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State of New York Public Employment Relations Board Decisions from November 29, 1995

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 29, 1995

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2A-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EDWARD SAYAD,

Charging Party,

-and-

CASE NO. U-15950

SUBWAY-SURFACE SUPERVISORS ASSOCIATION,

Respondent,

-and-

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

In the Matter of

EDWARD SAYAD,

Charging Party,

-and-

CASE NO. U-16150

NEW YORK CITY TRANSIT AUTHORITY

Respondent.

CURTIS HARGER, ESQ., for Charging Party

RICHARD DREYFUS, ESQ., for New York City Transit Authority

STUART SALLES, ESQ., for Subway-Surface Supervisors Association

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Edward Sayad to decisions by the Director of Public Employment Practices and Representation (Director) dismissing his charges against the Subway-Surface Supervisors Association (Association) and the New York City Transit Authority (Authority). Sayad alleges that

the Association violated §209-a.2(a), (b) and (c) of the Public Employees' Fair Employment Act (Act). The charge against the Authority alleges violations of §209-a.1(a), (b), (c), (d) and (e) of the Act. Both charges arise out of the Authority's discipline of Sayad and his eventual discharge from employment. After several amendments and clarifications by Sayad, the Director dismissed both charges as deficient. The bargaining and bargaining-related allegations in each charge were dismissed for lack of standing. The remaining allegations against the Authority were dismissed by the Director because nothing in Sayad's papers demonstrated that the Authority's discipline and ultimate discharge of Sayad stemmed from any exercise by him of rights protected by the Act. The remaining allegations against the Association were dismissed either as time barred or because they were wholly conclusory.

Sayad filed timely exceptions raising specifically only arguments regarding timeliness. Thereafter, he sought an extension of time to obtain an attorney. His request was granted and, on May 25, 1995, the attorney whom he had retained requested an additional extension of time "to file arguments in support of the exceptions filed by Mr. Sayad". By letter of May 30, Sayad's attorney was given until June 19, 1995, to submit arguments in support of the exceptions. However, in the brief filed on June 19, 1995, Sayad's attorney raised not only timeliness, but also arguments concerning the other grounds given for dismissal of the charges. Both the Association and the Authority objected

to our consideration of these arguments on issues not raised in the exceptions and no request was made for an extension of time to file additional exceptions.

Section 204.10 of our Rules of Procedure (Rules) allows a party to file exceptions within fifteen working days after that party's receipt of the decision in an improper practice charge. An extension of time to file exceptions may be requested.[1/] Although, after filing timely exceptions, Sayad requested and was granted an extension of time to obtain an attorney, his attorney then requested and was granted an extension of time to file arguments in support of the exceptions originally filed by Sayad, no extension of time for the filing of additional exceptions was requested and none was granted. We, therefore, decline to reach the other arguments delineated by Sayad's representative in his brief which do not relate to the exceptions as filed.

Sayad alleges that the Association breached its duty of fair representation by allowing the Authority to process a disciplinary charge alleging several infractions as one charge instead of requiring the Authority to hear each infraction separately, and by not providing him with a copy of the Association-Authority collective bargaining agreement so he could ascertain his contractual rights for himself. Sayad last requested a copy of his contract, which he did not receive, from

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[1/]Rules, §204.12.

the Association in March 1994. Sayad was served with the disciplinary charges on May 6, 1994.[2]

As to timeliness, Sayad asserts that because he received a notice of termination from the Authority on July 1, 1994, his time to file an improper practice charge against the Association alleging violations of the Act runs from that date and not from the dates on which the alleged improprieties actually occurred.

In support of his exceptions, Sayad relies on this Board's decision in Middle Country Teachers Association (Werner),[3] where we held:

> [A] party has standing to file an improper practice charge within four months after notification of a decision to perform an action alleged to be violative of the Act. The party may also await performance of the action and file an improper practice charge within four months after the intended action is actually implemented and the charging party is injured thereby.[4]

Sayad argues that because the Association could have provided him with a copy of the collective bargaining agreement and could have objected to the processing of all the alleged infractions in one disciplinary charge up to the date the letter of termination was issued on June 27, 1994, his time to file the charge runs from

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[2]The charges list several instances occurring in March and April 1994, when Sayad reported late for work, was absent without leave, reported to the wrong location, refused a work assignment after reporting for duty and was insubordinate. The charges resulted in his immediate suspension for one month and, after a hearing held on May 25, 1994, his dismissal by letter dated June 27, 1994.

[3]21 PERB ¶3012 (1988).

[4]Id. at 3026.

that date, which he defines as the date he was injured by the Association's decision. We do not agree that June 27, 1994 is the date from which the four-month filing period should run. Sayad alleges that the Association failed to give him a copy of the collective bargaining agreement. He last requested, but did not receive a copy of the contract from the Association in March 1994. His failure to file his charge within four months after he knew or should have known that his request had not been granted renders this aspect of the charge untimely.[5/] The Director's dismissal of this aspect of the charge is accordingly affirmed.

The allegation that the Association improperly failed to object to the processing of the several disciplinary charges as one charge was not dismissed by the Director as untimely filed; it was dismissed as being conclusory and not supported by any facts in the charge or amendments. As Sayad's exceptions are not addressed to the merits of the Director's dismissal decision, the merits dismissal is not properly before us for review. Were we to reach those merits, however, we would agree that Sayad's allegations are conclusory and devoid of any facts which would evidence that the Association's acquiescence to a single disciplinary hearing on the multiple disciplinary charges was arbitrary, discriminatory, or in bad faith.

Finally, it is clear from Sayad's original exceptions that what he actually wants by his charges and these exceptions is to

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[5/] City of Yonkers, 7 PERB ¶3007 (1974).

have this agency review the merit of all the disciplinary charges that have been filed against him since at least 1991 up to the charges which led to his discharge from employment in 1994. Sayad believes that the disciplinary charges against him are false. The Act, however, simply does not empower us in a context such as this to investigate or decide whether disciplinary action against an employee is warranted.

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

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

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2B-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EDNA BRAHAM,

Charging Party,

-and-

CASE NO. U-16958

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

Respondent.

EDNA BRAHAM, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Edna Braham to a decision by the Director of Public Employment Practices and Representation (Director) dismissing her charge that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act).

Braham's charge alleges that, from 1992, when CSEA first approved legal assistance for her in pursuing a Title VII claim before the Equal Employment Opportunity Commission (EEOC) and an Age Discrimination in Employment Act (ADEA) claim she had against her former employer, the State of New York, Unified Court System (UCS), alleging discrimination in job training and retaliatory discharge, to March 26, 1995, when she received a "consent to change attorney" stipulation from her CSEA-assigned counsel, she was not properly represented by CSEA and that CSEA violated the

Act when it withdrew the legal assistance it had provided to her. Braham was advised that her charge was deficient because she had failed to provide specific facts in support of her allegations and also because the charge was untimely. In response, she filed an amendment on August 4, 1995. The Director thereafter dismissed her charge because it was untimely and because the pleaded facts and supporting documents failed to show that CSEA's conduct was arbitrary, discriminatory or in bad faith.

Braham excepts to the Director's determination, alleging that she was in ill health and, therefore, could not file the improper practice charge in a timely fashion. She further alleges that she cooperated with CSEA's attorneys and a ruling in her favor in Federal District Court on one of her claims evidences that CSEA was arbitrary, discriminatory and acting in bad faith when it withdrew its legal assistance. CSEA supports the Director's decision.

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

Braham sought legal assistance from CSEA in 1992 in pursuing an age and race discrimination claim against UCS. CSEA approved legal assistance for her on July 2, 1992, and assigned the matter to one of its regional attorneys. Over the next two years, Braham had numerous disagreements with CSEA and its legal counsel about the processing of her claims. CSEA continued to represent her despite her allegations of misconduct to the Bar Association Disciplinary Committee about the conduct of her attorneys and her

numerous complaints to the EEOC, the U.S. Department of Justice and the Federal District Court Judge hearing her age discrimination claim. Finally, in November 1994, the assigned CSEA attorney requested the Judge to relieve him from representing Braham because Braham had recently filed a complaint about his representation of her with the Disciplinary Committee. The judge agreed to release him but requested that he first ascertain if CSEA could assign Braham other counsel, either from its legal staff or another regional attorney. On December 22, 1994, CSEA sent a letter to Braham confirming that the judge had allowed the assigned CSEA regional counsel to withdraw as Braham's attorney because of the adversarial relationship between Braham and the attorney. CSEA informed Braham that, as it appeared that Braham was not satisfied with CSEA's service to her, despite its efforts on her behalf, that it would not assign another attorney to her case. She was advised to retain her own attorney, at her own expense. She apparently did so because on March 23, 1995, the CSEA attorney forwarded to her, at the request of her attorney, a "consent to change of attorney" stipulation for her to execute. Braham asserts that she received the letter on March 26, 1995. The improper practice charge was filed on July 26, 1995.

PERB's Rules of Procedure (Rules), §204.1(a)(1), require an improper practice charge to be filed within four months of the conduct which is alleged to be violative of the Act. The Director concluded that CSEA had decided to no longer represent

Braham and had so informed her on December 22, 1994, more than four months prior to the filing of the charge. We agree. The letter received on March 26, 1995 merely reiterated CSEA's initial decision and was done pursuant to a request from Braham's then attorney. It cannot serve to extend Braham's time to file a charge complaining about the withdrawal of legal assistance, which occurred on December 22, 1994.[1/] Therefore, Braham's charge[2/] must be dismissed unless there is any merit to her other exceptions.

Braham argues that because she was in ill health and had undergone several surgeries, she was unable to file the charge in a timely fashion. However, her supporting documents show only that she had surgery in November 1994 and February 1995 and received some follow-up care following both. She could have filed a charge alleging that CSEA was not properly representing her anytime from July 1992,[3/] when CSEA approved her request for legal assistance and began its representation of her, to April 22, 1995, four months after CSEA informed her that it would

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[1/]See West Park Union Free Sch. Dist., 11 PERB ¶3016 (1978).

[2/]Braham simultaneously filed an action in Civil Court of the City of New York, County of New York, Small Claims Part, alleging a breach of contract by CSEA in failing to represent her. By decision dated October 9, 1995, Judge Bransten dismissed the action, holding that the court was bound by the Director's determination that her improper practice charge was untimely and also on the basis that Braham had elected to proceed administratively before PERB and could not, therefore, seek to adjudicate an identical claim simultaneously in that court. Braham has appealed to the Appellate Division, First Department.

[3/]Braham alleges that CSEA first breached its duty of fair representation to her by secretly meeting on July 10, 1992 with an EEOC attorney to block the filing of her ADEA claim.

no longer represent her. That she was allegedly incapacitated from, at most, November 1994 to sometime after February 1995, cannot serve to extend her time to file an improper practice charge.[4]

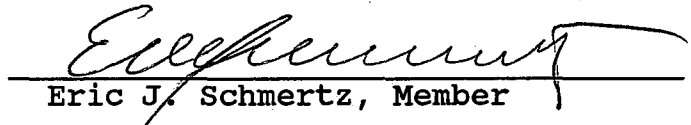
As to Braham's remaining exceptions, we need not reach them based on our determination that the charge is untimely.

For the foregoing reasons, Braham's exceptions are denied and the decision of the Director is affirmed.

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

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

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[4]The filing deadlines set forth in our Rules may not be waived or disregarded. Board of Educ. of the City Sch. Dist. of the City of New York and UFT, 17 PERB ¶3099 (1984); Central Islip Public Schools, 6 PERB ¶3063 (1973); Cattaraugus Co. Chapter of CSEA v. PERB, 3 PERB ¶7005 (Sup. Ct. Renss. Co. 1970). While we have extended the time to file exceptions in extenuating circumstances, our Rules specifically permit such an extension (Rules, §204.12). The Rules governing the filing of improper practice charges do not allow for a similar extension. (Rules, §204.1(a)(1)).

2C-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MONROE BOCES #1 EMPLOYEES ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-15500

MONROE BOCES #1,

Respondent,

-and-

MONROE #1 BOCES PARAEDUCATORS' (TEACHER AIDE) STEERING COMMITTEE,

Intervenor.

JAMES D. MATHEWS, for Charging Party

HARRIS BEACH & WILCOX, LLP (JAMES A. SPITZ, JR. of counsel), for Respondent

MARY WATTS, for Intervenor

BOARD DECISION AND ORDER

Monroe BOCES #1 (BOCES) excepts to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Monroe BOCES #1 Employees Association, NYSUT, AFT, AFL-CIO (Association). The Association alleges that BOCES dominated, interfered with, and supported the Monroe #1 BOCES Paraeducators' (Teacher Aide) Steering Committee (Committee) in violation of §209-a.1(a) and (b) of the Public Employees' Fair Employment Act (Act). Relying upon the National Labor Relations Board's (NLRB)

analysis in Electromation, Inc.[1] of similar issues under the National Labor Relations Act (NLRA), the ALJ, after a hearing, held that the Committee is an employee organization within the meaning of the Act[2] and that BOCES had improperly dominated, interfered with, and supported the Committee. The ALJ ordered that the Committee be disbanded and that BOCES cease all participation in or support of the Committee.

BOCES argues in its exceptions that the charge is not timely, that it did not violate the Act because it did not intend to interfere with its employees' right to form, join or participate in an employee organization, that the language, purpose and policies of the Act render Electromation inapplicable or unpersuasive in the public sector, and that the ALJ's bias against it prevented it from presenting an effective defense to the charge. BOCES also objects to the ordered disestablishment of the Committee as contrary to law and policy.

The Committee, which also filed exceptions to the ALJ's decision, argues that the ALJ misinterpreted or omitted material facts and that the ALJ favored the Association over it during the hearings.

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[1] 309 NLRB 990, 142 LRRM 1001 (1992), enf'd, 35 F.3d 1148, 147 LRRM 2257 (7th Cir. 1994).

[2] An employee organization is defined in §201.5 of the Act as "an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees."

The Association, in urging that we affirm the ALJ's decision, argues that BOCES' exceptions are without merit, that the ALJ's decision is correct on the facts and law, and that her conduct of the hearing was unbiased. It argues also that the Committee's exceptions are untimely and otherwise not in compliance with our Rules of Procedure (Rules) and that many of the representations of fact in the Committee's exceptions are inaccurate or immaterial.[3/]

Having reviewed the record and having considered the parties' arguments, including those at oral argument, we affirm the ALJ's decision. In reviewing the ALJ's decision, we have limited our discussion to BOCES' exceptions. The Committee's exceptions were not timely filed[4/] and, given the Association's objection to those exceptions, we may not consider them.

We treat first with BOCES' exceptions which are not directed to the ALJ's disposition on the merits.

[3/]The Committee has filed a response to what it characterizes as the Association's cross-exceptions. The Association did not, however, file exceptions or cross-exceptions to the ALJ's decision; it merely responded to the Committee's exceptions. Section 204.11 of our Rules does not permit a reply to a response unless "requested by the board or filed with the board's authorization". We neither requested nor approved the Committee's reply to the Association's papers. Therefore, we have not considered it on this appeal.

[4/]The lay representative for the Committee apparently assumed, incorrectly, that the extension of time afforded BOCES to file its exceptions was equally applicable to the Committee. In any event, the Committee's exceptions parallel BOCES' exceptions in certain respects, are not material to the disposition of this case, or have been rendered academic by our examination of the record.

BOCES argues that the ALJ was biased in favor of the Association and that her bias prejudiced its defense of the charge. We have carefully reviewed the record in this regard and conclude that it does not establish bias against BOCES or favoritism toward the Association. The ALJ's rulings and conduct of the hearing neither deprived BOCES of a reasonable opportunity to present its defenses or to make a fair record upon which to assess the merits of the Association's allegations against it. Quite the contrary, the record is voluminous and the facts reflected therein, many within the large number of documents in evidence, are undisputed in material respects. The ALJ's limited questioning of certain witnesses during the hearing was for the permissible purpose of clarification of testimony or documents or to facilitate rulings regarding the admissibility of evidence.[5/]

We consider next BOCES' argument that the charge is untimely. The Association filed a petition on February 7, 1994, to represent all of BOCES' full-time and part-time teacher aides and master teacher aides. On March 16, 1994, the Committee moved to intervene in that representation proceeding. In response to that motion, the Association filed this charge on March 31, 1994.

BOCES argues that the charge is untimely because the Association allegedly knew by March 1993, at the latest, of the acts alleged by the Association to constitute BOCES' domination, interference or support of the Committee. The ALJ held the

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[5/] Compare Canandaigua City Sch. Dist., 27 PERB ¶3046 (1994).

charge to have been timely filed because BOCES' domination, interference, and support of the Committee was "continuing" to at least March 1994.

A charge is clearly timely if filed within four months of the date a charging party knows or should have known an improper practice has been committed. In relevant context, there are two elements in the improper practices alleged. BOCES' actions vis-a-vis the Committee must constitute unlawful domination, interference, or support and the Committee must be an employee organization within the meaning of the Act. It is not improper for a public employer to dominate, interfere with, or support an organization other than an employee organization as defined in the Act. An essential inquiry in determining whether the charge is timely, therefore, is when the Association had actual or constructive knowledge that the Committee is an employee organization. We find on this record that the Association did not have reason to believe the Committee was an employee organization until it moved to intervene in the representation proceeding and thereby professed for the first time to be one.[6/] That date marks the earliest from which the four-month filing period runs and the charge is plainly timely when measured from that date.

[6/]Only an employee organization as defined in the Act may intervene in a representation proceeding to seek certification as the exclusive bargaining agent for a unit.

Our finding that the charge is timely is fully consistent with BOCES' own view of the Committee. Although BOCES has not taken an exception to the ALJ's finding that the Committee is an employee organization, the record shows that BOCES did not consider the Committee to be an employee organization until the Committee moved to intervene in the representation case. Its prior belief that the Committee was not an employee organization is still central to its rationale in defense of the charge on the merits. If BOCES did not consider the Committee to be an employee organization until it intervened in the representation proceeding, BOCES cannot fairly and reasonably expect us to charge the Association with the very knowledge BOCES denies. Having held the charge timely on this basis, we have no occasion to decide whether it is timely on the theory advanced by the ALJ or any other.

Turning to the merits, §209-a.1(b) of the Act makes it improper for a "public employer or its agents deliberately to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving [public employees] of [their rights guaranteed in section two hundred two]."[7] The remaining exceptions require us to consider for one of the few times in our history what the Legislature intended to prohibit by §209-a.1(b) of the Act. The infrequency with

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[7]Section 202 of the Act grants public employees the right to form, join and participate in an employee organization of their own choosing or to refrain from those activities.

which union domination allegations have been brought to our attention has not, however, deprived us of a clear framework for analysis of the questions presented in this case.

The Board's first consideration in any detail of the purpose of §209-a.1(b) was in Board of Education of the City School District of the City of Albany[8/] (hereafter Albany). There, the Board stated generally that the Legislature, absent any indication to the contrary, "sought to identify with comparable sections of the National Labor Relations Act . . . ."[9/] Section 209-a.1(b) of the Act was an "attempt by the Legislature to emulate the structures of §8(a)(2) of the National Labor Relations Act" and "the purport of subsection 209-a.1(b) was to proscribe employer domination of an employee organization or the grant of unlawful assistance or support to an employee organization."[10/]

Several years later, in County of Rockland and Rockland County Community College[11/] (hereafter Rockland), the Board again noted that §209-a.1(b) of the Act parallels §8(a)(2) of the NLRA and that the former is "designed to prevent a public

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[8/] 6 PERB ¶3012 (1973).

[9/] Id. at 3031.

[10/] Id.

[11/] 13 PERB ¶3089 (1980).

employer from meddling in the internal affairs of the organization or trying to control it."[12]

The Board in County of Onondaga and County of Onondaga Sheriff,[13] stated that the prohibition in §209-a.1(b) of the Act "is directed to conduct by a public employer which would compromise the independence of an employee organization that represents or seeks to represent its employees."[14]

It is clear from Albany and Rockland that the ALJ did not err by looking to the NLRB's decision in Electromation for guidance in the interpretation and application of §209-a.1(b). BOCES' exception, however, is not so much that the ALJ erred by borrowing from the NLRB's analysis in Electromation, but that she wrongly adopted Electromation "wholesale" and thereby ignored both the language and policies of the Act. BOCES' arguments in this regard, however, do not persuade us that an analysis or result different from that by the majority in Electromation is warranted in this case. Electromation is fully in accord with the language and policies of the Act.

BOCES argues that as a matter of law and policy a violation of §209-a.1(b) of the Act necessitates proof that the employer actually intended to interfere with its employees' right to form, join or participate in an employee organization. Domination,

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[12] Id. at 3143.

[13] 14 PERB ¶3029 (1981).

[14] Id. at 3051.

interference, or support in fact without scienter cannot, on the District's reading of §209-a.1(b), violate that subsection of the Act.

For this argument, BOCES relies on the language in both §209-a.1(a) and (b) which requires that the employer's action be taken "for the purpose of depriving" public employees of their statutorily protected rights. As BOCES itself notes, however, we have long considered that the motive element in these improper practices is satisfied in those circumstances in which the employer's actions necessarily have the effect of interfering with employees' fundamental statutory rights.[15/] Therefore, the NLRB's statement in Electromation that a violation of §8(a)(2) of the NLRA does not require a finding of antiunion animus or a specific motive to interfere with employee rights is entirely consistent with §209-a.1(b) as written and applied.

We are also not persuaded that the Act's purposes and policies require that a specific motive to dominate, interfere with, or support an employee organization be established to sustain a violation of §209-a.1(a) and (b) in the context of cases such as this one. In making this policy argument, BOCES argues that Electromation was written against an already existing and controlling body of case law and legislative history which

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[15/] Hudson Valley Community Coll., 18 PERB ¶3057 (1985); State of New York, 10 PERB ¶3108 (1977).

restricted the NLRB's application of §8(a)(2) of the NLRA, restrictions not equally present under the Act.

Although it is certainly true that we write on a cleaner slate than did the NLRB, we do not accept BOCES' premise that the purposes and policies of the Act are an invitation to us to be less vigilant in the protection of public employees against employee organizations which are dominated in fact by a public employer. We simply do not agree with BOCES' representation that the Legislature's declared policy to promote harmonious and cooperative labor relationships would be advanced by engrafting a specific motive requirement unto §209-a.1(b) violations.

BOCES' policy-based interpretation of §209-a.1(b) would leave intact employee organizations which are in fact dominated, interfered with, or supported by public employers unless it could be proven that the domination, interference, or support were extended for the specific purpose of depriving employees of statutory rights. Section 209-a.1(b), however, addresses the damage inflicted upon employees by an employer's domination, interference, or support of an employee organization and an employer's subjective intent to violate the Act is wholly unrelated to the damage sought to be avoided. The Legislature believed and declared that all of the policies of the Act would be best effectuated in a labor relations system under which employees, through a bargaining agent of their free choice, were given a right to negotiate collectively with their employer

regarding their terms and conditions of employment. Those fundamental rights are illusory at best if the employees' bargaining agent is in fact controlled by their employer, and the harm to those rights is always present apart from an employer's specific intent to violate the Act. Dominated unions are coercive by their very nature whether the employer intends them to be or whether the employees perceive them to be because they necessarily preclude the free exercise of the right to organize for purposes of collective negotiation. Therefore, the policy considerations prompting New York's prohibition of employee organizations which are dominated, interfered with, or supported by a public employer are exactly the same as those driving the comparable prohibition in the private sector.

BOCES argues also that the Committee's purposes and functions are consistent with policies outside of the Act's own, which favor communication systems "utilizing input from all groups affected by the decision-making process", citing Education Department regulations requiring shared decision-making in public schools. There are several short answers to BOCES' arguments in this regard. First, the Committee has never been part of the system of shared decision-making established by the Commissioner of Education. Second, any system of shared decision-making cannot operate in violation of the Act or any other laws. Third, BOCES' arguments in this respect are best addressed in the context of the facts of the particular case rather than as a

general policy-based interpretation of the Act's improper practice provisions. Our conclusion that the Committee is an employer-dominated employee organization is based upon the totality of evidence in the record before us in this case. We make no findings as to whether other systems of employee participation would violate the Act.[16/]

The remaining issue is whether BOCES' actions constitute unlawful domination, interference, or support of the Committee. Having affirmed the ALJ's finding that the Committee is dominated, we fashion our analysis in that context with the understanding that the domination finding subsumes the lesser-included allegations of support and interference.

Electromation, and the cases arising under the NLRA before and after that case, stand for the general proposition that a union is dominated when the impetus behind the formation of the organization emanates from the employer and the employee organization has no effective existence independent of the employer's active involvement. We find this standard equally useful in the interpretation of §209-a.1(b) of the Act because, for many of the reasons previously stated, there is simply nothing in the language or the policies of the Act which would

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[16/]We note, however, that there are undoubtedly many ways to obtain employee input without violating the Act, both within and without a unionized workplace. Electromation and E.I. duPont & Co., 311 NLRB 893, 143 LRRM 1268 (1993), mention several which have equal viability in the public sector.

establish that the Legislature intended some other standard to apply.

There are several indicia of employer domination and many of them are present in this case. As previously stated, however, our decision is based on the totality of circumstances in this case and we express no opinion as to whether any of the facts upon which we rely would, in isolation, constitute unlawful domination, interference or support.

As found by the ALJ, the Committee evolved from a salary schedule and career ladder committee formed at the specific suggestion of John Campolieto, BOCES Assistant Superintendent for Special Education. Campolieto is admittedly an exempt managerial employee under the Act. Throughout the Committee's existence, under each of its several different names, Campolieto and other managerial,[17] administrative and supervisory personnel have been members of and/or active participants in the Committee's affairs. Campolieto, in particular, is clearly a person with influence over the Committee, making proposals or effective recommendations regarding terms and conditions of employment and providing the Committee with information to facilitate their discussions and otherwise "advising" the Committee. The conduct

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[17]Section 214 of the Act forbids managerial employees from holding office or membership in an employee organization which is or seeks to become certified or recognized as the bargaining agent for employees. This section of the Act is intended, in part, to help ensure that an employee organization is and remains independent from a public employer.

and character of the Committee's discussions and exchanges of proposals with the BOCES have been marked frequently by an uncustomary sensitivity to BOCES' interests, with Campolieto, for example, at one point recommending to the Committee that it "strive to propose budget recommendations that are sensible, reasonable, rational and affordable". The budget recommendations adopted by BOCES, as applicable to the aides' terms and conditions of employment, are set forth in policy "reports" or "handbooks". Mary Watts, a teacher aide, is the BOCES-appointed liaison between the Committee and BOCES. Under her unofficial "liaison" title, Watts is the person who is most responsible for the direction and control of the Committee. Her functions within and on behalf of the Committee are effectively her primary job with BOCES for which BOCES pays her a 30% premium above her base salary as a teacher aide. Her immediate supervisor is Campolieto. Watts and Campolieto, singly or in combination, control the exchange of Committee proposals between the Committee, BOCES' Superintendent, and its governing body. As Committee liaison, Watts actively discouraged employees' involvement with the Association and she actively encouraged their membership and participation in the Committee. BOCES, moreover, contributes financial and other substantial support to the Committee, such as meeting space, use of equipment and mail privileges while not extending similar privileges to the Association and its members or advocates.

Campolieto is clearly BOCES' agent for purposes of §209-a.1(a) and (b), and, as Watts' Committee liaison activities are effectively, albeit unofficially, a major part of her employment relationship, Watts is equally BOCES' agent for these purposes, whether or not she is supervisory or confidential as the Association alleges. Campolieto's and Watts' active participation in the Committee placed BOCES in a position by which it could and did shape the Committee's functions, discussions and decisions.

In sum, the totality of the record evidence persuades us that the Committee simply does not have a viable existence independent of BOCES' active involvement therein. Its formation, reformation and administration over time have been dominated by the membership, participation and control of agents of BOCES. So complete is that control that BOCES admits in its answer to the charge that the Committee is "part of the organized structure" of BOCES. Although it attempted to distinguish the "Steering Committee", which is admittedly part of its structure, from the "Committee", which moved to intervene in the representation proceeding, it is one and the same organization which has existed under several different names. It is not an accurate reflection of the record to treat what is one committee as if it were two separate, distinct entities for purposes of our analysis.

Having held the Committee to be dominated in violation of §209-a.1(a) and (b) of the Act, the ALJ's disestablishment order

is clearly necessary and appropriate. We have, however, deleted that part of the ALJ's recommended order requiring BOCES to cease its participation in or support of the Committee because the disestablishment order renders the other part redundant of and arguably contradictory to the disestablishment.

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

IT IS, THEREFORE, ORDERED that BOCES:

1. Immediately disestablish the Committee.[18]
2. Sign and post the attached notice at all locations normally used to post notices of information to teacher aides and master teacher aides.

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[18] Our order is intended to cover the Committee under any and all of its former or current names.

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 teacher aides and master teacher aides employed by the Monroe BOCES #1 (BOCES) that:

1. **BOCES will immediately disestablish the Monroe #1 BOCES Paraeducators' (Teacher Aide) Steering Committee.**

Dated . . . . . .

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

MONROE BOCES #1

. . . . . .

is 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.

2D-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GEORGE DEVITO, PRESIDENT OF THE RYE POLICE ASSOCIATION, INC., and RYE POLICE ASSOCIATION, INC.,

Charging Parties,

-and-

CASE NO. U-14499

CITY OF RYE,

Respondent.

WOLIN & WOLIN (ALAN E. WOLIN of counsel), for Charging Parties

VINCENT TOOMEY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by George DeVito, President of the Rye Police Association Inc., and the Rye Police Association, Inc. (together, the Association) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissing their charge, which alleges that the City of Rye (City) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it precluded DeVito from working overtime and swapping tours of duty because he had engaged in activities protected by the Act.

The Assistant Director determined that, although DeVito had engaged in protected activities, the City's Commissioner of Police, Anthony J. Schembri, had no knowledge of those activities and he was not improperly motivated when he issued the memorandum that prevented DeVito's overtime and tour swapping.

The Association excepts to the Assistant Director's decision, arguing that the timing of the memorandum is suspect, that Schembri must have known about DeVito's activities because of the small size of the police department, that the reasons given by the City for its decision to restrict DeVito's eligibility for overtime and tour swapping are pretextual, and that DeVito received disparate treatment because of his protected activities. The City supports the Assistant Director's decision.

The Assistant Director made the following findings. In January 1993, Sergeant Robert Falk became the administrative sergeant for the patrol division of the City's police department.[1/] Falk's title is included in the Association's bargaining unit. One of his responsibilities is to monitor attendance and to track sick leave use and overtime expenses. He met with Schembri weekly, usually on Mondays, to discuss these and other issues. At the end of January, he reported to Schembri that DeVito had charged absences to sick leave seven times and had been available to work overtime nine times. He and Schembri discussed concerns about the department's use of sick leave and overtime costs due to the City's worsening financial condition at that time. It was decided that Falk would continue to monitor these areas and report back to Schembri. In late February, Falk reported that DeVito had utilized four sick days and had worked overtime nine times during the month of February. Falk and

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[1/]In August 1993, he became a patrol lieutenant, also a unit position, with essentially the same duties.

Schembri discussed the fact that DeVito was out sick many times, but that he still seemed able to work overtime whenever he was called. Falk reminded Schembri of an incident in 1990 involving another sergeant where Schembri had denied that officer permission to work overtime or second jobs because of his excessive use of sick leave.[2/] While they discussed imposing the same penalty on DeVito, Falk suggested that he would monitor the sick leave closely for some more time and that, in any event, DeVito had already arranged some swaps for the coming weeks, which Falk and Schembri did not want to disturb because they impacted on DeVito's and other sergeants' vacation plans.

On March 3, DeVito called in sick for his scheduled midnight to 8:00 a.m. shift but he was at work that afternoon to work the 4:00 p.m. to midnight shift he had swapped with another sergeant.[3/] Falk, aware of the situation, brought it to Schembri's attention on March 3 or 4, 1993. Schembri agreed with Falk's suggestion to deny DeVito the opportunity to work overtime or to swap shifts until his sick leave use improved. Immediately

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[2/]The sergeant had used 24 days of sick leave in a 10-month period, while continuing to work overtime. His right to work overtime and second jobs was restricted for approximately three weeks, during which time he had no absences charged to sick leave. The officer grieved Schembri's action and the matter was settled at arbitration.

[3/]The collective bargaining agreement between the Association and the City provides that a police officer should not work overtime within 24 hours of a shift for which he or she has called in sick.

following the meeting on March 3 or 4, Schembri prepared a memorandum to DeVito,[4] which stated, in relevant part:

> As of March 1, you have taken 12 days of sick leave from the beginning of this year. You have also made many swaps and on one occasion, called out sick on a midnight tour and came in 4-12 for another officer.
>
> This sick leave is unacceptable. Your fundamental responsibility is to be at your job when you are scheduled. Paying proper attention to your health by making sure that outside activities don't interfere with your ability to come to work is of primary importance. I understand you have made plans to be with your family. I do not want to interfere with that. Therefore, effective immediately, until your sick leave is improved, you are ineligible for overtime and your permission to swap is rescinded effective April 2, 1993.

The memo was not delivered to DeVito immediately because he had scheduled several swaps with other sergeants and Schembri and Falk did not want to penalize them by disrupting their vacation plans. Falk gave the memorandum to a desk officer on the 4:00 p.m. to midnight shift on March 9 to deliver to DeVito when he reported for his scheduled midnight to 8:00 a.m. shift on March 10. DeVito received the memorandum, dated March 10, 1993, sometime on March 10 or 11, 1993.[5]

Based upon our review of the record and the credibility determinations of the Assistant Director, the foregoing facts,

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[4]Schembri testified that he called the City Manager and Corporation Counsel on March 3 or 4 to read to them the memorandum he had prepared and discuss the sanctions he was imposing on DeVito.

[5]DeVito was not sure whether he worked his scheduled shifts on March 10 or March 11, 1993.

which are essentially uncontroverted, are confirmed and we affirm the Assistant Director's decision.

The Association points to three instances of DeVito's exercise of protected rights immediately preceding the issuance of the March 10 memorandum.[6] In February 1993, the Association filed with PERB a petition for compulsory interest arbitration and served a copy of the petition on the City's labor counsel, but not on Schembri. There is no evidence in the record that Schembri knew about the petition.[7]

On March 2, 1993, the Association's counsel sent a letter to the City Manager complaining about Schembri allegedly having made accusations of racism against DeVito and another police officer. Again, Schembri was not copied on the letter and there is no record evidence that he was aware of it at any time relevant to the inquiry herein.

Finally, on March 9, 1993, DeVito wrote a letter to Schembri requesting the scheduling of a staff meeting on behalf of all members of the police department. The letter alleged that Schembri had ignored prior requests for meetings and that he was having a negative effect on the department because of his interest in employment elsewhere. DeVito could not recall how or

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[6]The Association relies in its charge only on these three activities as motivating Schembri's action, not DeVito's position as Association president, of which Schembri was well aware.

[7]Schembri testified, and the Assistant Director found, that he had no knowledge of the petition or the arbitration proceeding and that he had no involvement in labor relations, leaving that to the City's labor counsel.

when the letter was sent to Schembri. On March 10, 1993, an article appeared in a local newspaper, quoting portions of DeVito's letter and also quoting Schembri's reaction to DeVito's accusations. However, there is no evidence in the record that Schembri was aware of DeVito's letter before he had the memorandum dated March 10 prepared and delivered to DeVito.

To establish a violation of §209-a.1(a) of the Act, DeVito and the Association must establish that DeVito was engaged in protected activities and that the City had knowledge of and acted because of those activities.[8/] Assuming that DeVito's activities were protected under the Act, the Assistant Director determined that the Association had failed to establish that Schembri was aware of those activities and, therefore, it failed to prove that the March 10 memorandum was issued because of those activities. We agree.

The record does not establish that Schembri had knowledge of DeVito's activities before the decision was made on March 3 or 4 to restrict his overtime and tour swapping privileges. Although the Association claims that the memorandum delivered to the desk sergeant at or around 4:00 p.m. on March 9 for delivery to DeVito at the start of his shift at midnight on March 10, was prepared after Schembri became aware of DeVito's March 9 letter, the direct evidence is to the contrary. The Association points to the timing of DeVito's March 9 letter to Schembri and the newspaper article of March 10 to establish that the memorandum

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[8/] City of Salamanca, 18 PERB ¶3012 (1985).

dated March 10 was improperly motivated. Although the March 10 memorandum was dated the same day as the newspaper article quoting DeVito's March 9 letter to Schembri, there is no record evidence to contradict Schembri's credited testimony that he decided to curtail DeVito's overtime and tour swapping on March 3 or 4, 1994. Further, Falk and Schembri credibly testified that the memorandum had been prepared right after their meeting on March 3 or 4 and was not delivered to DeVito until March 10 because that was the first day shift he worked and on which he had not swapped tours with any other sergeants.

The Association also cites to the "small plant doctrine", articulated by the National Labor Relations Board and adopted by us,[9/] as support for a finding that Schembri, because of the small size of the police department, must have known of DeVito's protected activities. The Association has, however, misapplied the doctrine. At best, the small plant doctrine permits an inference of knowledge to be drawn from the record as a whole[10/] in circumstances showing that union activities "were carried on in such a manner, or at times that in the normal course of events the respondent must have noticed them."[11/] The small plant doctrine only applies when there is no credible record evidence regarding a respondent's actual knowledge of protected

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[9/] Town of Rochester, 12 PERB ¶3078, aff'g 12 PERB ¶4501 (1979).

[10/] See Coral Gables Convalescent Home, 97 LRRM 1435, 1436 (1978).

[11/] Hadley Mfg. Corp., 108 NLRB 1641, 1650, 34 LRRM 1246, 1248 (1954).

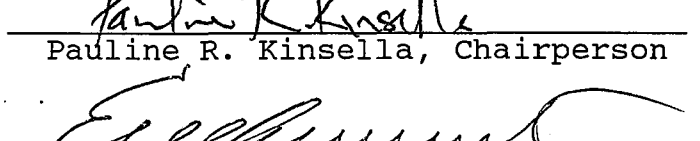
activities. Here, there is direct record evidence that Schembri did not know about the three specific activities in which DeVito was engaged. It is, therefore, inappropriate to infer from application of the small plant doctrine any knowledge on the part of Schembri of DeVito's union activities.[12/]

Finally, the evidence does not support the Association's argument that DeVito was subjected to disparate treatment for his use of sick leave. Another officer had previously been deprived of overtime privileges for excessive use of sick leave. That the circumstance of DeVito and the other sergeant differed somewhat and that DeVito's loss of overtime privileges was for a longer period does not, by itself, or with the other record evidence, establish that Schembri's decision with respect to DeVito was improperly motivated.

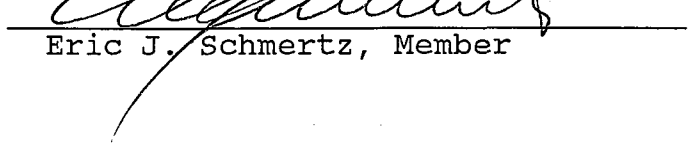
Based on the above, the Association's exceptions are denied and the decision of the Assistant Director is affirmed.[13/]

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

DATED: November 29, 1995
Albany, New York



Pauline R. Kinsella, Chairperson



Eric J. Schmertz, Member

[12/] City of Corning, 17 PERB ¶3022 (1984).

[13/] We need not reach the other exceptions raised by the Association because of our determination that Schembri did not know of DeVito's activities.

2E-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GENERAL BROWN TEACHERS' ASSOCIATION,

Petitioner,

-and-

CASE NO. CP-350

GENERAL BROWN CENTRAL SCHOOL DISTRICT,

Employer.

WILLIAM L. CURTIS, for Petitioner

STEVEN J. JOHNSON, for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the General Brown Central School District to a decision by the Director of Public Employment Practices and Representation (Director) on a unit clarification/placement petition filed by the General Brown Teachers' Association (Association). The Association seeks a determination that the newly created position of Teacher Assistant/District Computer Coordinator (TA/Coordinator) is in or should be placed into its existing instructional unit. After a hearing, the Director dismissed the clarification aspect of the petition because the Association's unit as defined did not include the TA/Coordinator position. The Director, however, placed the title into the Association's unit on a finding that the TA/Coordinator, as an allied professional position, had a greater community of interest with the District's professional,

certificated personnel than it did with either the District's administrators or its noninstructional personnel.

The District argues in its exceptions that the placement aspect of the petition should have been dismissed pursuant to its motion at the hearing because the Association did not satisfy its burden of proof on the issue of community of interest. It argues also that the Director's decision to place the title into the Association's unit is not required under our decisions and is actually inconsistent with two of the Director's earlier decisions involving coordinator titles. The Association has not filed a response to the District's exceptions.

Having reviewed the record and having considered the arguments presented, we affirm the Director's decision.

The District relies upon our decision in County of Niagara[1/] to support its argument regarding the motion to dismiss the unit placement petition. County of Niagara, however, involved a unit clarification petition only, which we dismissed because there was insufficient evidence that the title there in issue was in fact included in the petitioner's unit. A unit placement petition[2/] is, in substance and effect, a mini representation proceeding calling only for a nonadversarial investigation and the application of the statutory uniting

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[1/]21 PERB ¶3030 (1988).

[2/]The differences in the two types of petitions were detailed by us in State of New York (Dep't of Audit and Control), 24 PERB ¶3019 (1991).

criteria in §207.1 of the Public Employees' Fair Employment Act (Act). Therefore, the Director properly completed his investigation of the unit placement petition notwithstanding the District's motion to dismiss.

On the merits, the District argues that the Director decided to place the TA/Coordinator title into the Association's unit partly because the union representing the noninstructional personnel did not want to represent that title. As we read the Director's decision, however, he merely noted the other union's position with respect to the Association's petition, but he did not rely upon that as a factor in making the placement.

The District also argues that the unit placement which was ordered was not required by any of our decisions. The question on this appeal, however, is not whether the unit placement is compelled by any of our decisions, but whether it is consistent with those decisions. Our decision in Wappingers Central School District[3/] may not, as the District argues, be dispositive in favor of the Director's decision. That observation, however, does not make that case irrelevant nor does the Director's citation[4/] to it make his decision incorrect. The District's assertion that the Director's decision is inconsistent with his own earlier decisions is, however, clearly relevant. The

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[3/]28 PERB ¶3037 (1995).

[4/]The Director cited to Wappingers Cent. Sch. Dist. only in reference to a statement that the placement would not defeat the District's interests and expectations regarding utilization of the TA/Coordinator position, a point we discuss infra.

Director did not refer in his decision to the cases which the District argues are inconsistent with the unit placement he ordered. An unexplained departure from controlling precedent is at least arguably arbitrary.[5/] Having reviewed the cases cited by the District, however, we do not find them to be inconsistent with the Director's decision in this case.

The District's inconsistency argument is centered on the belief that the Director's earlier decisions created a per se uniting rule for coordinator positions. Uniting, however, rarely lends itself to a per se approach with respect to any position. Rather, for most positions, the appropriate unit determination rests on a careful analysis of all material facts, including existing unit structures and size of workforce, followed by an application of the Act's several uniting criteria in light of its overall purposes and policies. Many representation cases will present issues and facts which are or appear to be similar in at least certain respects. The unit determinations in these cases will often depend on subtle distinctions in those facts, differences often more of degree than substance. The analysis made by the Director in this case is consistent with this factual approach, one he also used in the cases cited by the District and discussed next.

[5/] Matter of Charles A. Field Delivery Service, Inc. (Roberts), 66 N.Y.2d 516 (1985); Uniondale Union Free Sch. Dist. v. PERB, 140 A.D.2d 612, 21 PERB ¶7012 (2d Dep't 1988)(subsequent history omitted).

In Wayne-Finger Lakes BOCES,[6] the Director declined to add a Coordinator of Computer Training and many other titles to a teachers unit on a finding that the excluded titles all had an insufficient community of interest with the unit positions. The excluded titles had little or no student contact, did not have common supervision and they had duties different from the unit employees.

In Albany-Schoharie-Schenectady BOCES,[7] the Director declined to place the coordinators of three programs into a teachers unit, instead concluding that the coordinators had a much stronger community of interest with nonunit program associates. None of the coordinators were certified or licensed, they did not work within a traditional school setting, they had terms and conditions of employment substantially different from unit employees and their placement could have been administratively inconvenient for the employer because placement was believed to have presented potential difficulties regarding their availability during the summer.

The unit determinations in both of those cases were made on the particular facts of each case. Having excluded certain coordinators from teachers units in Wayne-Finger Lakes BOCES and Albany-Schoharie-Schenectady BOCES does not mean that an exclusion of the TA/Coordinator in this case was required or

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[6] 26 PERB ¶4056 (1993).

[7] 27 PERB ¶4049 (1994).

warranted. In this case, the Director concluded, and the record supports, that the TA/Coordinator is appropriately placed into the teachers unit. Although recognizing that the TA/Coordinator has some interests in common with both the District's administrators and its noninstructional personnel, the Director concluded that the title had a greater community of interest with the professional employees in the Association's unit. Most significantly to the Director and to us, the TA/Coordinator position requires certification under the Education Law and the Commissioner's regulations and it has a substantial instructional component involving interaction with teachers and pupils, factors not similarly present in Wayne-Finger Lakes BOCES or Albany-Schoharie-Schenectady BOCES.

Moreover, the placement does not present on this record any supervisory or other conflicts of interest. In that regard, the District argues that placement of the TA/Coordinator position into the teachers unit will prevent it from using the position as it contemplated. This argument is also based on an incorrect assumption that upon placement of the TA/Coordinator into the teachers unit, the incumbent will automatically and necessarily be governed by all of the contract terms covering those already in the unit.[8/] Therefore, there is no basis to conclude, for example, that the twelve-month TA/Coordinator position will

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[8/] Onondaga-Cortland-Madison BOCES, 25 PERB ¶3044 (1992), rev'd on jurisdictional grounds, 198 A.D.2d 824, 26 PERB ¶7015 (4th Dep't 1993); Onondaga-Cortland-Madison BOCES, 23 PERB ¶3014, at 3031 n.8 (1990).

automatically become a ten-month position simply because teachers have the latter as their contractual work year. Although we do not consider the Director to have reached the merits of the employer's claim in this regard in Albany-Schoharie-Schenectady BOCES, to the extent anything in that decision is to the contrary, we simply disagree with that conclusion.

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

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2F-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EASTCHESTER TEACHERS ASSOCIATION, NEW YORK STATE UNITED TEACHERS,

Petitioner,

-and-

CASE NO. C-4193

EASTCHESTER UNION FREE SCHOOL DISTRICT,

Employer.

JEFFREY R. CASSIDY, for Petitioner

RAINS & POGREBIN, P.C. (CRAIG R. BENSON of counsel), 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 on remand by the Director of Public Employment Practices and Representation (Director). Pursuant to a petition filed in November 1993 by the Eastchester Teachers Association, New York State United Teachers (Association), the Director added teaching assistants to the Association's existing unit of professional employees. In his decision prior to remand,[1/] the Director reasoned that the teaching assistants should be added to the Association's unit because their one-time bargaining agent, the Eastchester Teaching Assistants (ETA), had "specifically disclaimed any representational interest . . . and [it] has apparently been dissolved." On the District's exceptions to that decision, we

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[1/] 27 PERB ¶4067 (1994).

ordered the case remanded[2/] because there "may have been some confusion regarding ETA's status and interests." The Director held a hearing on remand at which the only witness was Gail DelVecchio, the ETA representative who had written us, in conjunction with the first appeal, to deny that any ETA representative had ever specifically disclaimed a representational interest. On the basis of DelVecchio's testimony on remand, the Director concluded that the ETA had, in fact, disbanded in 1993 and is now defunct. Treating the teaching assistants as unrepresented, the Director concluded that they were most appropriately added to the Association's unit, reaffirming the result of his first decision.

The District argues in its exceptions that the Director's findings are not supported by the record and that his decision is contrary to principles of law established in both Board and Director decisions. The Association, in response, argues that the Director's findings and conclusions are correct, consistent with precedent, and should be affirmed.

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

Certain issues on this appeal have been decided previously by us. First, we held recently, in Union-Endicott Central School District,[3/] that when a bargaining agent becomes defunct, the

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[2/] 28 PERB ¶3009 (1995).

[3/] 28 PERB ¶3029 (1995)(appeal pending).

employees who were previously represented by that agent become unrepresented and their unit placement is effectively treated as a case of initial uniting. The fragmentation/consolidation cases cited by the District, therefore, have no application if the ETA is defunct. Second, we have held consistently that, in initial uniting situations, teaching assistants, as allied professional employees, are most appropriately grouped with teachers and other instructional personnel,[4] notwithstanding an existing disparity of benefits.[5]

Given the above two controlling principles, the issue in this case becomes a factual one: whether the record establishes that the ETA is defunct or, in the District's words, no longer a viable entity.

The District argues that the record establishes, at most, that the ETA has only gone underground, lying dormant until the outcome of the unit determination in this case. It argues that if the teaching assistants are not added to the Association's unit, the ETA could be reactivated and it could continue to represent the teaching assistants as it had before in a separate unit.

As noted, the record on this issue consists of DelVecchio's testimony. DelVecchio is admittedly not experienced in labor

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[4] See, e.g., Dutchess County BOCES, 25 PERB ¶3048 (1995); Onondaga-Cortland-Madison BOCES, 23 PERB ¶3014 (1991).

[5] Unatego Cent. Sch. Dist., 15 PERB ¶3097 (1982)(disparity of benefits disregarded among groups with shared professional community of interest).

relations and her testimony is, accordingly, often unclear or imprecise. We conclude, however, that the Director's decision reflects a fair and accurate reading of the material parts of the record. The ETA was viable until several of its members and representatives met with a representative of the Association to inquire as to whether their interests would be better served if they were represented by the Association in the teachers unit. The ETA members present at that meeting, including DelVecchio and the other representatives of the ETA, decided to pursue representation through the Association and they signed Association membership cards to that end. Accepting the advice of the Association's representative that continued negotiations through ETA would compromise their goal, and perhaps believing that they could not legally negotiate a collective bargaining agreement, the members of ETA ceased all organizational activity. No meetings of any kind for any purpose have been held by the ETA for more than two years.

An employee organization exists for purposes of the Public Employees' Fair Employment Act (Act) to negotiate and administer collective bargaining agreements. When an organization makes a clear and conscious decision to entirely stop representing employees with respect to their employment, it must be defunct for purposes of the Act. The District's representation that the ETA could at some later date become active is speculative at best. As DelVecchio herself noted, she could not even speak for others or the group if for no other reason than there has been a

change in circumstances and personnel over time. Therefore, even the very loose organizational structure the ETA once had has been lost. Moreover, the District would have us test viability by what might be, not by what was and is. What might be in the future under different circumstances cannot be the standard by which an organization's present viability is assessed. What was true when the petition was filed, and remains true to date, is that the ETA is nonfunctioning and its former members are currently unrepresented. Other than the fact that the union's abandonment of its unit was more formally conveyed to the employer in Union-Endicott Central School District than here, the material facts in this case are the same as there and warrant the same result. No formal communication to the District was necessary to establish or confirm a state apparent on the facts. Therefore, ETA's failure to "formally" convey to the District its abandonment of the unit is immaterial for purposes of this proceeding.

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

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2G-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SIDNEY TEACHERS ASSOCIATION,

Charging Party,

-and-

CASE NOS. U-13923 and U-14052

SIDNEY CENTRAL SCHOOL DISTRICT,

Respondent.

PETER B. BLOOD, for Charging Party

MARK W. PETTITT, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Sidney Teachers Association (Association) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissing its charges against the Sidney Central School District (District). The Association alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally assigned to nonunit personnel certain job duties previously performed exclusively by employees within the Association's unit. The Assistant Director dismissed both charges because the Association had not complied with the notice of claim requirements in Education Law §3813.

After the Assistant Director's decision, the Appellate Division, Third Department in Deposit Central School District v.

PERB,[1/] (hereafter Deposit) made three holdings that are dispositive of the Association's exceptions. First, the Court held that the notice of claim provisions in Education Law §3813 apply to all alleged violations of §209-a.1(d) of the Act. Second, the Court held that failure to satisfy the notice of claim requirements can be raised for the first time on appeal to us as the "court of original jurisdiction". Third, it held that the notice of claim provisions in Education Law §3813 are satisfied if the school district's governing body receives a copy of a sufficiently detailed improper practice charge within ninety days after the claims asserted therein arose.

The Court's decision in Deposit requires that we deny the Association's exceptions, except insofar as it argues that Education Law §3813 has been satisfied, at least in part. The third listed holding in Deposit requires reversal of the Assistant Director's decision in U-13923 in part and in U-14052 entirely.

The claims in U-13923 arose in June and August of 1992 when, to the Association's knowledge, the duties of unit employees were allegedly transferred outside of its unit. The charge was filed on October 8, 1992, a copy of the charge was sent by mail to the

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[1/] ___ A.D.2d ___, 28 PERB ¶7013 (3d Dep't 1995). That Court first held that Education Law §3813 is applicable to at least some improper practice charges in Union-Endicott Cent. Sch. Dist. v. PERB, 197 A.D.2d 276, 27 PERB ¶7005 (3d Dep't 1994), motions for leave to appeal denied, 84 N.Y.2d 803, 27 PERB ¶7012 & ¶7013 (1994). We have followed Union-Endicott despite our disagreement with its holding and rationale and apply Deposit similarly.

District by the Director of Public Employment Practices and Representation (Director) on October 20, 1992, and the District answered the charge on November 2, 1992. It is clear from these dates that the District did not receive a notice of claim regarding the June transfers of unit work within ninety days of the accrual of those claims.[2/] Such notice would have had to have been presented to the District at the latest by mid-September, but the charge was not even filed until October. The District, however, had timely notice of claim regarding the August 6, 7, 12 and 19 transfers of unit work. As to the August transfers of work, the District had before the end of the ninety-day notice period actually received and answered the charge, which is sufficiently detailed under Deposit.

The charge in U-14052 involves transfers of unit work which occurred during the summer of 1992. That charge was filed on November 20, 1992, and was sent to the District by the Director on December 1, 1992. In lieu of an answer, the District, pursuant to §204.3(b) of our Rules of Procedure, filed a motion for particularization of that charge on December 9, 1992.

[2/]The District's receipt of the improper practice charges is the only viable notice of claim it received in either of these cases. Grievances earlier filed by the Association did not provide the District with parallel notice because they were admittedly dissimilar to the allegations raised in the improper practice charges. Deposit necessarily rejects the Association's argument that only the demanded remedy controls the application of Education Law §3813 and the recognized exceptions thereto. The Assistant Director concluded, and we agree, that there is no occasion for us to consider whether under any circumstances a contractual grievance can constitute parallel notice of a claim of improper practice for Education Law §3813 purposes.

The Association alleges in U-14052 that it did not discover the transfers of unit work until certain dates in November 1992. If the claim is deemed to have accrued when the work was in fact transferred, the District clearly did not receive timely notice of claim under Deposit. Conversely, if the claim did not accrue until the Association learned of the transfers, then the District was in receipt of the requisite notice of claim because the charge as filed in U-14052 is sufficiently detailed.[3/]

An improper practice claim does not accrue for purposes of Education Law §3813 until the charging party knew or should have known of the conduct constituting the alleged improper practice. The cases construing Education Law §3813 clearly support our conclusion that the claimant must have had actual or constructive knowledge of the grounds constituting a claim for the claim to have accrued within the meaning of that statute.[4/] Any other interpretation would have a charging party do the impossible: give notice of a claim it had no reason to know or believe it

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[3/]The presiding Administrative Law Judge denied the District's motion for particularization because the charge as filed was reasonably clear.

[4/]Bd. of Educ. of Enlarged Ogdensburg City Sch. Dist. v. Wager Constr. Corp., 37 N.Y.2d 283 (1975)(accrual when damages are ascertainable). Accord Almar Constr. Corp. v. P.M. Hughes & Sons, Inc., 58 A.D.2d 615 (2d Dep't), appeal dismissed, 42 N.Y.2d 1009 (1977). Pope v. Hempstead Union Free Sch. Dist., 194 A.D.2d 654 (2d Dep't), motion for leave to appeal dismissed, 82 N.Y.2d 846 (1993)(claim accrued when claimant became aware of alleged contract breach). See also Chemical Constr. Corp. v. Bd. of Educ. of the City of New York, 105 Misc.2d 980 (Sup. Ct. Kings. Co. 1980)(claim does not accrue until claimant has reason to believe there is a claim).

had. In light of Deposit, the Assistant Director's dismissal of U-14052 must be reversed and remanded for a determination as to when the Association first knew or should have known of the transfers of unit work involved in that case. Depending upon that determination, the District may or may not have received timely notice of claim under Deposit.

For the reasons set forth above, the Assistant Director's decision in U-13923 is affirmed insofar as he dismissed that part of the charge concerning the June 1992 transfers of unit work and it is otherwise reversed. The Assistant Director's decision in U-14052 is reversed. The matters are hereby remanded for further processing and decision consistent with our decision herein. SO ORDERED.

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2H-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ODESSA-MONTOUR TEACHERS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-16016

ODESSA-MONTOUR CENTRAL SCHOOL DISTRICT,

Respondent.

JOHN B. SCHAMEL, for Charging Party

SAYLES, EVANS, BRAYTON, PALMER AND TIFFT (JAMES F. YOUNG of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Odessa-Montour Teachers Association (Association) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the Association's charge against the Odessa-Montour Central School District (District), which alleges that the District violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it transferred Phoebe Baker from her assignment as a first-grade teacher at B.C. Cate Elementary School to a sixth-grade assignment at its Hanlon School for the 1994-95 school year. The ALJ dismissed the §209-a.1(a) and (c) allegations finding no evidence that the District was aware of Baker's union-related activities, no evidence of any animus, and no evidence warranting a finding that anything other than legitimate educational reasons prompted the

District's decision to transfer her. The ALJ dismissed the §209-a.1(d) allegation because the transfer "practice" which the District allegedly failed to follow was embodied in a 1983 "TALC" agreement.[1/] Finding that the TALC agreement was the Association's source of right regarding teacher transfers, and that the Association was claiming that Baker's transfer violated the terms of the TALC agreement, the ALJ dismissed the §209-a.1(d) allegation for lack of jurisdiction pursuant to §205.5(d) of the Act.[2/]

The Association argues in its exceptions that the ALJ's findings and credibility determinations favoring the District's articulated educational reasons for Baker's transfer are not supported by the record and that the jurisdictional dismissal of the §209-a.1(d) allegation is incorrect because the TALC agreement is not an agreement within the meaning of the Act. The District in response argues that the ALJ's decision reflects correct findings and conclusions and should be affirmed.

Having considered the parties' arguments, we affirm the ALJ's decision. Our review of the record affords us no basis on which to disturb either the ALJ's material findings of fact or his credibility resolutions, all of which are consistent with the

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[1/]The parties' collective bargaining agreement creates a teacher-administrative liaison committee (TALC). The District and Association representatives on that committee reached the agreement regarding teacher transfers.

[2/]That section of the Act divests us of jurisdiction over violations of extant agreements.

evidence in the record. Whether, as the Association argues, Baker's transfer was unfair, arbitrary or capricious is not for us to decide. Our inquiry under the §209-a.1(a) and (c) allegations ends with the conclusion that Baker was not transferred because of her union status or activities.

The ALJ's jurisdictional dismissal of the §209-a.1(d) allegation is also correct. The Association itself argues that the District had honored the TALC agreement until it transferred Baker. Both parties concede that the TALC agreement is in effect, disagreeing only as to its meaning and application in this instance. The Association continues to argue that Baker's transfer violated the TALC agreement. The Association's arguments are simply not consistent with its assertion that the TALC agreement is not an agreement for purposes of the Act. An agreement for purposes of the Act is merely an exchange of promises, without regard to form, between an employer and union, in this case one made through agents of each on the TALC committee.[3/] Whether Baker's transfer violated that TALC agreement is an issue which is not properly before us under §205.5(d) of the Act.

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

[3/]Act §201.12. Both unions and employers clearly may, and often do, negotiate through designated agents. State of New York - Unified Court System, 28 PERB ¶3012 (1995)(appeal pending).

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

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

21-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SIDNEY TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-15531

SIDNEY CENTRAL SCHOOL DISTRICT,

Respondent.

PETER B. BLOOD, for Charging Party

MARK W. PETTITT, for Respondent

BOARD DECISION AND ORDER

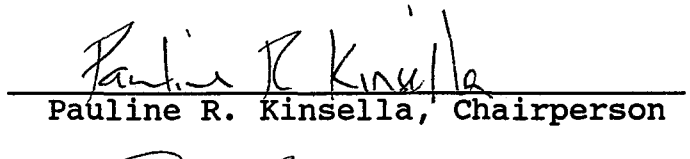
This case comes to us on exceptions filed by the Sidney Teachers Association, NYSUT, AFT, AFL-CIO (Association) to a decision by an Administrative Law Judge (ALJ) on a charge against the Sidney Central School District (District). The Association alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed its release time practice by requiring unit employees to charge their leave accruals when attending PERB proceedings. The ALJ dismissed the charge because the Association had not presented the District with a notice of claim pursuant to Education Law §3813.

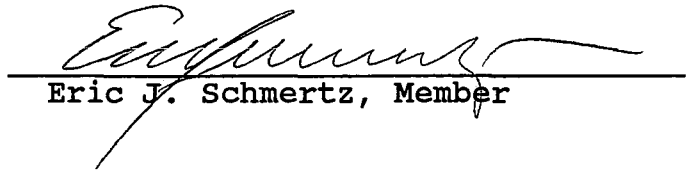
We reverse the ALJ's decision on the basis of the Appellate Division, Third Department's recent decision in Deposit Central

School District v. PERB (hereafter Deposit).[1] In Deposit, decided November 2, 1995, following issuance of the ALJ's decision, the Court held, inter alia, that the notice of claim provisions of Education Law §3813 are satisfied if the school district's governing body receives a copy of a sufficiently detailed improper practice charge within ninety days after the claim or claims asserted therein arose. The claims here arose at the earliest on March 14 and 25, 1994 when requests for paid leave were denied. The District answered the charge on April 29, 1994, thereby establishing its receipt of the charge within ninety days of the dates of accrual of the claims asserted therein. The improper practice charge in this case is as detailed as the one in Deposit regarding the nature of the claims and the time, place and manner in which they arose. On the basis of the Court's holding and rationale in Deposit, the Education Law §3813 notice requirements have been satisfied.

For the reasons set forth above, the ALJ's decision is reversed and the case is remanded to the ALJ for further processing consistent with this decision. SO ORDERED.

DATED: November 29, 1995
Albany, New York


Pauline R. Kinsella, Chairperson


Eric J. Schmertz, Member

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[1] ___ A.D.2d ___, 28 PERB ¶7013 (3d Dep't 1995). For further discussion of Deposit see Sidney Cent. Sch. Dist., 28 PERB ¶3066 (1995), also decided this date and involving these same parties.

2J-11/29/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCKLAND PROFESSIONAL MANAGEMENT,

Petitioner,

-and-

CASE NO. C-4163

COUNTY OF ROCKLAND,

Employer.

JAMES R. FILENBAUM, ESQ., for Petitioner

PAUL B. NOWICKI, COUNTY ATTORNEY (JACK SCHLOSS of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Rockland Professional Management (RPM) and cross-exceptions filed by the County of Rockland (County) to a decision of the Director of Public Employment Practices and Representation (Director). The Director held after a hearing that certain unrepresented employees of the County sought to be represented by RPM[1/] are

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[1/]RPM sought a unit which would include the following titles: Deputy Public Defender, Assistant Public Defender(F/T), Assistant Public Defender(P/T), Attorney III (Labor), Attorney III (Municipal Affairs), Attorney II, Attorney I, Counsel (Health Department), Assistant County Attorney (P/T), Construction Representative, Deputy County Clerk, Second Deputy County Clerk, County Insurance Coordinator, Coordinator of the Traffic Safety Program, Second Deputy Commissioner of Social Services, Director of County Veterans Services Agency, Engineer V, Engineer IV (Hydraulics), Second Deputy Commissioner of Hospitals, and Patient Services Administrator.

not entitled to representation in any unit because they are, as alleged by the County, managerial and/or confidential within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act) and that the remaining titles sought by RPM are most appropriately placed in a unit of professional and supervisory employees of the County, which is currently represented by the Rockland Association of Management, NYSUT, AFT, Local 4404, AFL-CIO (RAM).[2/] Although RAM was notified of the pendency of the petition, it did not intervene or participate in the Director's investigation.

RPM excepts to the Director's determination that the Attorney III (Labor) and the Attorney III (Municipal Affairs) are not entitled to representation under the Act because they are confidential employees on the ground that there is insufficient evidence in the record to support the Director's determination. It otherwise supports the Director's decision.

The County alleges in its cross-exceptions that, in placing certain titles into RAM's unit, the Director ignored the Rockland County civil service rules, which classify the titles as "confidential", and also that he disregarded the language in the collective bargaining agreement between the County and RAM excluding certain positions from RAM's existing unit. It further alleges that the inclusion in RAM's unit of the

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[2/]The decision of the Director, at 28 PERB ¶4033 (1995), sets forth the precise definition of the RAM unit.

Assistant County Attorney (P/T), County Insurance Coordinator, Director of the Veterans Service Agency, Counsel (Health Department), Attorney II, Attorney I, Deputy Public Defender, Deputy County Clerk (First Deputy), and Coordinator of the Traffic Safety Program is not supported by the facts in the record. In its response to the County's exceptions, RPM challenges the factual and legal basis for those exceptions. The County likewise responded to RPM's exceptions.

Based upon our review of the record and the parties' arguments, we affirm the Director's decision, in part, and remand, in part.

Section 201.7(a) of the Act defines public employees "as any person holding a position by appointment or employment in the service of a public employer". The definition is inclusive, covering all public employees as defined and presumes a right of representation in the appropriate unit for all, except those few who are specifically excluded (e.g., judges and justices of the unified court system and members of the organized militia) and those who satisfy the criteria for designation as managerial or confidential.[3/] Certain managerial and confidential employees were excluded from bargaining units in early initial uniting cases.[4/] It was not until 1971, however, that the Legislature amended the Act to specifically provide for the exclusion of

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[3/] State of New York (SUNY), 24 PERB ¶3035 (1991).

[4/] See New York State, Division of State Police, 1 PERB ¶399.32 (1968).

managerial and confidential employees as defined. In adopting this exclusionary language, the Legislature noted:

> It is the intention of the legislature that designations of employees as management or confidential... reflect the extent to which a public employer has from time to time organized itself for collective negotiations. It is not the intention of the legislature to destroy existing employer-employee negotiating units.... Nor is it the intention of the legislature to impede, impair or otherwise interfere with the exercise of rights of organization and representation of public employees... who do not formulate policy or who do not have a significant role in employee relations....[5/]

In one of the first cases decided after the enactment of this legislative policy statement, the Board reiterated the Legislature's caution that employees should not be excluded from bargaining units except in a very clear instance of the exercise of managerial or confidential responsibilities, noting that "all uncertainties should be resolved in favor of Taylor Law coverage."[6/] It is for a public employer to seek the designation of such employees and their removal from coverage under the Act.[7/] Likewise, in the context of a petition seeking the representation of unrepresented employees, it is for the employer to present evidence which supports the finding that employees with managerial or confidential job duties be excluded from the appropriate unit.

[5/]L. 1971, c. 503, as amended by L. 1971, c. 504 and L. 1975, c. 854.

[6/]State of New York, 5 PERB ¶3001, at 3004 (1972).

[7/]Rules of Procedure, §201.10.

In determining whether a public employee should be deprived of representation rights, in either the context of a managerial/confidential application or a representation petition, we are controlled by the criteria set forth in the Act,[8/] as interpreted and applied in our decisions:

> The first criterion for managerial designation is "Policy formulation". An employee who either individually selects from among options those which are to be the objectives of a public employer in fulfilling its mission, and the methods and extent of meeting those objectives, or who regularly participates in the essential process resulting in such decisions, formulates policy within the meaning of the Act. A person who participates in that process in a clerical or advisory role or as a resource person does not satisfy that criterion.
>
> To satisfy the second criterion, participation in collective negotiations, an employee must be a direct participant in the preparation of the employer's proposals and positions in collective negotiations and an active participant in the negotiating process itself. Acting as an observer or resource person either at the table or in caucuses is insufficient.
>
> To satisfy the third criterion an employee must have a major role in the administration of agreements, beyond that of a routine or clerical nature. He must have the authority to exercise independent judgment in effecting changes in the employer's procedures or methods of operation as necessitated by the implementation of agreements. Participation in the first level of the contract grievance procedures does not meet this criterion.
>
> The fourth criterion, exercising a major role in personnel administration, requires that an employee exercise independent judgment and fundamental control over the direction and scope of the employer's mission. A first step grievance role or the authority to hire or recommend the retention of employees could indicate supervision but would not satisfy this criterion.

[8/]Act, §201.7(a)(i) & (ii).

> With respect to the foregoing, even those employees occupying what may fairly be termed a high-level supervisory role, do not necessarily fall within the "managerial" definition. (Footnote omitted)
>
> To be designated confidential, an employee must act in a confidential capacity to another employee who satisfies any of the latter three managerial criteria or be privy to labor relations information not intended for the eyes and ears of unit members or their representatives. (Footnote omitted)[9/]

In this case, the Director determined that the current Attorney III (Labor) is a confidential employee on the basis of his involvement in labor relations on behalf of the County. The current incumbent is no longer involved in contract negotiations, but he is the County's representative in all disciplinary proceedings, prosecuting Civil Service Law §75 charges on behalf of the County and appearing for the County in all cases before PERB and related court actions. On this basis alone, his exclusion is necessary because he is exposed to information not appropriate for the eyes and ears of unit members or their representatives.[10/] RPM argues, however, that only a small number of disciplinary charges flow from the RAM unit and that the Attorney III (Labor) has never exhibited any disloyalty to the County in his handling of labor relations matters. As to the first argument, the exclusion is based not only on the attorney's exposure to labor relations information

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[9/] City of Binghamton, 12 PERB ¶4022, at 4035, aff'd, 12 PERB ¶3099 (1979).

[10/] Nassau County BOCES, 10 PERB ¶4071 (1977), aff'd, 11 PERB ¶3032 (1978).

involving RAM but the County's labor relations work with all of the eleven units of County employees, for which he is almost solely responsible.[11/] As to the second argument, the absence of a demonstrated disloyalty to the County is not a basis upon which to conclude that a managerial or confidential position, excluded from the Act's coverage, is nonetheless appropriately placed in a bargaining unit.

The Director also excluded the Attorney III (Municipal Affairs) from representation due to his exposure to confidential information about the County's financial operations. The record reflects that the current incumbent serves as counsel to the County Attorney on legislation, ethics and conflict of law and also as counsel to the County Legislature's Budget and Finance Committee, which handles the County appropriations issues. He attends most meetings of that committee, rendering legal opinions to it on a variety of matters. As such, he is exposed to the County's fiscal information and discussions on the County's financial situation and proposed actions. Clearly, such exposure to the County's financial information supports the Director's determination that the Attorney III (Municipal Affairs) is not entitled to inclusion in a negotiating unit.

The County excepts to the Director's decision because he did not defer to the County's civil service rules, which designate all Assistant County Attorneys, the County Insurance

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[11/] See Niagara-Wheatfield Cent. Sch. Dist., 11 PERB ¶4044 (1979).

Coordinator and the Director of the Veteran Service Agency as confidential. However, the explanation given to those rules by a memorandum from the County Commissioner of Personnel makes clear that the civil service rules, in referring to the designation of individuals as confidential, do not utilize the criteria set forth in §201.7(a) of the Act.[12/] In any event, whether an employee is managerial or confidential within the meaning of the Act is a determination resting within PERB's jurisdiction exclusively. Although in determining managerial or confidential status, we look to job descriptions, civil service job specifications, the duties actually performed, and the public employer's placement, or nonplacement, of the title in a unit of represented employees, the employer's designation is not dispositive, especially when the employer does not base its placement on the Act's definition of a confidential employee.

The County also argues that the Director erred by placing several of the titles into the unit represented by RAM because the contract between the County and RAM specifically excludes the officer or head of each office, department or agency who has the power to appoint or the chief executive or director of each

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[12/]In a memorandum to department heads, school district officials and town and village officials within the County, the Commissioner specifically states: "[Y]ou should be aware that the various criteria flowing from the Taylor Law and the determinations of PERB with respect to managerial/confidential designations are not those to be used for this determination. The Taylor Law definitions are more strictly defined than the ones used here to determine whether a position should be exempt...."

department, office or agency, certain assistant county attorneys and public defenders. It asserts that the County and RAM have the right to determine the appropriate scope of RAM's bargaining unit without question, investigation or interference by PERB.

Although public employers and employee organizations are encouraged to agree upon the composition of bargaining units, as well as the terms and conditions of employment of unit employees, when a representation dispute arises, PERB has the statutory duty, pursuant to §207 of the Act, to determine the most appropriate bargaining unit consistent with the criteria contained therein. Agreements between the employer and the employee organization regarding unit inclusions and exclusions are, accordingly, not controlling.[13/]

The County also excepts to the Director's determination that the employees in the following several titles are entitled to representation.

Initially, we note that assistant attorneys general and assistant district attorneys are the only attorney titles which are specifically designated in the Act as managerial employees and excluded from representation under the Act.[14/] The representation rights of all other attorneys in public employment must be assessed on the basis of the duties they actually, or could reasonably be expected to, perform.

[13/] See State of New York, 1 PERB ¶399.85 (1968).

[14/] Act, §201.7(b).

The County asserts that the Deputy Public Defender is a policy maker and, therefore, should be excluded from coverage under the Act. The Director found that this title is responsible for supervision of the Assistant Public Defenders and may act in the place of the Public Defender when he is not available, but that it does not have any policy-making or any labor relations responsibilities. As a result, the position is not disqualified from inclusion in a bargaining unit. The record supports the Director's determination.[15/]

The County also challenges the Director's determination that the Attorney II and Attorney I are eligible for inclusion in a bargaining unit.[16/] The record shows that although the Attorney II, who heads the debt collection task force within the County Attorney's office,[17/] has some supervisory responsibilities over secretarial and para-professional staff, he has no labor relations responsibilities. While the Attorney II exercises some independent judgment with respect to accomplishing the work of the debt collection task force, the record does not establish that he is responsible for setting or significantly influencing policy, which would warrant a

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[15/]Indeed, the County legislation which created the position in 1994 specifically states that "this legislature deems the position created herein not to be a policy making position."

[16/]The Attorney I promotes to Attorney II, which promotes to Attorney III or Counsel (Health Department).

[17/]The other Attorney II title is located in the social services department and is already included in the RAM unit.

conclusion that he is a managerial employee.[18] That he may assist those who formulate policy is not a basis for determining that he is a confidential employee. An employee is confidential for purposes of the Act only when assisting in a confidential capacity a managerial employee who exercises labor relations responsibilities and, thus, has access to information regarding contract negotiations, contract administration or personnel administration.[19]

The Attorney I title is assigned by the County Attorney to provide legal assistance to the County's Department of Mental Health. Although the incumbent acts as legal advisor to the Department and to the County Legislature's multi-service committee, his recommendations to those bodies are reviewed and approved by the County Attorney. He may also exercise some degree of independent judgment in the cases in which he represents the department. The Director found, and we agree, that he does not make policy and he is not responsible for any negotiations or personnel or contract administration which would otherwise warrant his exclusion from the bargaining unit.

There are three Assistant County Attorneys (P/T) in the County Attorney's office, all of whom the Director found were

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[18]In Binghamton City Sch. Dist., 8 PERB ¶3084, at 3146 (1975), policy was defined as "the development of the particular objectives in the fulfillment of the employer's mission and of the methods, means and extent of achieving such objectives", citing to State of New York, 5 PERB ¶3001, at 3005 (1972).

[19]Act, §201.7(a).

entitled to representation. They are responsible for giving advice in the areas of solid waste, sewer districts and highways. While they assist the County Attorney and the departments responsible for their respective areas of expertise in formulating policy, they have no major role in policy formulation. As noted above, assisting a managerial employee in the formulation of the employer's policy is insufficient to warrant a designation as managerial or confidential under the Act and, therefore, to deprive an employee of representation rights.[20/]

The Deputy County Clerk (First Deputy) may assume the responsibilities of the County Clerk when he is away or unable to perform the duties of his office, although there is no record evidence that the Deputy has ever done so. The Deputy Clerk supervises fifteen employees in the land records area of the County Clerk's office and hears grievances as their immediate supervisor under the contractual grievance procedure. The County Clerk may consult him, as well as the second deputy, the administrative assistant and other department heads about the preparation of the department budget and the hiring of new employees. The County points to these responsibilities as warranting a conclusion that this position should be excluded from the bargaining unit as a managerial or confidential

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[20/]There is a fourth Assistant County Attorney (P/T) position with labor relations responsibilities which is currently vacant. It was not included in RPM's petition and its unit placement is, therefore, not addressed by this decision.

position. The Director determined that, as the position had no policy-making responsibilities and did not act in a confidential capacity, it was eligible for inclusion in RAM's unit. We agree with the Director's rationale. Although a high-level supervisor, the Deputy County Clerk is a resource person who serves in an advisory role to the County Clerk and has only a ministerial role in the administration of the collective bargaining agreement covering the employees he supervises.

The County excepts to the inclusion of the Counsel (Health Department) in RAM's bargaining unit, arguing that it is managerial or confidential. It appears from the record that the Counsel works out of the County Attorney's office but reports to the Commissioner of Health. His job description lists a wide range of responsibilities, including giving legal advice to the Commissioner, the Medical Examiner's Division and the County Legislature's multi-service committee, acting as the Commissioner's representative at certain administrative hearings, reviewing County rules, regulations and guidelines to ensure compliance with State and federal guidelines, reviewing contracts with the County's insurance carriers, and advising Board of Health hearing officers in enforcement actions. However, these duties are not fully explained on the record. Therefore, we are unable to determine whether the Counsel's job duties constitute the kind of direct and powerful influence on policy formulation which would warrant exclusion from the Act's coverage. The case must, therefore, be remanded to the Director

to take further evidence as to the duties actually performed by the Counsel (Health Department).

The County excepts also to the Director's determination that the County Insurance Coordinator, Director of the Veterans Services Agency and Traffic Safety Coordinator should be afforded representation rights within RAM's unit.

The Coordinator of the Traffic Safety Program reports directly to the County Executive and supervises a small office staff. The record reflects that she is involved in policy formulation "to a certain degree" in that she reviews and evaluates current and future County policies with respect to traffic safety, applies for grants and makes recommendations to the County Executive. We find, as did the Director, that this position acts as an office head and the incumbent is a high-level supervisor with a great degree of technical skill, who, nevertheless does not

> participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the government. The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.[21]

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[21] Town of Greece, 27 PERB ¶3024, at 3059 (1994).

The position of Coordinator of Traffic Safety Programs is, therefore, appropriately placed in the RAM unit.

The Insurance Coordinator is involved in the selection of insurance carriers and the settlement of insurance claims for the County, but it does not appear that he is the final decision maker, as the County Executive must approve any resolution of claims and the County Legislature must pass a resolution. He makes recommendations to the County Executive and the County Legislature on insurance matters, but he is only one of several advisors, including the attorneys employed by the County. He has supervisory responsibility over a small staff, including the ability to hire, fire and discipline.[22/]

The Director of the Veterans Services Agency also reports directly to the County Executive and makes recommendations to him about the County's policies toward veterans. Like the Insurance Coordinator, his recommendations are reviewed by the County Executive and may be followed, modified or ignored. He, too, supervises a small staff, apparently with the power to hire, fire and discipline. While he makes some policy recommendations, it is unclear whether he has independent authority to implement those policies without prior approval by the County Executive.

[22/]The County alleges in its exceptions that, since the close of the record in this case, a new incumbent has been hired with additional duties and responsibilities, evidence of which it would present on remand.

There is very little in the record, beyond their job descriptions, upon which to base a determination as to the managerial status of the County Insurance Coordinator and the Director of the Veterans Service Agency. Since we will not deprive employees of representation rights solely on the basis of a job description, the case must be remanded to the Director for evidence concerning the duties of the Insurance Coordinator and the Director of Veterans Services as actually performed.

Neither party has taken any exception to the Director's determination that a new unit of middle management employees represented by RPM is not most appropriate because such a unit already exists and is represented by RAM. RAM has not intervened in the proceeding and it has not filed any objections to the Director's placement of the at-issue employees in its unit. We, therefore, do not find any basis to disturb this aspect of the Director's decision.

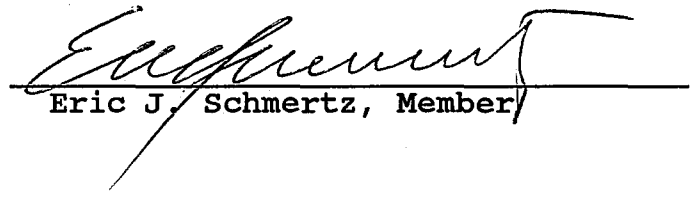
For the reasons set forth above, the Director's decision is affirmed in part and remanded in part, for further processing consistent with our decision herein regarding the Counsel (Health Department), County Insurance Coordinator and the Director of the Veterans Services Agency.

IT IS, THEREFORE, ORDERED that, in addition to the titles which were placed into RAM's unit pursuant to the Director's decision and which were not the subject of the exceptions or cross-exceptions, the following titles be and are added to the unit represented by RAM:

Coordinator of the Traffic Safety Program
Deputy Public Defender
Deputy County Clerk
Attorney II
Attorney I
Assistant County Attorney (P/T)[24/]

DATED: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson


Eric J. Schmertz, Member

[24/]No election is necessary as the addition of these titles to RAM's unit constitutes only a de minimis change which does not affect RAM's majority status. New York Convention Center Operating Corp., 27 PERB ¶3034 (1994).

3A-11/29/05

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BROOME COUNTY SHERIFF'S LAW ENFORCEMENT OFFICERS ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4438

THE COUNTY OF BROOME and BROOME COUNTY SHERIFF,

Employer,

-and-

BROOME COUNTY DEPUTY SHERIFF'S LOCAL 2012, COUNCIL 82, AFSCME, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Broome County Sheriff's Law Enforcement Officers 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: Deputy sheriff; deputy sheriff sergeant; deputy sheriff lieutenant; deputy sheriff detective; and deputy sheriff detective sergeant.

Excluded: All other employees of Sheriff's Department.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Broome County Sheriff's Law Enforcement Officers 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: November 29, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member