, the ALJ's decision is affirmed and the District's exceptions are dismissed. Our affirmance makes it unnecessary and inappropriate to consider CSEA's cross-exception.

IT IS, THEREFORE, ORDERED that the District immediately:

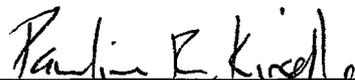
1. Cease subjecting health aide-typists to strength tests or physical examinations regarding duties involving assisting handicapped students with their physical needs.
2. Rescind the transfer orders of any health aide-typist which were based on a physical examination or strength test conducted since August 1993, and return those employees to their former assignments.

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<sup>10/</sup>See, e.g., County of Nassau, 27 PERB ¶13054 (1994) (appeal pending).

3. Remove any reports related to such physical examinations or strength tests from any employment or personnel files kept or maintained by the District or its agents.
4. Sign and post notice in the form attached at all locations ordinarily used to post notices of information to CSEA unit employees.

DATED: March 22, 1995  
Albany, New York

  
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Pauline R. Kinsella, Chairperson

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

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

# NOTICE TO ALL EMPLOYEES

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

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Dutchess Educational Local 867, Wappingers Central School District that the Wappingers Central School District will immediately:

1. Stop subjecting health aide-typists to strength tests or physical examinations regarding duties involving assisting handicapped students with their physical needs.
2. Rescind the transfer orders of any health aide-typist which were based on a physical examination or strength test conducted since August 1993, and return those employees to their former assignments.
3. Remove any reports related to such physical examinations or strength tests from any employment or personnel files kept or maintained by the District or its agents.

Dated . . . . .

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

WAPPINGERS CENTRAL SCHOOL DISTRICT  
. . . . .

*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.*

2H- 3/22/95

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

ASSOCIATION OF SURROGATES AND SUPREME  
COURT REPORTERS WITHIN THE CITY OF  
NEW YORK,

Charging Party,

-and-

CASE NO. U-13412

STATE OF NEW YORK-UNIFIED COURT SYSTEM,

Respondent.

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FULBRIGHT & JAWORSKI L.L.P. (K. JANE FANKHANEL and EVAN K.  
KORNRICH of counsel), for Charging Party

NORMA MEACHAM, ESQ., DIRECTOR OF HUMAN RESOURCES (SUSAN G.  
WHITELEY and LEONARD R. KERSHAW of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York-Unified Court System (UCS) and the Association of Surrogates and Supreme Court Reporters Within the City of New York (Association) to a decision by an Administrative Law Judge (ALJ). The Association alleges in its charge that UCS violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed its practice and discontinued the terms of two separate, expired agreements pertaining to the rate of and conditions under which UCS pays for transcripts produced and delivered by court reporters in the

Association's unit.<sup>1/</sup>

After several days of hearing, the ALJ held that UCS violated §209-a.1(d) of the Act in the following respects:

1. ending its practice of paying double (\$2.75) the base rate (\$1.375) for daily and expedited transcripts when only the court orders a copy;
2. requiring expedited copy to be supplied within three business days instead of within three days for each day of testimony to qualify for any payment by UCS.<sup>2/</sup>

The ALJ also held that UCS discontinued the terms of an expired 1983 Page Rate Agreement (PRA) in violation of §209-a.1(e) of the Act when it ceased paying the base rate of \$1.375 for regular copy<sup>3/</sup> produced and delivered before the close of the case.

As relevant to the Association's exceptions, the ALJ dismissed allegations pertaining to indeterminate sentencing

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<sup>1/</sup>The Association represents approximately 330 court reporters working in Supreme Court in New York City. There are similar charges against UCS filed by other unions representing court reporters working elsewhere within UCS. The ALJ issued separate decisions because there are some different issues and facts in each case. To avoid confusion, we have not consolidated the cases on appeal. Decisions involving other affected unions were issued at our January 1995 meeting.

<sup>2/</sup>Under UCS's abolished practice in this respect, a reporter would have, for example, six days in which to produce and deliver a transcript for payment after a two-day hearing.

<sup>3/</sup>Regular copy for purposes of the ALJ's decision and order in this case is that which is produced and delivered outside of the time frames defining daily or expedited copy.

transcripts.<sup>4/</sup> The ALJ held that an agreement, memorialized by letter dated March 9, 1979, under which UCS ordered three copies of indeterminate sentencing transcripts, paying the prevailing rate for the first copy and one-half that rate for the second and third copies, was not an agreement for purposes of §209-a.1(e) of the Act. The ALJ dismissed the §209-a.1(d) allegation based on UCS' decision to stop purchasing a second and third copy of the indeterminate sentencing transcripts on the ground that the decision in that respect, despite its effect on the reporter's compensation,<sup>5/</sup> was not mandatorily negotiable because the number of transcripts ordered related primarily to UCS' mission and level of service. The Association excepts to the ALJ's dismissal of each of these allegations.

UCS defends its stoppage of premium payments for daily and expedited copy on the ground that the expired 1983 PRA establishes a base rate of \$1.375 per page for all transcripts and that it could revert to the terms of that agreement notwithstanding any inconsistent practice. It defends its cessation of payments for any transcripts produced and delivered in excess of three working days of the recording on the ground

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<sup>4/</sup>Criminal Procedure Law §380.70 requires that a certified copy of the minutes of the sentencing proceeding be delivered within 30 days to the person in charge of the institution to which the defendant has been sentenced and delivered. The agreement in issue was reached in response to enactment of this legislation.

<sup>5/</sup>By ordering only one copy of indeterminate sentencing transcripts, UCS effectively cut the reporters' pay for those transcripts in half.

that such transcripts constitute "regular" copy within the meaning of Judiciary Law §299 as interpreted in Alweis v. Evans<sup>6/</sup> and that such regular copy must be provided to a judge free of charge.

UCS' defenses to the violations of the Act found by the ALJ in this case were considered and rejected by us in a decision issued at our January 1995 meeting on a substantially similar charge filed against UCS by District Council 37 (U-13410).<sup>7/</sup> We incorporate our decision in U-13410 herein and, for the reasons fully set forth in that decision, reject UCS' defenses to the violations of the Act found by the ALJ in this case.

The Association's exceptions, however, were not considered in U-13410. Those exceptions pertain to indeterminate sentencing transcripts and center on the nature of a 1979 agreement pertaining thereto. The 1979 agreement in issue was entered into by Lester Kane, then the Association's president, and David Barnes, then the Deputy Administrative Director for New York City Courts. That agreement was implemented consistently by UCS until early 1992, when it began ordering only one copy of indeterminate sentencing transcripts instead of the agreed-upon three copies.

In dismissing the §209-a.1(e) allegation, the ALJ held that the 1979 agreement was not an agreement within the meaning of §209-a.1(e) of the Act because it did not contain a specified

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<sup>6/</sup>69 N.Y.2d 199 (1987).

<sup>7/</sup>State of New York-Unified Court System, 28 PERB ¶3003 (1995).

period and was not entered into by UCS' chief executive officer. The ALJ rested his determination on the definition of an agreement in §201.12 of the Act which states as follows:

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

We reverse the ALJ's decision finding no violation of §209-a.1(e) of the Act with respect to compensation for indeterminate sentencing transcripts because the 1979 agreement qualifies as an expired agreement for purposes of §209-a.1(e) of the Act.

An agreement, if reduced to or memorialized by a writing,<sup>8/</sup> need not contain an express duration clause for it to be an agreement within the meaning of §§201.12 and 209-a.1(e) of the Act. The relevant language in §201.12 merely means that if there is a duration clause in the document, the contract is binding for that stated period. Where no specific duration is stated in a collective bargaining agreement, a reasonable duration will be implied as a matter of law.<sup>9/</sup>

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<sup>8/</sup>An agreement need not be in writing to be valid and enforceable for any purpose under the Act. Indeed, §204.3 of the Act entitles a party to a written agreement only on demand.

<sup>9/</sup>Bd. of Educ. of Brookhaven-Comsewogue Union Free Sch. Dist. v. Port Jefferson Station Teachers Ass'n, 88 Misc.2d 27, 10 PERB ¶7502 (Sup. Ct. Suffolk Co. 1976) (citing cases and authority); Wyandanch Union Free Sch. Dist. v. Wyandanch Teachers Ass'n, 9 PERB ¶7534 (Sup. Ct. Suffolk Co. 1976).

A cause of action under §209-a.1(e) requires also, however, that the agreement be expired. If the 1979 agreement was still in effect when the UCS discontinued its terms, no cause of action would exist under §209-a.1(e). When this case first came before us for discussion, we decided to invite the parties to file an additional brief on the question of whether the 1979 agreement should be found to be expired within the meaning of §209-a.1(e) if an agreement within the meaning of the Act was found to exist at all. In response to that request, the Association argues that the agreement could be considered expired at different dates before its charge was filed. UCS did not address the issue of expiration, reiterating its argument that the 1979 agreement is not an agreement within the meaning of the Act. UCS made no arguments in opposition to the Association's contention that the agreement is expired for purposes of §209-a.1(e).

Having reviewed the record and considered the parties' arguments, we hold that the 1979 agreement must be considered expired for purposes of §209-a.1(e). It suffices for purposes of §209-a.1(e) that an agreement be expired when the employer fails or refuses to continue the terms of the expired agreement. It is not, therefore, necessary to fix a precise expiration date for the 1979 agreement. We believe that the most logical expiration date of that agreement is July 1987 when the PRA expired. The transcript payment methodology and rate originally agreed upon in the 1979 agreement changed upon negotiation of the PRA to reflect the PRA methodology and rate. The 1979 agreement specified

payment at the rate of \$.30 per folio for the first copy and \$.15 per folio for the second and third copies consistent with the then prevailing payment methodology and rate. The 1983 PRA substituted a base rate per page at rates which increased over the duration of the PRA. UCS continued to order three copies of indeterminate sentencing transcripts after negotiation of the PRA, paying for those transcripts at the rates required by the PRA. This evidences that the parties intended to link the terms of the two agreements in certain significant respects.

Alternatively, the 1979 agreement could be considered to have expired when, in negotiations for a successor to the PRA, the State proposed to discontinue payments for all transcripts. This demand manifested UCS' clear intent not to automatically renew the 1979 agreement, a conclusion which might otherwise have been drawn from its continuing adherence to an agreement without explicit duration. On either of these theories, there is an expired agreement within the meaning of §209-a.1(e) of the Act.

The second ground for the ALJ's dismissal of the §209-a.1(e) charge was that the 1979 PRA had not been entered into by UCS' chief executive officer. It is immaterial, however, that the 1979 agreement was not negotiated personally by UCS' chief executive officer.<sup>10/</sup> A chief executive officer of a public employer clearly may, and often does, negotiate through agents. The chief executive officer of UCS is specifically empowered to

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<sup>10/</sup>Judiciary Law, §212(1)(e) makes the Chief Administrator of the Courts UCS' chief executive officer for purposes of the Act.

delegate functions, powers and duties to any deputy or assistant.<sup>11/</sup> UCS' uninterrupted adherence to the 1979 agreement for approximately thirteen years, even after negotiation and expiration of the 1983 PRA, establishes that Barnes either had actual or apparent authority to initially enter into that agreement on behalf of UCS' chief executive officer<sup>12/</sup> or that his actions were subsequently ratified by UCS. The payments UCS made pursuant to the 1979 agreement continued for so long a period of time, even after negotiation of the 1983 PRA, that it was incumbent upon UCS to establish that its responsible agents lacked actual or imputed knowledge of that agreement and disavowed the payments made thereunder. The record does not establish that Barnes lacked any authority to enter into the 1979 agreement, that responsible agents of UCS were unaware of that agreement, or that UCS ever disavowed it until the action in 1992 giving rise to this charge. Quite the contrary, having

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<sup>11/</sup>Judiciary Law, §212(1)(s). Hudson Valley Dist. Council of Carpenters v. State of New York, 152 A.D.2d 105, 23 PERB ¶7514 (3d Dep't 1989) (hereafter Hudson Valley) is not to the contrary and affords UCS no defense in this case. The Court in Hudson Valley held only that on the facts of that case, a state agency commissioner and facility superintendents were not acting as the Governor's agents for purposes of negotiating an agreement regarding carpentry at certain facilities. Among other factors influencing the Court in Hudson Valley, the agency commissioner had specifically and promptly disavowed the existence of any agreement and the power of the facility superintendents to enter into any agreements. Hudson Valley does not support or require a conclusion that the Chief Administrator of the Courts and UCS' Director of Labor Relations are the only two persons empowered to enter into agreements with the representatives of UCS' employees.

<sup>12/</sup>See Sachem Cent. Sch. Dist., 6 PERB ¶3014 (1973).

negotiated the 1983 PRA through its designated labor relations negotiator, UCS necessarily ratified outstanding agreements and practices with respect to payments for other types of transcripts. UCS' proposals submitted in the negotiations for a successor to the 1983 PRA, most particularly the December 1989 proposal to terminate all transcript payments, further confirm UCS' awareness of transcript payments in relevant part.

UCS also argues that §209-a.1(e) of the Act cannot require the continued ordering of and payment for a second and third copy of an indeterminate sentencing transcript because there is no evidence that the 1979 agreement has been legislatively approved. We are not certain whether UCS contends that legislative approval of transcript payments after 1992 is required or whether legislative approval was required of the 1979 agreement when it was first entered. Neither argument, however, is persuasive.

A government's obligations under §209-a.1(e) of the Act are not dependent upon the actions or inactions of its legislative body. Section 209-a.1(e) of the Act attaches upon expiration of an agreement and requires the continuation of all terms of that expired agreement until a successor agreement is negotiated, whether or not the legislative body elects to "approve" the post-expiration continuation of those terms. Section 209-a.1(e) imposes affirmative obligations upon a government which must be honored so long as its conditions are satisfied, irrespective of the actions or inactions of the government's legislative body.

UCS' argument in this respect is no more compelling if it is suggesting that §209-a.1(e) cannot serve to continue the terms of the 1979 agreement on and after 1992 because it had not been legislatively approved on negotiation or during its duration. In relevant context, legislative approval is required only as to those terms of an agreement requiring "additional funds" for implementation.<sup>13/</sup> Payments under the 1979 contract were in fact made by UCS for years, payments which could not have been made without an appropriation. Therefore, the 1979 agreement either carried with it the funds necessary for its implementation, in which case legislative approval was not required, or such additional funds as were necessary for its implementation were appropriated, in which case legislative approval was granted. In either circumstance, the March 1979 agreement was binding.

UCS argues lastly that the 1983 PRA extinguished the 1979 agreement. We held in U-13410, incorporated by reference herein, however, that the 1983 PRA applies by its terms only to regular copy and not to other forms of copy such as the indeterminate sentencing transcripts in issue in this case. Moreover, as noted in the discussion of the expiration of the 1979 agreement, it appears that the parties intended to have the 1979 agreement applied according to the rates set by the PRA and did, in fact, do so. This intent and practice is not consistent with a

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<sup>13/</sup>Act §204-a.1.

conclusion that the parties intended to abolish the 1979 transcript agreement when they negotiated the 1983 PRA. Again, UCS' demands in negotiations for a successor to the PRA make manifest that even UCS did not understand the 1983 PRA to have extinguished payments for all but regular copy.

Having found an agreement within the meaning of both §201.12 and §209-a.1(e) of the Act, we do not consider the Association's equitable estoppel argument. Similarly, in view of our finding that UCS is required to order and pay for three copies of indeterminate sentencing transcripts pursuant to the expired 1979 agreement, we do not reach the §209-a.1(d) allegation, which is also based on UCS' decision to order only one copy of such transcripts. Therefore, we do not consider the Association's exception directed to the ALJ's dismissal of the §209-a.1(d) allegation pertaining to indeterminate sentencing transcripts.

For the reasons set forth above, the ALJ's decision is affirmed in part and reversed in part. IT IS, THEREFORE, ORDERED that UCS:

1. Reinstate its practice of paying reporters double the base rate of \$1.375 per page for the production of daily or expedited copy when only the court orders the transcript and reinstate its practice of paying the base rate of \$1.375 per page for transcripts produced in other than a daily or expedited time frame, but before the close of a case.

2. Rescind and cease implementation of any work rules or directives requiring expedited transcripts be supplied within three business days of the date of order to qualify for payment.

3. Make any unit employees who produced and delivered daily transcripts by the next day and were not paid \$2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

4. Make any unit employees who produced and delivered expedited transcripts within three days for each day of testimony and were not paid \$2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

5. Make any unit employees who produced and delivered transcripts in other than a daily or expedited time frame, but before the close of a case, and were not paid \$1.375 per page whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

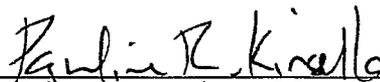
6. Continue to order three copies of indeterminate sentencing transcripts, paying the prevailing base rate for the first copy and one-half that rate for the second and the third copy.

7. Pay to any unit employee who produced and delivered one copy of an indeterminate sentencing transcript the difference between the payment actually made by UCS to the employee and what would have been paid by UCS to the employee had UCS ordered and paid for a second and third copy pursuant to the 1979 agreement

pertaining to indeterminate sentencing transcripts, with interest at the currently prevailing maximum legal rate.

8. Sign and post the attached notice at all locations ordinarily used by UCS to post notices of information to Association unit employees.

DATED: March 22, 1995  
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

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## **NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

we hereby notify the employees of the State of New York-Unified Court System (UCS) represented by the Association of Surrogates and Supreme Court Reporters Within the City of New York that UCS will:

1. Reinstate its practice of paying reporters double the base rate of \$1.375 per page for the production of daily or expedited copy when only the court orders the transcript and reinstate its practice of paying the base rate of \$1.375 per page for transcripts produced in other than a daily or expedited time frame, but before the close of a case.
2. Rescind and cease implementation of any work rules or directives requiring expedited transcripts be supplied within three business days of the date of order to qualify for payment.
3. Make any unit employees who produced and delivered daily transcripts by the next day and were not paid \$2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.
4. Make any unit employees who produced and delivered expedited transcripts within three days for each day of testimony and were not paid \$2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.
5. Make any unit employees who produced and delivered transcripts in other than a daily or expedited time frame, but before the close of a case, and were not paid \$1.375 per page whole for any loss of pay, with interest at the currently prevailing maximum legal rate.
6. Continue to order three copies of indeterminate sentencing transcripts, paying the prevailing base rate for the first copy and one-half that rate for the second and the third copy.
7. Pay to any unit employees who produced and delivered one copy of an indeterminate sentencing transcript the difference between the payment actually made by UCS to the employee and what would have been paid by UCS to the employee had UCS ordered and paid for a second and third copy pursuant to the 1979 agreement pertaining to indeterminate sentencing transcripts, with interest at the currently prevailing maximum legal rate.

21- 3/22/95

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Charging Party,

-and-

CASE NO. U-14708

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

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NANCY E. HOFFMAN, GENERAL COUNSEL (MARILYN S. DYMOND of  
counsel), for Charging Party

NORMA MEACHAM, ESQ., DIRECTOR OF HUMAN RESOURCES (SUSAN G.  
WHITELEY and LEONARD R. KERSHAW of counsel), for Respondent

BOARD DECISION AND ORDER

The State of New York - Unified Court System (UCS) has filed exceptions to a decision of an Administrative Law Judge (ALJ) finding that it had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it changed a full-time principal office assistant position into two part-time principal office assistant positions and refused demands from the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Capital Region Judiciary Local #694 (CSEA) to negotiate the change. In reaching her decision, the ALJ rejected UCS' several defenses, including waiver, past practice, reclassification of positions and managerial prerogative.

UCS employs approximately 2,062 nonjudicial employees in the State Judiciary Unit represented by CSEA. Some of these employees are assigned to the Court of Claims, which is located in the Justice Building in Albany. Prior to August 1993, the Court of Claims was accessed through several different entries.

As a result of complaints about missing property and loud and inappropriate behavior by some visitors to the Court, UCS determined to limit access to the Court to one entrance and to move the receptionist/switchboard operator into that area. New locks and a "swipe card" security system were installed. UCS then decided that it was necessary to have staff escort visitors and operate the swipe card system. Therefore, it abolished a vacant principal office assistant position, grade JG-12, in its purchasing unit and created two part-time principal office assistant positions, also grade JG-12, to be assigned to the receptionist/switchboard operator area.<sup>1/</sup> Not utilizing the promotion eligible list for the competitive class position of principal office assistant, UCS posted, on May 26, 1993, an employment opportunity announcement for two part-time principal office assistant positions. CSEA thereafter made two demands to negotiate UCS' action, both of which were refused by UCS. Two employees were hired to fill the positions, effective August 2

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<sup>1/</sup>Pursuant to Chief Administrative Judge Evans' administrative order of July 7, 1980, part-time positions share the same title standard with full-time positions, but full-time positions are in the competitive class of the Civil Service and part-time titles are in the noncompetitive class.

and 9, 1993, respectively. Both positions are in the unit represented by CSEA.<sup>2/</sup> The two part-time principal office assistants work alternate weeks of thirty-five hours per week, which is the equivalent of one full-time principal office assistant. They are paid one-half the salary of a full-time principal office assistant and their benefits are pro-rated accordingly. The parties stipulated that although the duties of the two part-time principal office assistants assigned to the reception/switchboard area are different from the duties performed by the full-time principal office assistant in the purchasing unit, they fall within the range of duties contained in the job description for the position.

The parties' 1991-95 collective bargaining agreement contains a management rights clause, Article 5, which states:

Except as expressly limited by other provisions of this Agreement, all of the authority, rights and responsibilities possessed by the State are retained by it, including but not limited to, the right to determine the mission, purpose, objectives and policies of the State; to determine the facilities, methods, means and number of personnel required for the conduct of State Judiciary programs; to administer the Merit System, including the examination, selection, recruitment, hiring, appraisal, training, retention, promotion, assignment or transfer of employees pursuant to law; to direct, deploy, and utilize the work force; to establish specifications for each class of positions and to classify or reclassify and to allocate or

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<sup>2/</sup>The unit represented by CSEA includes both full-time and part-time employees, including ten full-time principal office assistants and four part-time principal office assistants. Two of the part-time employees are those who are in issue here. The other two participate in job sharing of one position pursuant to a job share policy implemented by UCS in 1990, with CSEA's agreement.

reallocate new or existing positions in accordance with law and the provisions of this Agreement.

The parties further stipulated that "[m]anagement states that its reason for deciding that such duties should be shared by two part-time employees was to enable them to remain vigilant and observant to detect problems and respond promptly and prudently".

The ALJ found that, by agreement to the language in the management rights clause, CSEA had not waived its right to negotiate the abolition of the full-time position and the creation of the two part-time positions. She further found that UCS' action was not a reclassification and was not permitted by the parties' past practice. She also rejected UCS' argument that the subject nature of its decision was not mandatorily negotiable as being mission-related.

UCS excepts to each of the ALJ's findings; CSEA supports the ALJ's decision. Having reviewed the record and considered the parties' arguments, we affirm the ALJ.

UCS argues in its exceptions that its action in abolishing the full-time principal office assistant position and creating two part-time office assistant positions was a reclassification, which it is not required to negotiate.<sup>3/</sup> The ALJ determined that no new job title had been created because the Chief Administrative Judge's 1990 administrative order had already created part-time titles for all full-time titles in the unit.

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<sup>3/</sup>New York State Court Employees Ass'n, 12 PERB ¶3075 (1979).

She further found that no classification, as it is statutorily defined, had taken place as the UCS had not undertaken

a grouping together, under common and descriptive titles, of positions that are substantially similar in the essential character and scope of their duties and responsibilities and in the qualifications therefor.<sup>4/</sup>

Although the parties stipulated that the UCS "reclassified" the vacant, full-time, competitive class position of principal office assistant, JG-12, which was assigned to the purchasing unit, to principal office assistant, JG-12 (part-time) in the non-competitive area and assigned it to the new reception/switchboard area, they further stipulated that the job description was not changed and that the duties of the part-time principal office assistants are included in the job description utilized for both the full-time and part-time positions.<sup>5/</sup> In determining the negotiability of an employer's personnel actions, we have held:

Classification is clearly a personnel management tool which facilitates the ascertainment of staffing needs within particular areas of an employer's operation. It is closely allied to the setting of job qualifications, the promulgation of job descriptions characterizing employees' essential duties and functions and the creation of a table of organization - all of which we have previously held to constitute nonmandatory subjects of negotiations. (footnote omitted) Moreover, classification as such does not

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<sup>4/</sup>Civil Service Law §2.11.

<sup>5/</sup>UCS argues that since the parties stipulated that UCS had "reclassified" the at-issue principal office assistant position from full-time to part-time, the ALJ could not find otherwise. It is clear, however, that the parties stipulated not that the action was a reclassification, but that that was what UCS called it.

establish, and does not have a direct impact upon, terms and conditions of employment.<sup>6/</sup>

Absent the creation of a new title, a new job description or new qualifications, the abolition of the full-time principal office assistant position and the creation of two part-time principal office assistant positions cannot be viewed as a reclassification. Additionally, as the ALJ found, the primary impact of UCS' action here is on employees' terms and conditions of employment, such as hours of work.

UCS also argues that it required two part-time employees to ensure vigilant security in the switchboard/reception area and that its decision concerning what services to provide and the staffing required to provide it are managerial decisions which need not be negotiated. While level of service<sup>7/</sup> and staffing<sup>8/</sup> are nonmandatory subjects of negotiation, "the selection of a specific means of accomplishing that prerogative affects terms and conditions of employment and is a mandatory subject of negotiations".<sup>9/</sup> Certainly, several different methods of staffing could provide the "vigilance" sought by UCS, assuming

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<sup>6/</sup>New York State Court Employees Ass'n, supra, at 3140-41.

<sup>7/</sup>See, e.g., City Sch. Dist. of the City of New Rochelle, 4 PERB ¶3060 (1971).

<sup>8/</sup>See, e.g., City of Schenectady Patrolmen's Benevolent Ass'n, 21 PERB ¶3022 (1988).

<sup>9/</sup>Starpoint Cent. Sch. Dist., 23 PERB ¶3012, at 3027 (1990).

for the sake of this decision that vigilance beyond that normally required of UCS employees was necessary.<sup>10/</sup>

Therefore, unless there is merit to UCS' remaining defenses, UCS violated §209-a.1(d) of the Act when it unilaterally abolished the full-time principal office assistant position and created two part-time principal office assistant positions and refused to negotiate its decision with CSEA.

UCS argues that CSEA has waived its right to negotiate by virtue of the language of the management rights clause giving it the right to reclassify existing positions and to recruit, select, hire, and assign employees pursuant to law. The rights UCS points to are rights it possesses notwithstanding the language of the management rights clause.<sup>11/</sup> Indeed, the clause specifies that UCS merely retains "all the authority, rights, and responsibilities possessed by" it, in accordance with law. The clause as written is merely a retention of existing rights; no additional rights were acquired by it. UCS' existing rights do not include the right to unilaterally "substitute part-time

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<sup>10/</sup>We reject UCS' argument raised in its exceptions that since CSEA did not demand negotiations specifically related to the allocation of the hours of work of the former full-time principal office assistant, the charge should be dismissed. We have previously held, however, that an employer's unilateral action with respect to a mandatory subject of negotiations gives rise, without more, to an improper practice charge. A demand by the union to negotiate that which has been improperly unilaterally implemented is not required.

<sup>11/</sup>The clause sets forth, inter alia, UCS' right to determine its "mission, purpose, objectives and policies", the administration of the Merit System and the allocation and reallocation of positions.

employees for full-time employees".<sup>12/</sup> General management rights clauses do not give rise to a waiver of the right to negotiate.<sup>13/</sup> Waiver must be clear, unmistakable and unambiguous.<sup>14/</sup> This clause cannot be read as a clear and explicit waiver of CSEA's right to negotiate the relevant decision.

Finally, UCS argues that because it has always utilized part-time employees to deliver its service, CSEA had agreed that it could utilize part-time employees as it saw fit. However, there is no evidence that UCS' utilization of part-time employees has also consistently involved the substitution of part-time positions for full-time positions or that CSEA has ever acquiesced in such an action by UCS.<sup>15/</sup>

Based on the above, we find that UCS violated the Act when it unilaterally abolished a full-time principal office assistant position and replaced it with two part-time principal office assistant positions.

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<sup>12/</sup>County of Broome, 22 PERB ¶13019, at 3052 (1989).

<sup>13/</sup>Id.

<sup>14/</sup>CSEA v. Newman, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982).

<sup>15/</sup>That there are two part-time principal office assistants in the unit is not dispositive of this issue. Their positions were created as part of a job share arrangement agreed to by CSEA. The action was initiated by the two employees, not unilaterally imposed by UCS and actually keeps the single item intact, compared to two different part-time positions.

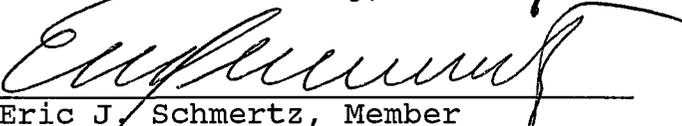
IT IS, THEREFORE, ORDERED that UCS restore the principal office assistant position to full-time status as it existed prior to May 26, 1993, and negotiate with CSEA regarding any substitution of part-time positions for that full-time position.

IT IS FURTHER ORDERED that UCS sign and post the attached notice at all locations ordinarily used by it to post written communications to unit employees.

DATED: March 22, 1995  
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 of the State of New York-Unified Court System (UCS) represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Capital Region Judiciary Local #694 (CSEA) that UCS will restore the principal office assistant position to full-time status as it existed prior to May 26, 1993, and negotiate with CSEA regarding any substitution of part-time positions for that full-time position.

Dated .....

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

STATE OF NEW YORK-UNIFIED COURT SYSTEM  
.....

*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

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In the Matter of

ODESSA-MONTOUR TRANSPORTATION ASSOCIATION,

Charging Party,

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-and-

CASE NO. U-14544

ODESSA-MONTOUR CENTRAL SCHOOL DISTRICT,

Respondent.

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JOHN B. SCHAMEL, for Charging Party

SAYLES, EVANS, BRAYTON, PALMER & TIFFT (CYNTHIA S.  
HUTCHINSON and JAMES F. YOUNG of counsel), for Respondent

BOARD DECISION AND ORDER

The Odessa-Montour Central School District (District) excepts to a decision of an Administrative Law Judge (ALJ) finding that it violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted its school bus services, thereby eliminating all of the positions in the unit represented by the Odessa-Montour Transportation Association (Association). The Association excepts to the scope of the remedy ordered by the ALJ, but otherwise supports his decision.

The charge alleges a violation of §209-a.1(a) and (d) of the Act. The ALJ dismissed the alleged violation of §209-a.1(a) of the Act for lack of proof and that aspect of the charge is not

before us. He also initially dismissed for lack of proof the allegation that the District had violated §209-a.1(d) of the Act by refusing a request to continue contract negotiations.<sup>1/</sup> The unilateral subcontracting allegation was dismissed on the ground that the charge was limited to actions taken by the District's Board of Education and that the duty to negotiate could not be violated by the action of a legislative body. We reversed the ALJ's dismissal of the subcontracting allegation, determining that the charge had pled an action by the District's chief executive officer, the Superintendent of Schools, which was sufficient as a matter of law to make out a prima facie claim of a §209-a.1(d) violation. We remanded the case to the ALJ for further findings consistent with our decision.<sup>2/</sup>

On remand, the ALJ held that the Association had not agreed to the subcontracting of the District's busing operation and had not waived, by silence or otherwise, its right to negotiate the decision to subcontract. The ALJ ordered the District to cease and desist from utilizing nonunit personnel to perform unit work, to restore its busing and maintenance services and to make unit employees whole for any wages lost because of the subcontracting.

The District excepts to the ALJ's decision, asking us to reconsider our earlier finding that the Association had pled a prima facie violation of §209-a.1(d). It also argues that the

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<sup>1/</sup>27 PERB ¶4511 (1994).

<sup>2/</sup>27 PERB ¶3050 (1994).

ALJ erred in finding that the District had refused to negotiate its decision to subcontract with the Association and in finding that the Association had not waived its right to negotiate that decision.

The Association excepts only to the remedy, arguing that the ALJ erred in not ordering the District to make unit members whole for any loss in benefits that resulted from the District's action.

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

The Association represented a unit consisting of the school bus drivers and mechanics employed by the District.<sup>3/</sup> The parties had a collective bargaining agreement which expired on July 1, 1991. Their negotiations for a successor agreement had resulted in a memorandum of agreement, but, when the District's Board of Education failed to accept the proposed three-year agreement in October 1992, no new negotiations were scheduled for a time.<sup>4/</sup> Tilden and the Association president, Charles Vary, were thereafter notified by an October 15, 1992 letter from James

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<sup>3/</sup>The District conceded that the at-issue work had always been exclusively performed by employees represented by the Association.

<sup>4/</sup>William Stratton, the District's chief negotiator, notified Robert Tilden, chief negotiator for the Association, on October 13, 1993, that the agreement had not been approved by the District and noted that "my direction from the District is to continue to reach an acceptable agreement between the parties."

Young, the District's attorney, that because of economic concerns, the District was exploring the option of contracting out its transportation service to a private company. Young noted:

Decisions of the Public Employment Relations Board ~~require a municipality to offer to negotiate the decision to contract out services previously performed by employees, and, if the decision is reached to contract out the services, the employer is required to negotiate the impact.~~ The District has instructed me to offer to meet with you for the purpose of negotiating the decision to contract out transportation.

Vary responded by letter dated October 19, 1992, stating that the Association "will be unable to secure advice regarding impact negotiations in time to meet with you on the dates you have proposed" and suggesting new dates. The parties met on November 10, 1992, and agreed that after the District advertised for bids from contractors, the resulting bid information would be given to the Association to enable it to formulate a counterproposal. Young confirmed in a November 11 letter to Tilden and Vary that procedures had been agreed to in "regard to the negotiations for the decision and the impact of subcontracting".

Meanwhile, on December 1, 1992, the parties resumed their negotiations for a successor to the collective bargaining agreement which had expired on June 30, 1991. The Association was represented in these negotiations by Tilden and Vary, and the District was represented not by Young, but by Stratton. The Association submitted a proposal for the successor agreement, the

District countered, and the Association then conceded on a number of issues, including a reduction in the salary increases it sought over the proposed four-year contract. Stratton consulted with Donald Gooley, the Superintendent of Schools, during the December 1 negotiating session about the District's response to the Association's proposals, although Gooley was not present at the session.

Young, Vary and Tilden corresponded throughout January 1993, with the Association proposing dates when it would be available to continue "impact negotiations" and Young inviting the Association to make a counterproposal regarding transportation. Young confirmed in a February 1, 1993 letter to the Association that the proposed bids indicated a large economic savings to the District and that if it should decide to subcontract, "we will have to negotiate the impact of that decision with you. I also invite you at this time to make proposals for that possibility also." Young further confirmed in a February 5, 1993 letter that "the District wishes to fulfill its Taylor Law obligations to your Association in regard to the decision and impact of contract busing and that the District wanted the Association to compare costs of transportation provided by unit employees with the proposed bids the District had received."

Association representatives met with Young on February 17, 1993. While the versions offered by the parties to the discussions at that meeting conflict, the ALJ determined that the record showed that the Association did not make a counterproposal

at that time regarding contract busing.<sup>5/</sup> The Association thereafter advised the District that it would be meeting with its membership and would then be prepared to make a proposal regarding subcontracting. Young responded with a February 22, 1993 letter to Tilden. In it, he expressed his understanding that the Association desired to negotiate the impact of subcontracting and that if it had a proposal to make, it must be made by March 1, 1993.

On February 25, Vary wrote to Young, informing him that the Association had a proposal for a severance package in response to the District's proposed subcontracting. The letter contained nine proposals related to the severance benefits sought by the Association if the District were to subcontract. On March 8, Young and Tilden met to discuss the Association's demands. Young told Tilden that the District's first offer would be its best offer, with the money declining from that point on. He offered the Association \$1000 for each member, but made no other counterproposals relating to the Association's nine proposals. Tilden confirmed these discussions by a March 11 letter to Young. He noted that the Association still needed the information from the State Retirement System it had earlier requested, but that it

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<sup>5/</sup>Tilden testified that he told Young that the Association's counterproposal to subcontracting had been made to Stratton during negotiations for the successor agreement. Young testified that the Association representatives stated that it had no proposal to make regarding the decision to subcontract.

was available for further negotiations and was awaiting a counterproposal from the District.

Throughout January and February 1993, the Association representatives and Stratton continued to meet and correspond regarding the negotiation of a successor agreement. Tilden wrote a letter to Willie Pittman, president of the District's Board of Education, and Gooley in February 1993, outlining the comparative costs and benefits of District-provided busing and contract busing based on the bids reviewed by Tilden. He pointed out that the District's savings with subcontracting would be minimal, even with the modified salary increases sought by the Association in its proposals for a successor agreement. Both Gooley and Pittman responded to Tilden with inquiries about the figures arrived at by the Association, disputing some and agreeing with others.<sup>6/</sup> Tilden answered their inquiries with more information about his calculations. Negotiations for the successor agreement were held again on March 10, with Stratton urging the Association to take a two-year agreement, with four percent raises in each year. Stratton told Tilden that if the District did not go for subcontracting, "the next two years were [the District's] problem."<sup>7/</sup> Tilden confirmed the Association's proposal for an

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<sup>6/</sup>In his March 4, 1993 letter to Tilden, Gooley pointed out that "[f]uture salaries and fringe for drivers would in all probability be higher with district busing based on Birnie Bus' recent bid. By proposing no increase in wages for 1993-94 and 1994-95, the drivers may be agreeing to short-term pain for long-term gain."

<sup>7/</sup>The meaning of this remark is unexplained on the record.

agreement with those terms in a letter to Stratton dated the same day.

However, on March 11, 1993, the District's Board of Education voted to abolish all busing and maintenance positions effective June 30, 1993, to accept a bid for transportation services from Birnie Transportation Services, Inc., and directed Young to prepare a contract for 1993-94 and 1994-95 with Birnie. Notwithstanding this vote, on March 15, Stratton met with Tilden to urge him to make an offer to the District for a four-year agreement with no salary increases, informing him that Gooley wanted that proposal to come from the Association, not the District. Tilden complied and made the proposal to Stratton around March 25. Tilden also sent the proposal to Robert Lieby, a member of the Board of Education. Stratton later confirmed with Tilden that he had discussed the demand with Gooley.<sup>8/</sup>

On March 26, Young wrote to Tilden and Vary, responding to Tilden's March 10 letter and indicating that the District would like to meet and clarify all its contractual and statutory obligations to unit employees upon their layoff. The Association then filed this improper practice charge.

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<sup>8/</sup>After a meeting of the Board of Education on April 8, 1993, Lieby told Tilden to get the proposal for a four-year contract with no salary increases to Stratton. When Tilden told Lieby that Stratton already had the proposal, Lieby informed him that the Board of Education was under the impression that the proposal had not been discussed in the contract negotiations and that Stratton had not seen it.

DISCUSSION

We decline to reconsider our earlier decision that the District, including its Superintendent of Schools, wholly adopted the action of the Board of Education on March 11, 1993, abolishing its bus driver and mechanic positions and accepting the bid for transportation services from Birnie. Therefore, as pleaded, the charge set forth a cognizable claim of a violation of §209-a.1(d) premised upon a unilateral subcontract.

Turning directly to the merits of the allegation, the District's actions in this matter indicate that it misapprehends its rights and obligations under the Act relating to a decision to subcontract. In Saratoga Springs School District,<sup>9/</sup> we held that "the replacement of unit employees of a public employer with employees of a contractor who do the same work under similar performance standards"<sup>10/</sup> plainly comes under the meaning of the words "terms and conditions of employment" which cannot be unilaterally imposed. The District is incorrect in its view that its duty to negotiate the decision to subcontract hinges upon a demand to negotiate by the Association. "The District's unilateral subcontracting of unit work is itself a per se rejection of the bargaining process and a refusal to bargain. No

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<sup>9/</sup>11 PERB ¶3037 (1978), aff'd, 68 A.D.2d 202, 12 PERB ¶7008 (3d Dep't), motion for leave to appeal denied, 47 N.Y.2d 711, 12 PERB ¶7012 (1979).

<sup>10/</sup>Id., at 3059 (1978).

demand to bargain is necessary in such circumstance."<sup>11/</sup> With few exceptions, discussed infra, a public employer may not act unilaterally with respect to a mandatory subject of negotiations.<sup>12/</sup> Therefore, unless there is merit to the District's defenses, it violated §209-a.1(d) of the Act when it unilaterally contracted out its school busing and maintenance operations.

The District informed the Association that it was contemplating contracting out its busing operation and offered to negotiate with the Association in its October 15, 1992 letter to the Association. However, it was the District's position that unless the Association came up with a proposal which was at least as economically beneficial to the District as subcontracting, the District would be free to enter into contract busing. The District argues in its exceptions that because the Association did not make a counterproposal to subcontracting directly to Young during the course of his negotiations with Tilden and Vary, it waived its right to negotiate, in effect conceding that the District could act unilaterally.

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<sup>11/</sup>Germantown Cent. Sch. Dist., 26 PERB ¶3003, at 3007 (1993), rev'd on other grounds, 205 A.D.2d 961, 27 PERB ¶7009 (3d Dep't 1994).

<sup>12/</sup>City of Poughkeepsie, 15 PERB ¶3045 (1982), aff'd, 95 A.D.2d 101, 16 PERB ¶7021 (3d Dep't), appeal denied, 60 N.Y.2d 859, 16 PERB ¶7027 (1983).

The ALJ characterized the District's argument in this regard as a "waiver by silence",<sup>13/</sup> which he rejected. He found that the Association never by word or action waived its right to negotiate the subcontracting of the District's busing operation. We agree.

A waiver is an intentional relinquishment of a known right that must be clear, unmistakable and without ambiguity.<sup>14/</sup> The Association, both by its words and actions, articulated its position to the District regarding the proposed subcontracting. With one exception, throughout negotiations the Association proposed to the District a four-year successor agreement. The existence of that proposal is completely inconsistent with the District's position that the Association never made a counterproposal regarding subcontracting and agreed to allow the District to subcontract. The Association proposed to continue using bargaining unit employees to provide busing and bus maintenance for the District. It modified salary and benefit

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<sup>13/</sup>The District did not raise waiver as an affirmative defense in its answer. However, the ALJ decided that since the District's answer asserted that "the District never received a demand to negotiate the decision to contract out busing from the Odessa-Montour Transportation Association" and because of the evidence the District introduced at the hearing, it had effectively raised the waiver defense. No exceptions are taken to this aspect of the ALJ's decision.

<sup>14/</sup>Civil Service Employees Ass'n v. Newman, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't), appeal of remand dismissed, 57 N.Y.2d 775, 15 PERB ¶7020 (1982), on remand sub. nom. State of New York (State Univ. of New York at Albany), 16 PERB ¶3050 (1983), aff'd sub nom. Civil Service Employees Ass'n, Inc. v. Newman, 61 N.Y.2d 1001, 17 PERB ¶7007 (1984).

proposals at the urging of the District's negotiator, Stratton, to achieve that end. The Association communicated to Young, Stratton, Gooley and two Board of Education members its concerns and proposals about the District's proposed action. The District's bifurcation of the simultaneous negotiations on subcontracting and on the successor agreement caused confusion about the parties' positions, but in that circumstance the District certainly cannot assert that the Association had clearly and unambiguously waived its right to negotiate the decision to subcontract.

The District asserts that because no subcontracting proposal was made to Young, the Association made no subcontracting proposal and the District was, therefore, free to act. This argument ignores the facts in this case. Gooley and Stratton were aware throughout the process that the Association had not acquiesced to the District's subcontracting plans and had, in fact, countered the subcontracting proposal with proposals of its own.

As part of its waiver defense, the District asserts that the Association waived its right to negotiate the decision to subcontract because it chose only to negotiate the impact of the contracting out decision in its meetings with Young. The District described the scope of negotiations as both decisional and impact through the early communications and meetings between the Association and Young. The Association on two occasions referred to impact, noting first that it needed to get advice

about impact negotiations and later that it was available to continue to negotiate impact. Young thereafter began referring to the subcontracting negotiations as dealing with impact only and the District now seeks to limit the Association's rights to impact negotiations only.

As noted above, the Association at the same time was engaged in making proposals to the District both with respect to the decision to subcontract and with respect to the impact of such a decision on the bargaining unit, including its nine severance demands. It is apparent that the Association misused the term "impact negotiations", which refers to bargaining only "about those mandatorily negotiable effects which are inevitably or necessarily caused by an employer's exercise of a managerial prerogative."<sup>15/</sup> Such a misuse of terminology, even among experienced practitioners, is not unusual. As we noted in County of Nassau (Nassau County Police Department),<sup>16/</sup> in correcting a mistaken understanding about the difference between impact and decisional bargaining:

[I]mpact bargaining is actually a limited exception to an employer's duty to negotiate all terms and conditions of employment and to an employer's corollary bargaining duty to refrain from unilateral changes with respect to those mandatorily negotiable subjects.

The Association's characterization of the negotiations with Young which were ongoing as "impact negotiations" does not relieve the District of its responsibility to negotiate the

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<sup>15/</sup>County of Nassau (Nassau County Police Dep't), 27 PERB ¶3054, at 3120 (1994) (appeal pending).

<sup>16/</sup>Id.

decision itself when it is otherwise clear that the Association was seeking to bargain and was, in fact, engaged in bargaining with other District representatives, alternatives to the District's intended course of action with respect to the subcontracting decision itself. The District's chief executive officer, Gooley, was aware of the Association's position on both subcontracting and its impact as he was the recipient of reports on the status of negotiations from both Young and Stratton, as well as a number of communications directly from the Association. By negotiating with Stratton for a successor agreement and making a four-year, no increase offer, the Association clearly sought to negotiate continued performance of the busing and maintenance work by unit employees rather than by a private contractor as a cost effective measure.

Finally, the District argues that it satisfied its duty to bargain by offering to negotiate its decision to subcontract and by, in fact, bargaining that decision with the Association. However, the District only negotiated the subcontracting decision up to the point when it decided to act unilaterally. The parties were not at impasse, the District had no compelling need to act when it did and it did not remain willing to negotiate the decision itself after it acted.<sup>17/</sup> "A party does not satisfy its statutory duty to bargain by negotiating on a subject for a

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<sup>17/</sup>Cohoes City Sch. Dist., 12 PERB ¶3113 (1979); Wappingers Cent. Sch. Dist., 5 PERB ¶3074 (1972).

time and then taking action unilaterally and prematurely regarding that subject."<sup>18/</sup>

We accordingly find that the District's decision to subcontract its school busing and bus maintenance services and its elimination of its bus drivers and bus mechanics violated §209-a.1(d) of the Act. As to the Association's exception to the ALJ's remedy, we hereby modify the ALJ's order by requiring the District to make whole unit employees for any benefits lost as a result of the District's decision to subcontract.

IT IS, THEREFORE, ORDERED that the District:

1. Forthwith restore to the bargaining unit represented by the Association the duties which were formerly and exclusively performed by the bargaining unit positions of school bus driver and school bus mechanic.

2. Offer reinstatement under their prior terms and conditions of employment to those unit employees terminated as a result of the subcontracting of the District's busing and bus maintenance operation.

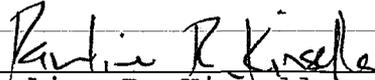
2. Make unit employees whole for any wages and benefits lost as a result of such subcontracting, with interest to be paid at the currently prevailing maximum legal rate.

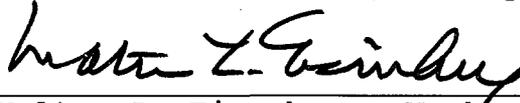
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<sup>18/</sup>Union-Endicott Cent. Sch. Dist., 25 PERB ¶3083, at 3171 (1992), vacated on other grounds, 26 PERB ¶7011 (Sup. Ct., Albany County, 1993), aff'd, 197 A.D.2d 276, 27 PERB ¶7005 (3d Dep't), motion for leave to appeal denied, 84 N.Y.2d 803, 27 PERB ¶7012 (1994).

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

DATED: March 22, 1995  
Albany, New York

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

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

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

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

## NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Odessa-Montour Transportation Association that the Odessa-Montour Central School District will:

1. Forthwith restore to the bargaining unit represented by the Association the duties which were formerly and exclusively performed by the bargaining unit positions of school bus driver and school bus mechanic.
2. Offer reinstatement under their prior terms and conditions of employment to those unit employees terminated as a result of the subcontracting of the District's busing and bus maintenance operation.
3. Make unit employees whole for any wages and benefits lost as a result of such subcontracting, with interest to be paid at the currently prevailing maximum legal rate.

Dated .....

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

ODESSA-MONTOUR CENTRAL SCHOOL DISTRICT  
.....

*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

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In the Matter of

LOCAL 342, LONG ISLAND PUBLIC SERVICE  
EMPLOYEES, UNITED MARINE DIVISION,  
INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4316

NORTH PATCHOGUE FIRE DISTRICT,

Employer.

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

Unit: Included: All full-time and part-time: Firehouse  
Attendant, Senior Firehouse Attendant,

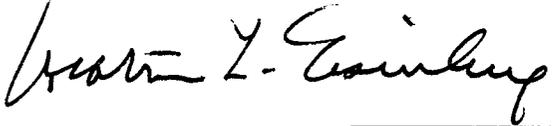
Automotive Equipment Operator, Emergency  
Medical Technician, Emergency Services  
Dispatcher, Custodial Worker I, Automotive  
Mechanic I, Automotive Mechanic III.

Excluded: District Commissioner, District Treasurer,  
District Secretary, Assistant District  
Treasurer, and District Manager.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 22, 1995  
Albany, New York

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

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

  
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Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

VILLAGE OF FISHKILL POLICE BENEVOLENT  
ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4333

VILLAGE OF FISHKILL,

Employer,

-and-

NYS FEDERATION OF POLICE OFFICERS,

Intervenor.

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Village of Fishkill Police Benevolent 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

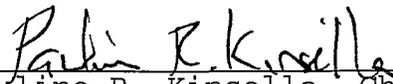
negotiations and the settlement of grievances.

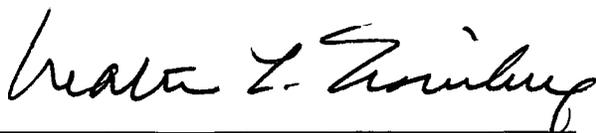
Unit: Included: All part-time police officers.

Excluded: Chief of police and all other employees.

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

DATED: March 22, 1995  
Albany, New York

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

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

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

GROVELAND HIGHWAY ASSOCIATION, LOCAL 1170  
COMMUNICATIONS WORKERS OF AMERICA,

Petitioner,

-and-

CASE NO. C-4380

TOWN OF GROVELAND,

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

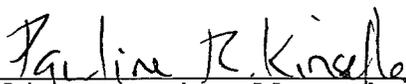
IT IS HEREBY CERTIFIED that the Groveland Highway Association, Local 1170 Communications Workers of America has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time hourly employees of the Highway Department.

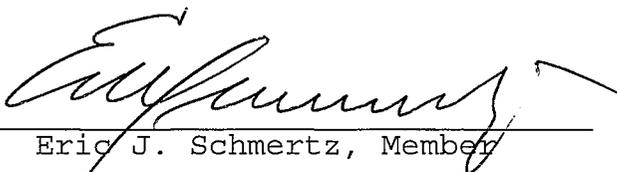
Excluded: Elected officials and supervisors.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Groveland Highway Association, Local 1170 Communications Workers of America. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 22, 1995  
Albany, New York

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

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

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

30- 3/22/95

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PORT WASHINGTON PUBLIC LIBRARY  
STAFF ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4251

PORT WASHINGTON PUBLIC LIBRARY,

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 Port Washington Public Library Staff 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.

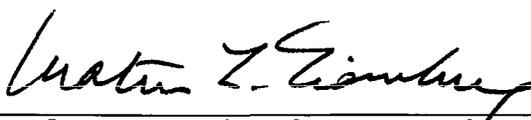
Unit: Included: All full-time, less than full-time, part-time and hourly employees of the Library who have worked a minimum of three hundred and fifty (350) hours in each of four (4) consecutive six (6) month periods immediately prior to the date of recognition of the Staff Association or thereafter work a minimum of three hundred and fifty (350) hours in each of four (4) consecutive six (6) month periods.

Excluded: Director, Deputy Director, Assistant Director, Assistant to the Director, Personnel Officer, Finance Officer, Assistant to the Finance Officer, Internal Auditor, Administrative Secretarial staff to the Director, employees who work less than three hundred and fifty (350) hours in any six (6) month period, employees who are enrolled in high school, and all others not specifically included in the unit.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Port Washington Public Library Staff 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: March 22, 1995  
Albany, New York

  
Pauline R. Kinsella, Chairperson

  
Walter L. Eisenberg, Member

  
Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

WESTHILL EMPLOYEES UNION, NYSUT, AFT,  
AFL-CIO,

Petitioner,

-and-

CASE NO. C-4361

WESTHILL CENTRAL SCHOOL DISTRICT,

Employer.

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

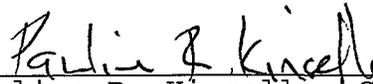
Unit: Included: All employees in the following titles who work 12½ hours per week or more: Teacher Aide, Custodial Worker I, Custodian II, Food Service Helper I, Food Service Helper/Baker, Cook Manager, Head Cook/Manager, Stenographer I, Stenographer II, Typist I, Typist II, Account

Clerk I, Head Groundsman, Groundsman, Courier,  
Print Center Aide, Transportation Clerk,  
Mechanic, Head Mechanic, Mechanics Helper.

Excluded: Account Clerk/Typist II (Secretary to  
Assistant Superintendent for Business  
Administration) and all other employees.

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

DATED: March 22, 1995  
Albany, New York

  
Pauline R. Kinsella, Chairperson

  
Walter L. Eisenberg, Member

  
Eric J. Schmertz, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

JEFFERSON COUNTY COMMUNITY COLLEGE  
EDUCATION SUPPORT PERSONNEL ASSOCIATION  
(NEA/NY),

Petitioner,

-and-

CASE NO. C-3840

COUNTY OF JEFFERSON & JEFFERSON COUNTY  
COMMUNITY COLLEGE,

Employer,

-and-

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

Intervenor.

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CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Jefferson County Community

College Education Support Personnel Association (NEA/NY) 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.

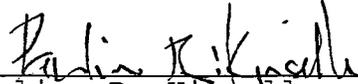
Unit: Included: All employees in the following titles employed at Jefferson County Community College:  
Custodian, Senior Custodian, Stenographer, Senior Stenographer, Building Maintenance Mechanic, Senior Building Maintenance Mechanic, Mail & Supply Clerk, Senior Typist, Typist, Library Typist, Account Clerk, Account Clerk Typist, Senior Account Clerk, Library Clerk, Senior Library Clerk, Keypunch Operator, Assistant DP Programmer, Data Processing Systems Analyst, Microcomputer Technician, Assistant Offset Print Machine Operator, Switchboard Operator, Laboratory Technician, Parking Lot Attendant and Hospitality Training Manager.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Jefferson County Community College Education Support Personnel Association (NEA/NY). 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: March 22, 1995  
Albany, New York

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

  
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Walter L. Eisenberg, Member

  
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Eric J. Schmertz, Member