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State of New York Public Employment Relations Board Decisions from November 3, 1995

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 3, 1995

Keywords

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Comments

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2A-11/ 3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCKVILLE CENTRE VILLAGE CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-13686

INCORPORATED VILLAGE OF ROCKVILLE
CENTRE,

Respondent.

AXELROD, CORNACHIO & FAMIGHETTI (WAYNE J. SCHAEFER of
counsel), for Charging Party

CULLEN AND DYKMAN (GERARD FISHBERG of counsel), for
Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Rockville Centre Village Civil Service Employees Association, Inc. (Association) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the Association against the Incorporated Village of Rockville Centre (Village). The Association alleges in its charge, to the extent relevant to its exceptions, that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted parking meter repair work after severing the employment of two unit employees who had done that work. After a hearing, the ALJ granted the Village's motion to dismiss, which

had been made at the end of the Association's direct case.^{1/} The ALJ dismissed the allegations regarding the subcontracting of meter repair work on two grounds. First, the ALJ held that the charge in that respect was untimely because some meter repair work had been subcontracted at least a year before the charge was filed. Reaching the merits, the ALJ held alternatively that the Association had failed to demonstrate exclusivity over parking meter repair, again because some of that repair work had been done by a private subcontractor.

The Association argues that the ALJ erred in dismissing the charge pursuant to the Village's motion because the record evidence does not conclusively establish either the untimeliness of the charge or the lack of exclusivity when that record is read most favorably to the Association, as it must be when considering the Village's motion.^{2/} The Village argues that the ALJ's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision in relevant part and remand for further proceedings regarding the parking meter repair allegations.

Both grounds for dismissal of the parking meter repair allegations were based largely upon the testimony of John Bacon, the Village's Highway General Supervisor. The ALJ concluded that

^{1/}The ALJ adjourned the hearing sine die after the motion was made.

^{2/}See, e.g., County of Nassau, 17 PERB ¶3013 (1984).

the charge in this respect was untimely because Bacon testified that meters had been repaired by a contractor during the time that unit employees were also doing that work. Bacon also testified that he recalled seeing, before May 1991, a package on his desk from a private contractor which contained repaired parking meters.

When considering the timeliness of a charge, the inquiry is to the charging party's knowledge, actual or constructive, regarding the conduct constituting the claimed impropriety. The inquiry is whether the charging party knew or should have known of the conduct alleged to constitute the improper practice more than four months before the date the charging party files its charge. Bacon is not an officer or agent of the Association; he is not even in the Association's unit. At the stage of the proceeding at which the charge was dismissed, there was nothing in the record that would compel a conclusion that the Association, through any of its authorized officers or agents, knew or should have known that parking meter repair had been subcontracted more than four months before it filed the charge in July 1992. Indeed, the testimony from the Association's president, Glenn Hudson, which was not discussed in the context of the timeliness dismissal of this aspect of the charge, was that he first became aware of meter repair being contracted in May 1992, when he read an article in a publication issued by the Village. If measured from that date, the charge is clearly timely. Our reversal of this part of the ALJ's decision is not a

determination that the allegations regarding transfer of meter repair are in fact timely, only that the charge cannot be concluded at this point to have been untimely filed.

Our conclusion is the same with respect to the ALJ's dismissal on the merits, which rests on the conclusion that the Association failed to establish exclusivity over parking meter repair. Bacon's testimony, and the other parts of the record relevant to the disposition of the exclusivity issue, are not sufficient as a matter of law to compel the conclusion that the Association lost exclusivity over all parking meter repair. The circumstances of this case are at least arguably distinguishable from those in State of New York (DMNA), in which we held that a "regular and open assignment of nonunit personnel to work done by unit employees for a period in excess of one year constitutes a breach of exclusivity" ^{3/} Moreover, the record reflects other bases upon which exclusivity might have been maintained over at least some parking meter repair, even assuming the Village's occasional use of a subcontractor to do some types of meter repair work. ^{4/} Again, as with the ALJ's dismissal for failure of timeliness, we make no determination as to whether the Association has established and maintained exclusivity over all or any part of parking meter repair work. We hold only that the

^{3/27} PERB ¶3027, at 3068 (1994).

^{4/}E.g., County of Onondaga, 27 PERB ¶3048 (1994) (incidental transfer of unit work); Board of Education of the City Sch. Dist. of the City of Long Beach, 26 PERB ¶3065 (1993) (transfer under sufferance); Town of West Seneca, 19 PERB ¶3028 (1986) (discernible boundary).

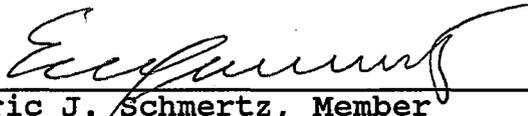
ALJ erred by dismissing on the merits pursuant to the Village's motion at the end of the Association's direct case because it cannot be concluded on this record as a matter of law that the Association lacks exclusivity over all parking meter repair work.

For the reasons and to the extent set forth above, the ALJ's decision is reversed and the case is remanded for further proceedings. SO ORDERED.

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

2B-11/ 3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TROY POLICE BENEVOLENT AND PROTECTIVE
ASSOCIATION,

Charging Party,

-and-

CASE NO. U-16419

CITY OF TROY,

Respondent.

GLEASON, DUNN, WALSH & O'SHEA (MARK T. WALSH of counsel),
for Charging Party

PETER KEHOE, CORPORATION COUNSEL (BRYAN J. GOLDBERGER of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Troy (City) to a decision by the Director of Public Employment Practices and Representation (Director) on a charge filed by the Troy Police Benevolent and Protective Association (Association). After a hearing, the Director held that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented a one-week lag payroll for employees represented by the Association and began paying them bi-weekly instead of weekly.

The City has filed exceptions to the merits of the Director's decision and the Association has responded. After the exceptions and response were filed, it came to our attention that

the Association had also filed a contract grievance on the subject matter of the improper practice charge and had obtained a favorable arbitration award which had been confirmed judicially.^{1/} At our request, the Association has provided us with a copy of the parties' collective bargaining agreement, the contract grievance, the arbitrator's opinion and award, and the decision and judgment of Supreme Court, Rensselaer County confirming the arbitration award. Each party has briefed the jurisdictional issues raised under §205.5(d) of the Act.

Having considered the parties' arguments, we conditionally dismiss the charge, without reaching the merits of the Director's decision, pursuant to our decision in Herkimer County BOCES.^{2/}

Section 205.5(d) of the Act denies us jurisdiction over contract violations not otherwise constituting an improper practice. That jurisdictional limitation is applicable if the collective bargaining agreement is a reasonably arguable source of right to the charging party with respect to the subject matter of the improper practice charge.^{3/} The subject of both the improper practice charge and the contract grievance is the City's September 23, 1994 inter-office memorandum which effected, as relevant, a lag payroll and a bi-weekly payroll upon employees in the Association's unit.

^{1/}This fact was not made known to the Director.

^{2/}20 PERB ¶3050 (1987).

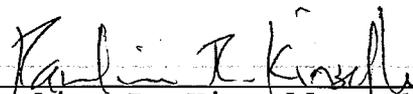
^{3/}County of Nassau, 23 PERB ¶3051 (1990).

In Herkimer County BOCES, we established a jurisdictional deferral policy applicable in circumstances in which both a contract grievance and a related improper practice charge have been filed and are pending. In such cases, rather than unconditionally dismissing the charge on jurisdictional grounds, as had been our practice, we determined that it would better serve the policies of the Act if the jurisdictional determination was held in abeyance pending the final disposition of the grievance. The City has taken an appeal from the judgment of Supreme Court confirming the arbitration award, potentially placing in issue questions concerning whether there exists a valid agreement between the parties and whether the arbitrator exceeded his power. The City's appeal automatically stays any enforcement of the arbitration award as confirmed and subjects the award to possible vacatur. The jurisdictional issue which is necessarily raised by the contract grievance, therefore, has not been finally determined. In such circumstances, a conditional dismissal of the charge pursuant to Herkimer County BOCES is appropriate.

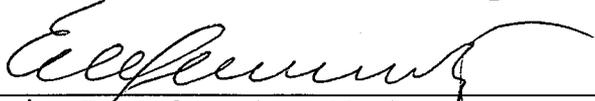
IT IS, THEREFORE, ORDERED THAT the determination of PERB's jurisdiction over this charge is deferred, and the charge is conditionally dismissed, with opportunity to the Association to file a timely motion with us at the conclusion of the judicial proceedings concerning the at-issue arbitration award to reopen

the charge upon the ground that the jurisdictional limitation in §205.5(d) of the Act does not apply.

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

20-11/ 3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOSE E. GONZALEZ,

Charging Party,

-and-

CASE NO. U-16499

DISTRICT COUNCIL 37, AFSCME,

Respondent,

-and-

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Employer.

In the Matter of

JOSE E. GONZALEZ,

Charging Party,

-and-

CASE NO. U-16615

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Respondent,

JOSE E. GONZALEZ, pro se

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Jose Gonzalez to decisions by the Director of Public Employment Practices and Representation (Director). The charge in U-16499 was filed by Gonzalez against District Council 37, AFSCME (DC 37), his

bargaining agent for purposes of his employment with the Board of Education of the City School District of the City of New York (District). In this charge, Gonzalez alleges that DC 37 breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) in conjunction with its representation of him on three grievances.^{1/} The charge in U-16615 was filed against the District and alleges that the District violated §209-a.1(d) of the Act, which makes it improper for a public employer to refuse to negotiate in good faith with the certified or recognized bargaining agents of its employees.

The Director dismissed both charges as deficient. As against DC 37, the Director held that many of the allegations were time barred, and those that were timely were conclusory and did not evidence the type of arbitrary, discriminatory or bad faith conduct necessary to establish a breach of a union's duty of fair representation. Reading the charge most favorably to Gonzalez, the Director held that his allegations evidenced, at most, a difference of opinion between Gonzalez and DC 37 regarding the nature of the grievances, how they should be prosecuted or argued and, as to an out-of-title work grievance, arguable negligence by DC 37 in failing to identify and rectify a hearing officer's error regarding the date that grievance had been filed. The Director dismissed the charge against the

^{1/}The District was made a party to this charge pursuant to §209-a.3 of the Act.

District on the ground that an employee has no standing to pursue a refusal to negotiate allegation because the statutory duty to bargain does not run to employees, but only to and between the union and the employer.

Having considered Gonzalez' exceptions, we affirm the Director's dismissals.

The charge against the District was properly dismissed as a matter of law for the reasons stated by the Director. Public employers owe a duty to negotiate in good faith only to the unions which are certified or recognized as the bargaining agents for that employer's employees.^{2/}

In his exceptions to the Director's dismissal of the charge against DC 37, Gonzalez argues that he did not intend any references to events occurring more than four months before his charge was filed on February 22, 1995 to constitute allegations of improper practice. Rather, he intended them only to help him establish the impropriety of the actions which occurred within four months of the date the charge was filed. If intended as bases of improper practices (which Gonzalez does not now claim), they are time barred as the Director held and were properly dismissed. If intended only to evidence the impropriety of actions taken within four months of the filing date, then they are relevant only as background information to those allegations which are timely and cognizable.

^{2/}Board of Educ. of the City Sch. Dist. of the City of New York, 19 PERB ¶3006 (1986).

On the merits, Gonzalez argues that DC 37 failed during the prosecution of the grievances to offer evidence that the District did not follow established policies in denying him a promotion.^{3/}

Our review of Gonzalez' original pleading and the numerous documents submitted by him in response to the Director's deficiency notice shows an ongoing communication between Gonzalez and DC 37 regarding his promotion grievances and a sharing of background information relevant thereto. In those exchanges, Gonzalez expressed his views regarding facts and arguments relevant to his grievances. They further reflect DC 37's willingness to respond to Gonzalez' several inquiries. Having reviewed these materials, we reach the same conclusion as did the Director. There may well be a difference of opinion between Gonzalez and DC 37 regarding what should have been done, what should not have been done, or what should have been done differently with respect to his grievances. However, lest we substitute our judgment for a union's regarding the filing and prosecution of grievances, a union must be and has always been afforded a wide range of reasonableness in making evidentiary and

^{3/}Gonzalez' exceptions do not appear to be applicable to the out-of-title work grievance which was dismissed by the District's hearing officer. Even if the exceptions are intended to address the Director's dismissal of this aspect of Gonzalez' charge, we would affirm for the reasons stated in the Director's decision. DC 37's arguable negligence in failing to identify and/or correct the hearing officer's alleged error does not, as a matter of law, constitute a breach of DC 37's duty of fair representation. See cases cited infra.

tactical decisions in these regards.^{4/} Indeed, the United States Supreme Court has stated that "union discretion [in grievance handling] is essential to the proper functioning of the collective bargaining system."^{5/} The duty of fair representation is breached only by conduct which is arbitrary, discriminatory or in bad faith. Indeed, it has been widely held that allegations that a union has been careless, inept, ineffective or negligent in the investigation and presentation of a grievance do not evidence a breach of the union's duty of fair representation.^{6/} Adequate representation, sufficient to satisfy a union's duty of fair representation, has been held to have been afforded an employee when the basic issues underlying a grievance have been presented in an understandable fashion.^{7/}

DC 37's representation of Gonzalez was without animosity or other indicia of bad faith or discrimination and was sufficiently

^{4/}See Airline Pilots v. O'Neill, 499 U.S. 65, 136 LRRM 2721 (1991); Ford Motor Co. v. Hoffman, 345 U.S. 330, 31 LRRM 2548 (1953).

^{5/}IBEW v. Foust, 442 U.S. 42, 51, 101 LRRM 2365, 2369 (1975).

^{6/}Smith v. Sipe, 67 N.Y.2d 928 (1986); CSEA v. PERB, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), aff'd. on other grounds, 73 N.Y.2d 796, 21 PERB ¶7017 (1988); Mellon v. Benker, 186 A.D.2d 1020, 25 PERB ¶7534 (4th Dep't 1992); Braatz v. Mathison, 180 A.D.2d 1007 (3d Dep't 1992); Harris v. Schwerman Trucking Co., 668 F.2d 1204, 109 LRRM 3135 (11th Cir. 1982); Findley v. Jones Motor Freight, 639 F.2d 953, 106 LRRM 2420 (3d Cir. 1981); McFarland v. Teamsters, Local 745, 535 F. Supp. 970, 110 LRRM 3022 (N.D. Texas 1982); Schleper v. Ford Motor Co., 107 LRRM 2500 (D. Minn. 1980); Liotta v. Nat'l Forge Co., 473 F. Supp. 1139, 102 LRRM 2348 (W.D. Pa. 1979), 2 cert. denied, 451 U.S. 970, 107 LRRM 2144 (1981).

^{7/}Findley v. Jones Motor Freight, supra.

adequate under the prevailing standards to avoid characterization as arbitrary. The grievance issues were clear and relatively uncomplicated, as were the District's controlling policies. Seniority and qualifications are factors in promotions to the at-issue position. What is evidenced is merely a disagreement between the District and Gonzalez regarding the interpretation and application of those policies. Apparently, Gonzalez believes that a junior employee must be promoted if better qualified by education than a senior employee, while the District believes that seniority controls provided the applicant has the minimally necessary educational qualifications. The District may have been incorrect in reaching its conclusion, but a mistaken interpretation or application of its policies does not evidence or establish that DC 37's representation of Gonzalez on his grievance fell below the minimally acceptable level. The District's hearing officers denied the grievances upon concluding that the promotion of employees who were senior to Gonzalez and who had satisfactory service records was fully consistent with the District's promotional policies. Gonzalez may consider himself better qualified for promotion than the employees who were promoted, but his belief in that respect does not evidence or establish that the District's contrary belief was wrong or that DC 37 violated its duty toward him in presenting the grievances to the District's hearing officers.

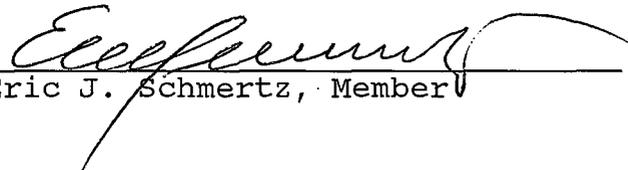
For the reasons set forth above, Gonzalez' exceptions are denied and the Director's decisions are affirmed.

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

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

2D-11/ 3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TROY POLICE BENEVOLENT AND PROTECTIVE
ASSOCIATION,

Charging Party,

-and-

CASE NO. U-14729

CITY OF TROY,

Respondent.

GLEASON, DUNN, WALSH & O'SHEA (MARK T. WALSH of counsel),
for Charging Party

PETER R. KEHOE, CORPORATION COUNSEL (MATTHEW TURNER of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Troy Police Benevolent and Protective Association (PBA) to a decision by the Director of Public Employment Practices and Representation (Director). After a hearing, the Director dismissed the PBA's charge against the City of Troy (City) which alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by establishing a panel of attorneys and a maximum attorney-fee schedule to implement its contractual obligation to provide legal representation to police officers who face civil claims arising out of service-related incidents. The Director dismissed the charge for lack of jurisdiction pursuant to §205.5(d) of the Act on the ground that Article XXIX(2) of the parties' contract is a source of right to the PBA with respect to

the issue raised in its improper practice charge. Article XXIX(2) provides, in relevant part, as follows:

In the event that a police officer is faced with a civil claim arising out of an incident related to his service with the Bureau, the City will provide legal counsel for his protection and hold him harmless from any financial loss including punitive damages pursuant to and as provided for in Section 50-j of the General Municipal Law.

The PBA claims that the Director erred in dismissing the charge for lack of jurisdiction and failed to distinguish our decision in County of Nassau,^{1/} which he cited in support of his decision. The City has not filed a response to the exceptions.

Section 205.5(d) of the Act does not accord us jurisdiction over contract violations not otherwise constituting an improper practice. Since at least County of Nassau,^{2/} we have consistently found the jurisdictional limitation in §205.5(d) applicable if the collective bargaining agreement is a reasonably arguable source of right to the charging party with respect to the subject matter of the improper practice charge. Article XXIX(2) is clearly a source of right of legal defense for unit employees. As we also observed in County of Nassau, the contours of the charging party's contract rights and the respondent's

^{1/}26 PERB ¶3052 (1993).

^{2/}23 PERB ¶3051 (1990). The Director's citation was to that case after remand and concerns waiver issues, not jurisdictional issues. As cited, it is not relevant to the basis for his decision or ours.

corresponding obligations need not be laid out in any detail to trigger the jurisdictional limitation in §205.5(d).

In this case, as the PBA itself notes, the contract is a "grant of right to the PBA members" which fixes and defines the nature and the extent of the "obligation upon the City" with respect to legal defense by reference to General Municipal Law §50-j. It may be, as the PBA itself claimed in an earlier grievance which was never arbitrated,^{3/} that Article XXIX(2) affords a police officer, at least in a case involving a potential conflict of interest with the City, a right to select his or her own attorney without relevant limitation. The contract alternatively may leave the choice of counsel and the terms applicable thereto to the City. An interpretation of the contract reflecting variations or combinations of the parties' positions is also possible. We express no opinion as to the proper interpretation of the parties' rights and obligations under Article XXIX(2). The merits of the parties' arguments regarding the nature and the extent of their rights and obligations under the contract are not material to the jurisdictional dismissal necessitated by §205.5(d) of the Act. A primary purpose of §205.5(d) of the Act is to prevent us from interpreting collective bargaining agreements except as necessary

^{3/}The jurisdictional issue is, therefore, presented to us for consideration. Compare our deferral this date of a jurisdictional issue in another case involving these parties. In that other case, a grievance had been arbitrated and that award was neither in effect nor final because of an appeal by the City from a judgment confirming the award.

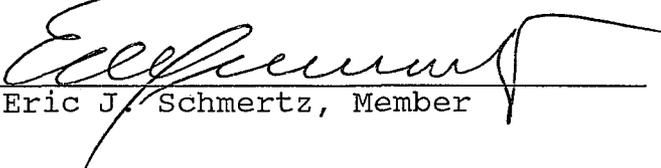
to the proper exercise of our improper practice jurisdiction. The controlling point is that the parties already have an agreement regarding the legal defense that must be afforded to police officers by the City. There is provided in the agreement both the right to counsel and the standard by which the grant is to be controlled, i.e., General Municipal Law §50-j. The contract being a source of right to the PBA with respect to the City's designation of an attorney panel and its establishment of a fee schedule for services rendered by attorneys to police officers, the Director was required to dismiss the charge for lack of jurisdiction.

For the reasons set forth above, the PBA's exceptions are denied and the charge must be, and hereby is, dismissed.

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

2E-11/ 3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
ANTONIO JENKINS,

Charging Party,

-and-

CASE NO. U-15092

NEW YORK CITY BOARD OF EDUCATION and
UNITED FEDERATION OF TEACHERS,

Respondents.

ANTONIO JENKINS, pro se

THOMAS A. LIESE, ESQ., for New York City Board of
Education

JAMES R. SANDNER, GENERAL COUNSEL (STEWART LIPKIND of
counsel), for United Federation of Teachers

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Antonio Jenkins to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the charge filed against Jenkins' employer, the New York City Board of Education (BOE), and his bargaining agent, the United Federation of Teachers (UFT), which alleges, respectively, violations of §209-a.1(a), (b) and (c) and §209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act). The charge against the BOE was dismissed as untimely and, alternatively, on the merits, upon the ALJ's finding that no evidence was presented to link the allegedly improper conduct and any exercise of statutorily protected right or to establish the BOE's interference with or domination of the UFT. The breach of

duty of fair representation allegations against the UFT were dismissed by the ALJ on her finding that the UFT's representation of Jenkins in conjunction with the settlement of a grievance regarding an unsatisfactory rating given him by the BOE was in complete good faith.

Jenkins received the ALJ's decision on May 2, 1995, and he filed his exceptions by mail on May 24, 1995. Section 204.10 of our Rules of Procedure requires exceptions to be filed within fifteen working days after receipt of an ALJ's decision. Excluding the day of receipt from the calculation, Jenkins' exceptions had to be filed by May 23, 1995, making them late by one day. The BOE in its response objects to our consideration of the exceptions because they were not timely filed.^{1/}

Our filing rules have been strictly construed. When raised by a party, noncompliance with the time limits for filing has resulted in a dismissal of exceptions.^{2/} Having been untimely filed, Jenkins' exceptions are not properly before us.

Even were we to reach the merits of these exceptions, however, we would affirm the ALJ's decision for the reasons set forth therein. Jenkins' allegations against the BOE are untimely or are deficient as a matter of fact or law as explained in the ALJ's decision. Many of Jenkins' exceptions directed to the

^{1/}The BOE is a party to the duty of fair representation aspects of the charge pursuant to §209-a.3 of the Act.

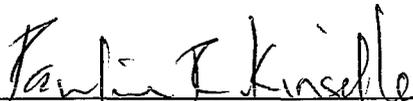
^{2/}See, e.g., City of Albany, 23 PERB ¶3027 (1990), conf'd, 181 A.D.2d 953, 25 PERB ¶7002 (3d Dep't 1992).

ALJ's dismissal of the allegations against the UFT are either unintelligible, are not encompassed within the charge as filed, or raise breach of contract allegations beyond our jurisdiction. In all other respects, there is nothing in the record to evidence the arbitrary, discriminatory or bad faith conduct which would constitute a breach of the UFT's duty of fair representation. Jenkins, facing serious allegations of job misconduct, knowingly entered into a settlement agreement which gave him a clean record and ultimately allowed him to obtain another job within the BOE, an agreement which he considered at the time to be in his best interest. His obligations under the settlement agreement were adequately, if not completely, explained to him by the UFT and any claimed noncompliance by the BOE or misunderstandings were promptly clarified and corrected by the UFT when Jenkins brought such claims to its attention. The duty of fair representation required nothing more of UFT's representatives.

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

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

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

2F-11/3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HAMMONDSPORT NON-TEACHING PERSONNEL
ORGANIZATION,

Charging Party,

-and-

CASE NO. U-15607

HAMMONDSPORT CENTRAL SCHOOL DISTRICT,

Respondent.

JOHN B. SCHAMEL, for Charging Party

MURRY F. SOLOMON, for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Hammondsport Non-Teaching Personnel Organization (Organization) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the Organization's charge against the Hammondsport Central School District (District) which, as relevant to the exceptions, alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by serving Pizza Hut pizzas to students for school lunch on April 13, 1994. The ALJ held that the Organization did not have exclusivity over the making of pizzas and, therefore, the District had no duty to bargain with it regarding the decision in issue.

The Organization argues in its exceptions that the work involved in Pizza Hut's making of pizzas is different from the

work involved when other nonunit personnel have made pizzas on premises or other circumstances in which pizzas made elsewhere have been served to students. The District argues in response that the ALJ's decision must be affirmed both because there is no exclusivity over the work in issue and because the "Pizza Hut Day" was a one-time experiment which did not effect any permanent, temporary or substantial transfer of unit work.

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

In essence, the Organization argues that the District may not for even one day serve pizzas to students unless those pizzas are either wholly or substantially made by unit employees, or are made by nonunit personnel on District premises with ingredients the District has purchased and stored. The record establishes, as the ALJ found, that the Organization does not have exclusivity over making pizzas. Persons outside the unit have in the past made pizzas which have been served to students after baking or reheating. There is nothing in this record which would warrant the definition of unit work or the recognition of a discernible boundary thereto which would effect the prohibition the Organization seeks. As did the ALJ, we express no opinion about whether transfers of other types or aspects of food preparation, or of the same type under different circumstances, would be subject to a decisional bargaining obligation.

We would add that this litigation involves labor relations issues which are not perhaps self-apparent. Seemingly minor

transfers of unit work might jeopardize a union's maintenance of exclusivity over unit work. With a loss of exclusivity, subsequent major transfers of unit work might not be subject to a duty to bargain. Even though the Organization's charge is from this perspective understandable, this litigation could have and should have been avoided through discussion and agreement between the parties. Efforts were undertaken by them in that regard, but were abandoned once positions hardened after an exchange of correspondence. Without singling out either party for blame, this intransigence is not consistent with the policy of the Act to promote harmonious and cooperative bargaining relationships.

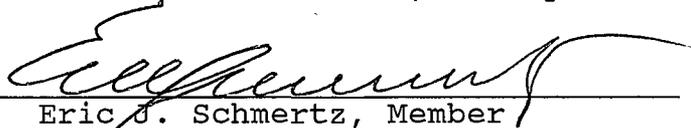
For the reasons set forth above, the Organization's exceptions are denied and the ALJ's decision is affirmed.

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

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

26-11/3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-16030

SMITHTOWN FIRE DISTRICT,

Respondent.

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

**ENGLANDER & ALBERT, P.C. (WILLIAM H. ENGLANDER of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing, for failure to prosecute, CSEA's improper practice charge alleging that the Smithtown Fire District (District) had violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by refusing to assign overtime to a unit employee because he exercised rights protected by the Act.

The assigned ALJ sent a notice of conference to CSEA and the District scheduling the matter for a pre-hearing conference on January 12, 1995. The District's attorney appeared but CSEA's

designated representative failed to attend. When finally contacted by telephone, he told the ALJ that, notwithstanding the date and time specified in the ALJ's scheduling letter, he thought the conference had been scheduled for a different time and had confirmed that time with a staff person at PERB's Brooklyn office. The ALJ then informed the CSEA representative that the charge would be dismissed if he failed to appear for another conference. By letter dated January 24, 1995, the ALJ gave the CSEA representative an opportunity to file an affidavit explaining his absence from the January 12 conference. Upon receipt of the representative's explanation and apology, the ALJ, on March 14, 1995, sent a letter to the CSEA representative and the District's attorney rescheduling the conference to May 5, 1995. Once again, the District's attorney appeared on May 5 as scheduled, but the CSEA representative did not. The ALJ contacted the representative's office, which then located him, and he told the ALJ orally that he did not have the conference scheduled. The representative was advised by the ALJ that the District would be filing a motion to which he could respond. On May 5, 1995, the District filed a motion to dismiss, citing CSEA's failure to prosecute and further alleging that the charge was untimely on its face. CSEA did not respond to the motion.

The ALJ dismissed the charge, concluding that CSEA's representative had failed to comply with PERB's procedures and processes and had imposed a burden on both PERB's and the

District's time and resources. As an alternative ground for dismissal, the ALJ held the charge to be untimely.

CSEA argues in its exceptions that the ALJ erred in dismissing the charge because the District's representative had requested and received several adjournments of the pre-hearing conference, which caused the CSEA representative to become confused about the actual date for the conference, the CSEA representative and the CSEA attorney had not received the ALJ's letter scheduling the May 5 conference, and that the charge is not untimely. According to its exceptions, CSEA did not respond to the motion to dismiss because its attorney did not receive a copy of the District's motion. The District supports the ALJ's decision.

Based upon our review of the record and the parties' arguments, we affirm the ALJ's decision.

Section 204.6 of our Rules of Procedure (Rules) provides that the failure of a party to appear at a pre-hearing conference may, in the discretion of the ALJ, constitute ground for dismissal of the absent party's pleading. Unless the ALJ's dismissal of the charge evidences an abuse of discretion based on the record before the ALJ, there is no basis to reverse the decision. Here, in addition to failing to appear, CSEA failed to submit any response to the District's motion to dismiss upon that ground, which its designated representative, Stanley Frere, does not deny receiving. Therefore, the only information that the ALJ

had to rely upon in making his decision was the CSEA representative's oral representation on May 5 that he was not present at that day's conference because he did not have it scheduled. Because CSEA never responded to the motion to dismiss, the ALJ did not have the benefit when he issued his decision of the arguments CSEA makes for the first time in its exceptions.^{1/} Based on the record before him, we do not find that the ALJ abused his discretion in dismissing CSEA's pleading pursuant to the express terms of our Rules.

We do not decide whether the other arguments raised by CSEA for the first time in its exceptions would warrant a contrary conclusion. We have held on numerous occasions that we will not consider allegations of fact made for the first time in exceptions when reviewing an ALJ's decision because our review is limited to the record as it was developed before the ALJ.^{2/}

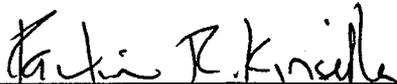
^{1/}CSEA's allegation in its exceptions that its attorney should have received a copy of the rescheduling letter and the District's motion to dismiss is rejected. On its notice of appearance in this matter, CSEA gives the name of its labor relations specialist as the representative to whom all correspondence is to be sent until the matter is ready for hearing. Its attorney is listed on the notice of appearance as the representative to be contacted at such time as the matter is ready for a stipulated record or a hearing. No allegation is made that the transfer of appearance had been triggered by either event.

^{2/}Town of Greece, 26 PERB ¶3004 (1993); Civil Service Employees Ass'n, Inc. (Reese), 25 PERB ¶3012 (1992); Manhasset Union Free Sch. Dist., 24 PERB ¶3003 (1991); Margolin v. Newman, 130 A.D.2d 312, 20 PERB ¶7018 (3d Dep't 1987), appeal dismissed, 71 N.Y.2d 844, 21 PERB ¶7005 (1988).

We, therefore, deny the exceptions filed by CSEA and affirm the decision of the ALJ.^{3/}

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

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

^{3/}Based on our decision, we need not reach the other grounds given by the ALJ for dismissal of the charge.

3A-11 / 3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4248

ROCHESTER 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 Civil Service Employees Association, Local 1000, AFSCME, 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 part-time employees in the following titles: Librarian I, Librarian II, Library Assistant, Clerk I, Clerk II, Clerk III/Typist, Clerk IV, Secretary/Typist, Cleaner, Stock Clerk, Security Guard, Clerk/Typist, Shipping Aide.

Excluded: Pages and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Local 1000, AFSCME, 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: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION
LOCAL 424, A DIVISION OF UNITED
INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4358

SOUTH HUNTINGTON UNION FREE SCHOOL DISTRICT,

Employer,

-and-

LOCAL 144, DIVISION 100, SERVICE
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Permanent full-time employees in the following categories: custodians, head custodians, chief custodian, maintenance, instructional media, grounds, and matrons. Full-time/part-time employees in the following categories: bus transportation and bus maintenance.

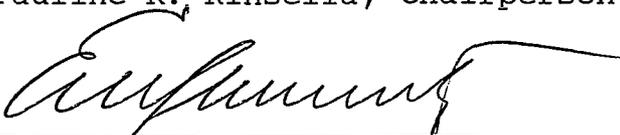
Excluded: All other employees.

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

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4423

TOWN OF CORNING,

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 Civil Service Employees Association, Local 1000, AFSCME, 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: Motor equipment operators.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer

shall negotiate collectively with the Civil Service Employees Association, Local 1000, AFSCME, 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: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

30-117-3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4426

CITY OF SYRACUSE,

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 Civil Service Employees Association, Local 1000, AFSCME, 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: School Crossing Guards.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer

shall negotiate collectively with the Civil Service Employees Association, Local 1000, AFSCME, 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: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

3E-11/3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION
LOCAL 424, A DIVISION OF UNITED INDUSTRY
WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4447

UTICA TRANSIT AUTHORITY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: DART drivers.

Excluded: All other employees.

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

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

3F-11/3/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION
LOCAL 424, A DIVISION OF UNITED INDUSTRY
WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4450

SOUTH HUNTINGTON UNION FREE SCHOOL
DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

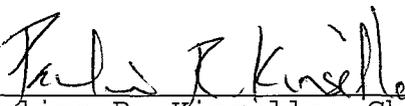
Unit: Included: All full-time and regularly scheduled part-time

security guards.

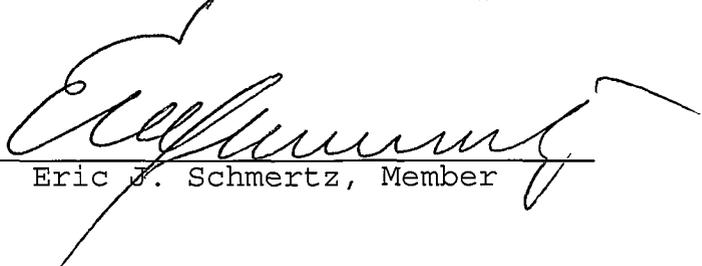
Excluded: All other employees.

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

DATED: November 3, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member