



Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Board Decisions - NYS PERB

New York State Public Employment Relations
Board (PERB)

11-4-1997

State of New York Public Employment Relations Board Decisions from November 4, 1997

New York State Public Employment Relations Board

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

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

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

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

State of New York Public Employment Relations Board Decisions from November 4, 1997

Keywords

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

Comments

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**CORRECTION OFFICER BENEVOLENT ASSOCIATION
OF ROCKLAND COUNTY,**

Charging Party,

-and-

CASE NO. U-17366

**COUNTY OF ROCKLAND AND SHERIFF OF
ROCKLAND COUNTY,**

Respondent.

**GOODSTEIN & WEST (NANCY ZECCA of counsel), for Charging
Party**

JOSEPH E. SUAREZ, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us now on a request made by the County of Rockland and the Sheriff of Rockland County (County) to appeal a ruling by an Administrative Law Judge (ALJ) reopening this charge, which had been closed administratively. The Correction Officer Benevolent Association of Rockland County (COBA) alleges in this charge that the County refused to negotiate a decision to double cell inmates and the impact thereof. As a result of the reopening, the case is now pending for decision by the ALJ.

An interlocutory appeal from a ruling made in conjunction with the processing of a case is by permission only under §204.7(h)(2) of our Rules of Procedure. In Town of Shawangunk,^{1/} we denied a respondent's request for permission to

^{1/29} PERB ¶3050 (1996).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**CORRECTION OFFICER BENEVOLENT ASSOCIATION
OF ROCKLAND COUNTY,**

Charging Party,

-and-

CASE NO. U-17366

**COUNTY OF ROCKLAND AND SHERIFF OF
ROCKLAND COUNTY,**

Respondent.

**GOODSTEIN & WEST (NANCY ZECCA of counsel), for Charging
Party**

JOSEPH E. SUAREZ, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us now on a request made by the County of Rockland and the Sheriff of Rockland County (County) to appeal a ruling by an Administrative Law Judge (ALJ) reopening this charge, which had been closed administratively. The Correction Officer Benevolent Association of Rockland County (COBA) alleges in this charge that the County refused to negotiate a decision to double cell inmates and the impact thereof. As a result of the reopening, the case is now pending for decision by the ALJ.

An interlocutory appeal from a ruling made in conjunction with the processing of a case is by permission only under §204.7(h)(2) of our Rules of Procedure. In Town of Shawangunk,^{1/} we denied a respondent's request for permission to

^{1/}29 PERB ¶3050 (1996).

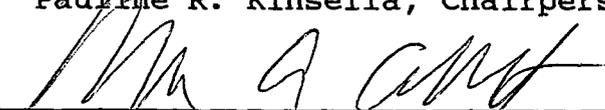
appeal a ruling reopening a closed case. In Town of Shawangunk, a hearing had not yet been held and the reopening of the charge exposed the respondent to the time and expense of a hearing, which the respondent argued could be avoided if its interlocutory appeal were heard and granted. This case, in contrast, has been litigated, with only the ALJ's decision to issue. There is, therefore, even less reason to grant the County permission to appeal than there was in Town of Shawangunk. The extraordinary circumstances necessary to our grant of permission to appeal from an interlocutory ruling not being present, the County's request to appeal is denied, without prejudice to its right to appeal the ruling reopening the charge upon exceptions, if any, to the ALJ's decision. Because the issue of whether the charge was properly reopened is preserved for eventual appeal by the County as it deems necessary and appropriate, its interests are fully protected and permission for interlocutory appeal is not warranted.

For the reasons set forth above, the County's request to appeal from the ALJ's ruling reopening this charge is denied. SO ORDERED.

DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ERIE COUNTY SHERIFF'S POLICE BENEVOLENT
ASSOCIATION,

Charging Party,

-and-

CASE NO. U-18374

COUNTY OF ERIE AND ERIE COUNTY SHERIFF,

Respondent.

W. JAMES SCHWAN, ESQ., for Charging Party

MICHAEL A. CONNORS, ESQ., for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the County of Erie and Erie County Sheriff (County) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Erie County Sheriff's Police Benevolent Association (PBA). As relevant to these exceptions,^{1/} the PBA alleges that the County violated §209-a.1(a) by failing and refusing to remit membership dues and agency shop fees to it.

^{1/}The charge as filed alleged violations of §209-a.1(a), (c), (d) and (e) of the Act. The ALJ dismissed all but the §209-a.1(a) allegation and no exceptions have been taken as to the ALJ's dismissal of the other aspects of the charge.

The PBA was certified to represent a unit of full-time deputy sheriffs-criminal on October 23, 1996.^{2/} Deputy sheriffs-criminal had been in an overall Sheriff's department unit represented by Teamsters Local 264. Pursuant to a representation petition filed by the PBA, by decision dated June 19, 1996, we fragmented the existing Sheriff's department unit and found most appropriate the deputy sheriff-criminal unit^{3/} for which the PBA was certified. After the PBA's certification, the County commenced a judicial proceeding seeking to annul our decision and order creating the separate deputy sheriff-criminal unit. That proceeding is now pending before the Appellate Division, Third Department.

This charge was filed on November 12, 1996. On November 21, 1996, the PBA also commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR) seeking to compel the County to remit to it the membership dues and agency shop fees from the employees in the deputy sheriff-criminal unit. By decision dated December 7, 1996, and order dated March 7, 1997, Supreme Court, Erie County, ordered the County to escrow the dues and fees from the employees in the deputy sheriff-criminal unit which had been deducted since October 23, 1996. The Court also referred all questions concerning the rights and

^{2/}County of Erie and Sheriff of Erie County, 29 PERB ¶13000.31 (1996).

^{3/}County of Erie and Sheriff of Erie County, 29 PERB ¶13031 (1996).

duties of the parties with respect to the at-issue dues and fees to Supreme Court, Albany County, which was then presiding over the County's CPLR Article 78 proceeding seeking to annul our uniting determination. There has been no appeal from Supreme Court's escrow and referral decision and order.

The ALJ found the County in violation of §209-a.1(a) of the Act. The ALJ held that the County's appeal from our uniting decision did not automatically stay our decision and certification order pursuant to CPLR 5519 because CPLR 5519 applies only to appeals from civil judicial judgments or orders,^{4/} not decisions and orders of an administrative agency. Finding no stay,^{5/} the ALJ then held that the PBA was entitled under the Act to the deduction and transmittal of membership dues and agency shop fees from the employees in the deputy sheriff-criminal unit for which it had been certified as the exclusive bargaining agent. The ALJ further held that Supreme Court's order escrowing the dues and fees had expired with her determination declaring PBA's rights to the dues and fees. In that regard, the ALJ concluded that it was the Court's intent that the escrow would expire when the rights of the PBA were declared by anyone with authority to decide the issue, which

^{4/}The CPLR applies by its terms only to "civil judicial proceedings in . . . courts of the state" CPLR 101.

^{5/}A discretionary stay of enforcement of an administrative determination being reviewed can be sought under CPLR 7805, but there is no evidence that a stay pursuant to that provision of the CPLR was sought or obtained.

included either a court pursuant to the referral or PERB pursuant to this charge.

The County argues that the ALJ erred in holding that its appeal of our uniting determination did not stay the PBA's certification and that the ALJ exceeded her authority by determining that the Court's escrow order had expired. The PBA has not responded to the County's exceptions.

Having reviewed the record, we conclude that we should not exercise jurisdiction over this charge and that it should be conditionally dismissed without reaching the merits of PBA's allegations, subject to a motion to reopen in appropriate circumstances.

The PBA is simultaneously seeking to obtain the County's checkoff of dues and agency shop fees in two different forums. The CPLR Article 78 proceeding which the PBA commenced against the County resulted in a judicial decision and order escrowing the at-issue dues and fees before the ALJ decided this case. That proceeding is still pending for determination either at Supreme Court, Albany County, or the Appellate Division, Third Department, pursuant to the transfer of the County's CPLR Article 78 proceeding appealing the Board's uniting decision.

We have previously indicated our willingness to refrain from an exercise of our improper practice jurisdiction in circumstances in which the charging party has initiated a

judicial proceeding involving the same or similar issues.^{6/} The PBA alleges in both the administrative and the judicial contexts that it has the right under the Act to the receipt of dues and fees from the deputy sheriffs-criminal in its unit notwithstanding the County's appeal of our uniting determination. The relief it seeks in both forums is the same. It would not effectuate the policies of the Act to allow the PBA to maintain essentially the same cause of action in two places simultaneously.

Declination of jurisdiction in these circumstances serves several purposes without prejudice to PBA's rights. First, it avoids our having to make an interpretation of the Court's escrow order and any unexpressed "intent" underlying that order. Second, it prevents an improper practice proceeding from becoming an unofficial mechanism to appeal and reverse a prior judicial determination. The process for appeal from judicial judgments and orders is set forth in the CPLR which, so far as practicable, should be the exclusive means by which an aggrieved party may seek review. Third, declination of jurisdiction avoids the possibility of inconsistent results and the untenable positions into which these parties would be cast. If the County complies with the ALJ's order and remits the escrowed funds to the PBA on the theory that the Court's escrow order has "expired", it risks being in contempt of the Court's order. That circumstance is

^{6/}Elwood Union Free Sch. Dist., 6 PERB ¶3039 (1973) (subsequent history omitted).

obviously further complicated if the County prevails in its appeal of our uniting decision such that Teamsters Local 264 remains the bargaining agent for an overall Sheriff's department unit. On the other hand, if the County were to comply with the Court's order, it risks noncompliance with any administrative order issued pursuant to a finding of violation of the Act. Although a dismissal of this charge on the merits would, of course, avoid the several policy issues stated as reasons for declining jurisdiction, a dismissal rendered in the circumstances of this case might be viewed as one not on the merits of the charge, but one reached only to avoid consideration of the policy issues previously mentioned. Any perception that the disposition of a charge has been reached on other than the merits is itself a consequence to be avoided if possible and serves as an additional reason for us to decline to exercise jurisdiction at this time.

Our declination to exercise jurisdiction over this charge is also not prejudicial to the PBA's interests. Disposition of the County's appeal of our uniting determination will likely resolve any issues regarding the PBA's rights under the Act to checkoff of dues and fees from the deputy sheriffs-criminal.^{7/} If and to the extent that litigation does not fully resolve those issues,

^{7/}We are not suggesting by our observation of this likelihood that the County's appeal from our uniting determination would have been grounds for a declination of jurisdiction if the PBA had not commenced and had pending its own judicial proceeding seeking the deduction and transmittal to it of the at-issue dues and fees. Our point is only that there are at least two other proceedings pending which will likely resolve the issues raised by this charge.

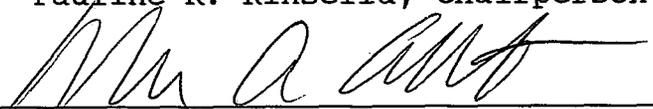
the PBA's Article 78 proceeding against the County, which is still pending, will do so. In the unlikely event that neither the County's nor the PBA's Article 78 proceeding fully resolves the issues concerning the parties' rights and duties regarding the deduction and transmittal of membership dues and agency shop fees, the PBA may move to reopen this charge.

For the reasons set forth above, the charge is dismissed without prejudice to PBA's right to reopen under such circumstances as may be appropriate. Given our disposition, we do not decide the effect, if any, of the County's appeal of our uniting determination upon our certification of the PBA as the exclusive negotiating agent for the unit of deputy sheriffs-criminal. SO ORDERED.

DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

HOLBROOK FIRE DISTRICT ASSOCIATION,

Charging Party,

-and-

CASE NOS. U-17643 &
U-17755

HOLBROOK FIRE DISTRICT,

Respondent.

MICHAEL KRAUTHAMER, ESQ., for Charging Party

**INGERMAN SMITH, L.L.P. (JOHN H. GROSS of counsel), for
Respondent**

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Holbrook Fire District (District) to a decision by an Administrative Law Judge (ALJ) on two charges filed by the Holbrook Fire District Association (Association). The first charge (U-17643) alleges that the District violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it issued Jason Feinberg, a fire dispatcher for the District, a counseling memorandum dated February 27, 1996 because he was then attempting to organize District employees into a union for purposes of collective bargaining with the District. The second charge alleges that the District also violated §209-a.1(a) and (c) of the Act when, on March 26, 1996, for the same improper reason, it

rescheduled Feinberg from the midnight to 8:00 a.m. shift to the 4:00 p.m. to midnight shift.

After a hearing, the ALJ held that the District violated the Act as alleged. The ALJ concluded, largely on credibility resolutions favorable to the Association, that Feinberg was engaged in activities protected by the Act, that District agents, including Deborah Knopfke, the District Manager who took the at-issue personnel actions, knew about Feinberg's protected activities, and that the personnel actions were taken because of those activities.

The District argues in its exceptions that Feinberg was not engaged in any statutorily protected activities on the dates the acts complained of in the charges occurred and that it did not know Feinberg was engaged in any union-related activities until after the personnel actions at issue were taken. In these regards, the District argues that it knew at the relevant times only that Feinberg and another District fire dispatcher, David Beattie, had attended a meeting with the Board of Fire Commissioners and Knopfke on February 15, 1996, which the District argues was not protected activity under the Court of Appeals decision in Rosen v. PERB.^{1/} The District argues also that it took both personnel actions for legitimate business reasons.

^{1/}72 N.Y.2d 42, 21 PERB ¶7014 (1998).

The Association, in response to the District's exceptions argues that the ALJ's findings of fact and his conclusions of law are correct, and that his decision should be affirmed.

Having reviewed the record and having considered the parties' arguments, including those at oral argument, we affirm the ALJ's decision.

In affirming the ALJ's decision, we find it unnecessary to decide whether Feinberg's appearance at the meeting on February 15, 1996 itself constituted activity protected by the Act. The record establishes, without contradiction, that after that meeting, between February 22 and 24, 1996, Feinberg met with approximately fifteen District employees, discussed the benefits of having a union with them, and distributed union authorization cards which were signed by eleven employees. Those activities are clearly protected by the Act. The question becomes, therefore, whether the two personnel actions which the District took against Feinberg thereafter were taken because of those organizing activities or, as the District argues, for entirely legitimate reasons in the ordinary course of its business without knowledge of Feinberg's protected activities.

Feinberg's counseling memorandum was dated February 27, 1996. The ALJ found that Knopfke knew by that date that Feinberg was engaged in efforts to form a union from his statements and actions at the meeting with the Fire Commissioners and Knopfke on February 15 and from the small size of the District in which

Knopfke is the employees' immediate supervisor.^{2/} Even if the February 15 meeting was not itself protected activity, that meeting is properly considered to evidence the District's knowledge regarding Feinberg's subsequent organizing activities.

The basis for the ALJ's findings regarding the District's knowledge about Feinberg's organizing efforts have clear support in the record and are properly affirmed. It was reasonable and consistent with the record for the ALJ to have found that the District had to have known, or at least had to have believed, that Feinberg was pursuing organizing efforts after the February 15 meeting he and Beattie had with the Fire Commissioners and Knopfke. Feinberg and Beattie requested that meeting. Feinberg made it known to the Commissioners and Knopfke that employees wanted issues concerning their terms and conditions of employment addressed. Interest in a written agreement was expressed and copies of collective bargaining agreements other unions had with other fire districts were shown to the District's Commissioners. Feinberg and Beattie left that meeting with their demands completely unmet. They were told that employees were being paid what they deserved given that their jobs were not "career jobs", that maybe the District would consider "in a year" some dental coverage, and that if the employees wanted to seek employment elsewhere, the District would encourage the employees to do so.

^{2/}The District at the relevant dates had approximately 20 employees.

The ALJ specifically discredited Knopfke's assertion that she did not know about any unionization efforts by Feinberg or other employees until a February 26, 1996 letter demanding recognition was received by her sometime in the beginning of March 1996.^{3/} It was wholly reasonable for the ALJ to have concluded upon this record, with the credibility resolutions he made, that Knopfke knew or at least believed that Feinberg was then or would soon be organizing employees to try to obtain formally through a labor organization what had been denied the employees informally at the meeting on February 15.

The shift change which the ALJ found to have violated the Act was one announced in late March 1996, to take effect mid-April 1996. Although the District suggests that this shift change was planned and effectively made on February 23, 1996, when Feinberg was assigned to an 8:00 a.m. to 4:00 p.m. shift, the March shift change, which was effective in April, assigned him to a 4:00 p.m. to midnight shift.^{4/} Nothing in this record would require or warrant a conclusion that Feinberg's assignment to the 4:00 p.m. to midnight shift was a decision made any time before March 1996. By then, not only had Feinberg engaged in the protected organizing activities previously mentioned, but a

^{3/}The record shows conclusively that the letter was actually received before March 1996 because Knopfke denied the Association's demand for recognition by letter dated February 29, 1996. The record does not establish, however, the exact date upon which Knopfke received the demand for recognition.

^{4/}That shift change prevented Feinberg from working one or more part-time jobs he had with other fire districts.

formal demand for the Association's recognition had been made, Feinberg had been identified as one of the Association's organizing team, the recognition demanded had been rejected by Knopfke, and a petition for certification had been filed by the Association.^{5/} Therefore, the late March shift change was made unquestionably with the District's actual knowledge of Feinberg's protected activities.

The only remaining issue is the motive for the District's counseling memorandum and the at-issue shift change. In that regard, the ALJ considered at length the District's articulated business rationale, and he held, upon credibility resolutions, that the District's stated reasons for its actions were pretextual and that the real reason for both personnel actions was Feinberg's protected activities. Those findings, fully explained in the ALJ's decision, are supported by the record, which affords us no basis for reversal.

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

IT IS, THEREFORE, ORDERED that the District:

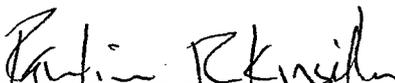
1. Rescind the counseling memorandum dated February 27, 1996 issued to Jason Feinberg and remove that

^{5/}The Association subsequently withdrew its petition and another union filed a petition seeking to represent the same employees, who have voted against representation. That second petition was dismissed pursuant to the employees' vote. Holbrook Fire Dist., 30 PERB ¶3035 (1997).

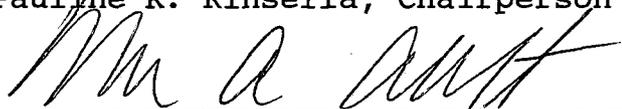
memorandum from his personnel or other employment files.

2. Immediately reassign Jason Feinberg to the midnight to 8:00 a.m. shift and maintain that shift assignment in accordance with District policy and practice.
3. Make Jason Feinberg whole for any wages and benefits lost as a result of his reassignment from the midnight to 8:00 a.m. shift in March 1996 with interest at the currently prevailing maximum legal rate.
4. Sign and post the attached notice at all locations customarily used to post notices of information to District employees.

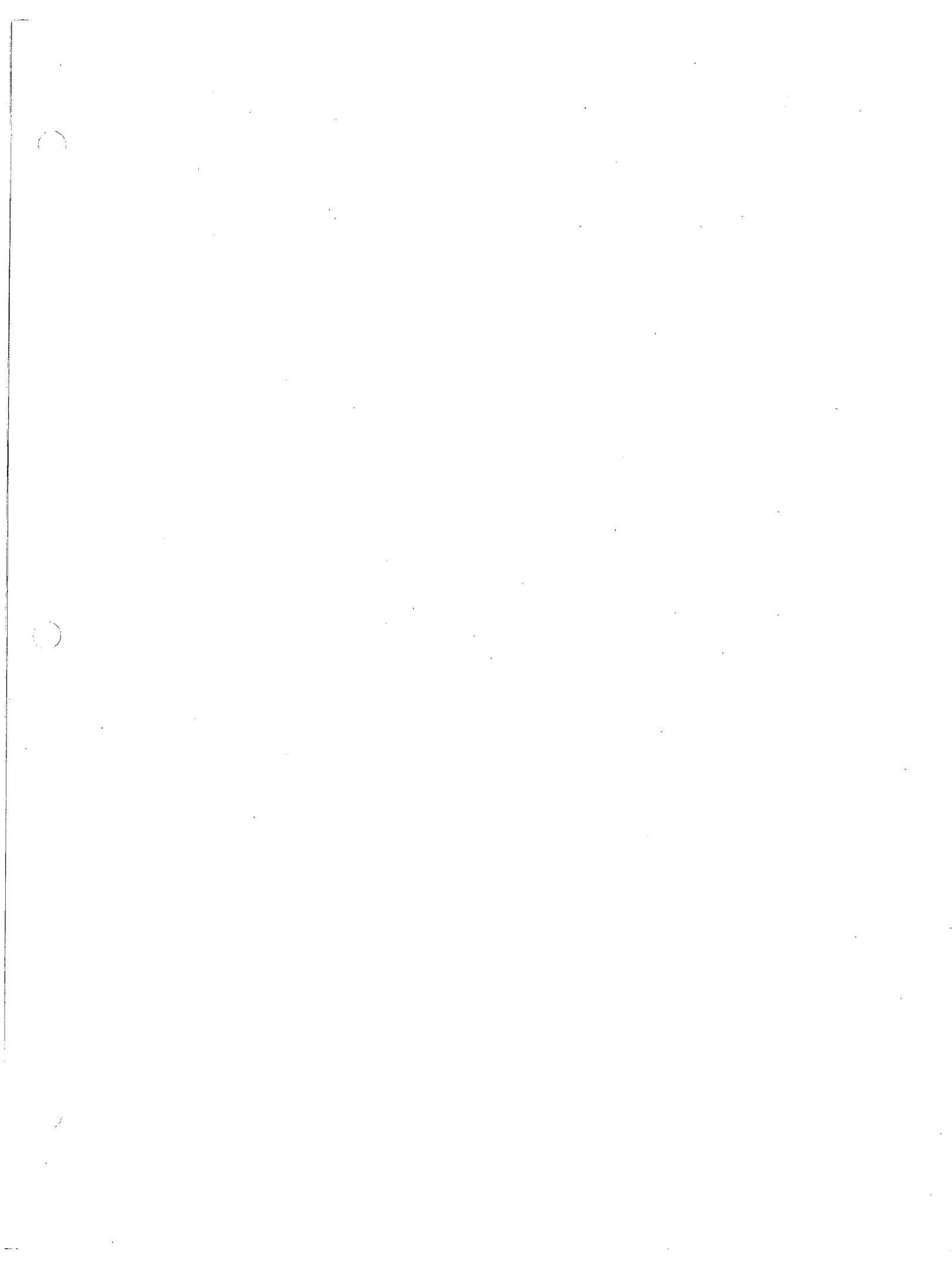
DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member



NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Holbrook Fire District (District) that the District will:

1. Rescind the counseling memorandum dated February 27, 1996 issued to Jason Feinberg and remove that memorandum from his personnel or other employment files.
2. Immediately reassign Jason Feinberg to the midnight to 8:00 a.m. shift and maintain that shift assignment in accordance with District policy and practice.
3. Make Jason Feinberg whole for any wages and benefits lost as a result of his reassignment from the midnight to 8:00 a.m. shift in March 1996 with interest at the currently prevailing maximum legal rate.

Dated

By
(Representative) (Title)

HOLBROOK FIRE DISTRICT
.....

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

KEVIN SIMMONS,

Charging Party,

-and-

CASE NO. U-18899

NEW YORK CITY TRANSIT AUTHORITY and
TRANSPORT WORKERS UNION LOCAL 100,
AFL-CIO,

Respondents.

CURTIS HARGER, ESQ., for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Kevin Simmons to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge that the New York City Transit Authority (Authority) and the Transport Workers Union Local 100, AFL-CIO (TWU) violated, respectively, §209-a.1(a) and §209-a.2(c) of the Public Employees' Fair Employment Act (Act). Simmons alleges that the Authority and the TWU conspired to have him terminated from his employment with the Authority. Simmons was notified that the charge as filed was deficient. He then filed an amendment, but that failed to correct the deficiencies and the charge was thereafter dismissed. Most of the allegations were dismissed as untimely. The remaining allegations were dismissed as failing to set forth facts which would establish a violation of the Act.

Simmons excepts to the Director's decision, arguing that the allegations in the amended charge, even though untimely, established the improper motivation necessary to find that the timely allegations set forth a violation of the Act.

Based upon our review of the record and consideration of the arguments raised, we affirm the decision of the Director.

Simmons was employed as a bus operator until his dismissal was confirmed by a tripartite arbitration board on December 31, 1996. Simmons was charged with submitting fraudulent doctor's notes in support of days he had taken off from work and charged to sick leave. In his charge, Simmons claims that representatives of the Authority and the TWU knew he had not seen a doctor while he was out of work and conspired to force him to obtain fraudulent medical excuses so that they could then terminate him. The arbitration board found that Simmons had been on a Sick Leave Control List^{1/} since November 15, 1995. He was, therefore, required to provide documentation for every sick leave absence while he was on the list. Failure to provide such documentation results in denial of sick leave pay and appropriate disciplinary action.

Simmons was out on sick leave from August 31, 1996 to September 3, 1996. On September 16, 1996, Anthony Crisci, General Superintendent Transportation, and John Mauri, TWU representative, met with Simmons. He was advised by Crisci that

^{1/}Employees who have six or more unsubstantiated sick leave absences within a 12-month period are placed on the list.

because he was on the Sick Leave Control List, he had to submit a doctor's certification for the days he had charged to sick leave or he would receive a ten-day suspension. Simmons accepted the extension of time to obtain a doctor's note to cover his absence. Later that day, Simmons submitted a doctor's certification, dated September 9, 1996, in support of his absences from August 31 to September 4, 1996. Thereafter, Michael McFarland, a Special Investigator for the Authority, investigated Simmons' sick leave application because the date on the doctor's certification and the date the application was submitted were so much later than the days of absence. McFarland interviewed the doctor whose signature appeared on the certification and the doctor denied signing the certification or ever treating Simmons. Crisci was notified of the apparent fraud and he then met with Simmons and Mauri. Crisci urged Simmons to resign and told Simmons that if he did not resign, he would be suspended for thirty days and disciplinary charges seeking his termination would be filed. Mauri also tried to persuade Simmons to resign. Simmons refused, claiming that if Crisci and Mauri had not urged him to get a doctor's certification, so as to avoid the ten-day suspension for his unsubstantiated use of sick leave in August and September 1996, when they knew he had not seen a doctor while he was absent

from work, he would not have obtained the fraudulent doctor's certification.^{2/}

Simmons made the same claim at his arbitration hearing on December 31, 1996, arguing that Crisci and Mauri must have known that he would have to commit fraud to obtain a doctor's certification because they knew that he had not seen a doctor while he was out from August 31 to September 3, 1996. The arbitration board found him guilty of fraud and sustained the disciplinary charge and penalty of dismissal on December 31, 1996. This charge was filed on April 15, 1997.

The Director correctly determined that any allegations relating to events occurring before December 15, 1996, were untimely, having occurred more than four months prior to the filing of the charge.^{3/} With regard to the conduct of the arbitration hearing on December 31, 1996, the charge fails to set forth any violation of the Act by either the Authority or TWU.

As to the Authority, there are no facts alleged in either the original charge or the amended charge to evidence or establish that any adverse employment action was taken against him by the Authority because of his exercise of rights protected by the Act.

^{2/}Apparently Simmons went to a doctor's office and paid \$20 to a receptionist who gave him a signed doctor's certification for the dates he was absent from work.

^{3/}Rules of Procedure, §204.1(a)(1).

As to the TWU, the Director correctly found on Simmons' own allegations that the TWU had represented Simmons throughout the disciplinary proceedings, advising him and presenting his case at the arbitration. That Simmons disagrees with the way in which the case was handled by the TWU representatives^{4/} does not establish that the TWU was arbitrary, discriminatory or acted in bad faith in its conduct of the arbitration hearing.^{5/} Even after Simmons admitted that he had purchased a doctor's certificate, the TWU continued to represent him. There are no facts alleged in the charge or its amendment which would establish, if proven, a violation of the duty of fair representation.

Based on the foregoing, the exceptions are dismissed and the decision of the Director is affirmed.

^{4/}Simmons asserts that the TWU failed to keep out of evidence a version of the disciplinary charge which alleged a course of conduct of obtaining fraudulent medical documentation from the same doctor's office on earlier occasions, but his pleadings show that the TWU did object, albeit unsuccessfully, to the presentation of the document. In any event, the arbitrator's decision relies only on one instance of submission of fraudulent medical documentation for its termination order. Simmons also claims that the TWU could have called Mauri to corroborate his testimony that Crisci told him to get a doctor's certificate. A representative is entitled to some leeway in the presentation of its case. Here, Simmons had admitted to the panel that he had purchased the doctor's certificate and that was the basis upon which the panel sustained the disciplinary charge. Even Simmons concedes that Mauri's testimony would only have established that Crisci told Simmons that if he did not have a doctor's certificate, he would be suspended for ten days without pay.

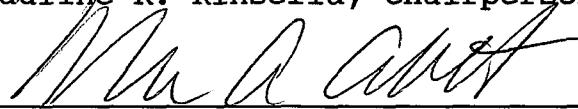
^{5/}Civil Serv. Employees Ass'n v. Diaz, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), aff'd on other grounds, 73 N.Y.2d 796, 21 PERB ¶7017 (1988).

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

DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CITY OF NIAGARA FALLS

**CASE NOS. E-2025
and E-2026**

Upon the Application for Designation of
Persons as Managerial or Confidential.

**ROBERT P. MERINO, JR., CORPORATION COUNSEL (RICHARD J.
ROTELLA of counsel), for Employer**

**E. JOSEPH GIROUX, JR., ESQ., for Intervenor United
Steelworkers of America, Local 15071**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by both the City of Niagara Falls (City) and the United Steelworkers of America, Local 15071 (Steelworkers) to a decision of the Director of Public Employment Practices and Representation (Director). The City excepts to the Director's denial of the City's application to designate James Sorge, Systems Manager, and Dean Spring, City Purchasing Agent, as managerial in accordance with the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act).^{1/} (Case No. E-2025). The Steelworkers except to the

^{1/} Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, ...persons...who may reasonably be designated from time to time as managerial or confidential (Footnote cont'd on next page.)

designation of Anita Zona, Secretary to the Director of Human Resources, and Roberta Mackie, Junior Human Resources Technician, as confidential within the meaning of the Act (Case No. E-2026).

The Director determined that neither Sorge nor Spring was managerial because neither formulated policy and neither could reasonably be expected, based on their job descriptions, to perform labor relations or contract administration duties. However, the Director found that Zona and Mackie performed duties of a confidential nature for the City's Director of Human Resources, David Fabrizio, who is responsible for the City's labor relations and who is the chief negotiator for the City with its eight bargaining units.

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

(Footnote 1 cont'd.)
upon application of the public employer to the appropriate board....Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

Fabrizio testified that both Sorge and Spring attend monthly department head meetings.^{2/} At these meetings, the City Administrator, Fabrizio, Spring and Sorge, as well as the City's other department heads,^{3/} discuss ongoing and future City programs, budget preparation, cost reduction measures and negotiations.

The Director dismissed the application as to Sorge and Spring upon the ground that they did not formulate policy, but acted only as resource persons during these meetings.^{4/} However, Fabrizio also testified that prior to negotiations the City's proposals are discussed and modified, the City's bottom line is reviewed and negotiations strategies are outlined at the department head meetings. Fabrizio could not attribute any specific comments to Sorge or Spring, but he testified that they had been present for and had participated in the discussions about negotiations and the City's proposed privatization of its

^{2/}Sorge heads the City's Management Information Systems (MIS) and supervises a staff of seven. Spring is responsible for the City's central purchasing system, record management, assets inventory and telephone system.

^{3/}The Manager of Environmental Services, Director of Building Inspection, Fire Chief, Police Superintendent, City Engineer, City Controller, Corporation Counsel, Director of the Department of Public Works/Parks and Director of Utilities are the other department heads who attend the monthly meetings. None are in a bargaining unit.

^{4/}The Director also found that although the job descriptions of both Sorge and Spring had recently been amended to include negotiations and grievance responsibilities, the City had offered no evidence that either could be "reasonably required" to perform such duties. The application was dismissed on that ground also. See City of Jamestown, 19 PERB ¶3019 (1986).

sanitation services. While both Sorge and Spring testified that they had not made any negotiations proposals, they both agreed that they had been present at department head meetings where negotiation strategies and proposals had been discussed.

It is clear that both Sorge and Spring are exposed to the City's negotiation proposals in their formative stages, before the proposals have been finalized and presented to the several City unions. They are privy to and may participate in discussions in which the City's negotiations strategy is formulated and its proposals are finalized, including the City's bottom line in negotiations. For this reason alone, both warrant managerial designation.^{5/} Because of our finding, we do not reach the City's other exceptions to the Director's decision concerning these positions.

Both Zona and Mackie work for Fabrizio, who is responsible for all of the City's labor relations, including contract negotiations, contract administration, grievances and disciplinary actions. Zona, as Fabrizio's secretary, types all of his correspondence and memoranda relating to contract negotiations, grievances, disciplinary proceedings and arbitrations, and she has access to all the material in his files. She is a confidential employee.^{6/} Mackie has access to retirement applications, workers' compensation and civil service

^{5/}City of Binghamton, 12 PERB ¶4022, aff'd, 12 PERB ¶3099 (1979).

^{6/}Id.

information of all the City's employees. However, it is her role in substituting for Zona, which she has done for several months while Zona was on leave, that warrants her designation as confidential. Mackie has performed all of Zona's duties in her absence, including typing draft grievance responses and draft negotiation proposals. For this reason, her designation as confidential is warranted.

For the reasons set forth above, the City's exceptions to the Director's decision are granted and the Steelworker's exceptions are denied. The Director's decision in Case No. E-2025 is reversed and we find that Sorge and Spring are, and they are hereby designated, managerial employees within the meaning of the Act. The Director's decision in Case No. E-2026, designating Zona and Mackie as confidential, is affirmed.

DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RENSSELAER COUNTY DEPUTY SHERIFF'S
P.B.A.,

Petitioner,

-and-

CASE NO. C-4663

COUNTY OF RENSSELAER and SHERIFF OF
RENSSELAER COUNTY,

Employer,

-and-

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

Intervenor.

BOHL, DELLAROCCA & DORFMAN, P.C. (JAMES B. TUTTLE of
counsel), for Petitioner

NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of
counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Rensselaer County Deputy Sheriff's P.B.A. (PBA) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing as untimely a petition seeking to represent certain deputy sheriffs of the County of Rensselaer and Sheriff of Rensselaer County (County) who are currently in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

CSEA and the County entered into a five-year contract in November 1994, covering January 1, 1994 through December 31,

1998. Applying our decisions in County of Orange and Sheriff of Orange County^{1/} (hereafter Orange) and Kenmore-Town of Tonawanda Union Free School District^{2/} (hereafter Kenmore-Tonawanda), the Director held that the five-year contract had to be treated as two contracts for purposes of fixing challenge periods, one contract expiring in November 1997 and one expiring in December 1998. On that basis, the Director held that CSEA was open to challenge in May 1996 and again in May 1998, but not in May 1997, when the PBA filed this petition.

The PBA argues in its exceptions that a literal reading of §208.2^{3/} of the Public Employees' Fair Employment Act (Act) and §201.3(e)^{4/} of our Rules of Procedure (Rules) makes CSEA open to challenge continuously on and after May 1, 1997. According to the PBA, Orange and Kenmore-Tonawanda, which it admits endorse the "successive contract methodology relied on by the Director," should be limited to their particular facts and disregarded in

^{1/}27 PERB ¶3068 (1994).

^{2/}12 PERB ¶3055 (1979).

^{3/}In relevant part, §208.2(b) of the Act provides that an "agreement having a term in excess of three years shall be treated as an agreement for a term of three years"

^{4/}This section of the Rules allows petitions to be filed "120 days subsequent to the expiration of a written agreement . . . or, if the agreement does not expire at the end of the employer's fiscal year, then 120 days subsequent to the end of the fiscal year immediately prior to the termination date of such agreement. Thereafter, such a petition may be filed until a new agreement is executed."

determining the challenge periods for petitions affecting CSEA's existing unit.

CSEA argues that the Director's decision is correct on any reading of the Act, Rules or case law and must be affirmed to promote the policies of the Act.

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

As was made clear in both Kenmore-Tonawanda and Orange, the purpose of §208.2 of the Act and our implementing Rules is to ensure that employees have a chance at least once every three years to reassess their choice of bargaining agent, but not necessarily more often. The PBA's argument that the term of a contract in excess of three years' prospective duration must be treated as a nullity for purposes of fixing challenge periods is exactly the same argument rejected in 1979 in Kenmore-Tonawanda. In that case, a union argued that a contract covering 1974-80 had to be deemed to have expired on June 30, 1977, such that a petition filed any time on and after November 1, 1977 was timely under §201.3(e) of our Rules. In rejecting that argument, the Board concluded that the policies of the Act were served by treating the six-year contract as two, three-year agreements producing two window periods for filing representation petitions during the life of that agreement.

The decision in Kenmore-Tonawanda was specifically reaffirmed in Orange in 1994. In Orange, it was again argued that a six-year contract covering 1990-95 had to be deemed to

have expired on December 31, 1992, allowing a petition to be filed 120 days after that deemed expiration date pursuant to §201.3(e) of the Rules. In again rejecting that argument and in reaffirming Kenmore-Tonawanda, the Board concluded that Kenmore-Tonawanda

reasonably balances the Act's purposes to promote stability in labor relations and the employees' right to periodically reassess their selection of a bargaining agent.^{5/}

Nothing in this case warrants any result different from that in Orange and Kenmore-Tonawanda.

Finding this petition untimely does not result, as the PBA claims, in CSEA having unchallenged representation status for a period "well in excess of three years". CSEA's preceding contract expired December 31, 1993. From May 1994 until its new agreement was reached with the County in November 1994, CSEA was continuously open to challenge pursuant to §201.3(e) of the Rules. CSEA was similarly open to challenge in May 1996 and it will be again open to challenge in May 1998 pursuant to §201.3(d) of the Rules. None of these dates affords CSEA an insulated period of more than three years' duration.

The PBA argues that CSEA should be open to challenge in May 1997 because the employees missed prior filing periods in 1994 and 1996 as they had not decided to pursue representation through a different union until after May 1996. The possibility that filing periods will be closed before employees decide to exercise

^{5/}27 PERB ¶13068, at 3157.

statutory rights, however, is always present in the very concept of defined and limited challenge periods. As CSEA argues, representation filing periods cannot and should not be created and defined by the degree or extent to which employees have chosen to try to unionize through other than their incumbent bargaining agent if the policies of the Act favoring labor relations stability are to have any meaning.

Kenmore-Tonawanda and Orange are entirely consistent with a literal reading of both the Act and the Rules, which are silent in relevant respect to the calculation of filing periods once a contract has been deemed to have expired. Deeming a contract of more than three years duration to be expired after three years, such that a petition filed in the eighth month preceding that deemed expiration date is timely, provides no answer to the question of how the balance of the valid contractual term is to be treated for purposes of determining representation filing periods. Indeed, if anything, as the CSEA/County agreement expires with the County's fiscal year, a literal reading of §201.3(e) of our Rules would run the filing period established by that Rule from the actual expiration date of the parties' agreement, not a deemed expiration date.

Finally, we find unpersuasive the PBA's suggestion that this petition should be held timely because these particular employees, and all employees generally, would have difficulty ascertaining the filing periods under Orange and Kenmore-Tonawanda. Those cases are not difficult to understand.

Moreover, as these particular employees' interest in representation by the PBA did not arise until after May 1996, the employees' failure, if any, to learn that May 1997 was not an open period for representation petitions affecting the existing unit is not material. The filing in May 1997 was untimely. That these employees may not have known that the petition was untimely when it was filed does not present a reason to extend to them filing rights which they do not have at the current time.

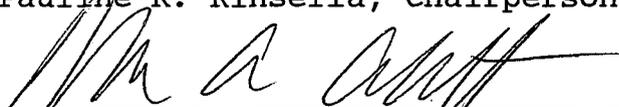
For the reasons set forth above, the PBA exceptions are denied and the Director's decision is affirmed.

IT IS, THEREFORE, ORDERED that the petition must be, and it hereby is, dismissed as untimely filed.

DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

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

Charging Party,

-and-

CASE NO. U-17316

TOWN OF PENFIELD,

Respondent.

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

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Penfield (Town) to a decision of an Administrative Law Judge (ALJ) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). The ALJ found that the Town had violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act)^{1/} when it unilaterally retaliated against Patricia Marini for the exercise of rights protected by the Act.

Specifically, the ALJ found that the Town had improperly issued a counselling memorandum to Marini for failing to advise the Town in a timely fashion of her attendance at a PERB

^{1/}An allegation that the Town also violated §209-a.1(b) of the Act was dismissed by the ALJ as no facts were pleaded or established to support that violation. No exceptions have been taken to that part of the ALJ's decision, and it is, therefore, not before us.

representation hearing, had issued a counselling memorandum to her for receiving a telephone call at the workplace from CSEA when the telephone call, in fact, came from a PERB employee, and had given her an unsatisfactory performance evaluation based largely on the first counselling memorandum. The ALJ determined that all of the Town's actions against Marini were in retaliation for her attendance at a PERB representation hearing during which she assisted CSEA's attorney in the presentation of CSEA's case.

The Town argues in its exceptions that the ALJ was not an impartial and disinterested trier of fact,^{2/} the ALJ incorrectly allowed CSEA to amend the original improper practice charge, the ALJ improperly allowed a witness to testify to the prejudice of the Town in violation of the ALJ's sequestration order, and the ALJ's decision is not supported by the record. CSEA supports the ALJ's decision.

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

In May 1995, CSEA filed a petition seeking to represent a unit of unrepresented white-collar employees of the Town.^{3/} A hearing on the appropriateness of the unit sought by CSEA was

^{2/}Prior to the first day of hearing in this case, the Town filed a motion pursuant to §204.7(h)(1) of PERB's Rules of Procedure seeking that the ALJ recuse herself from further participating in the proceedings. The ALJ denied the motion and the Town appealed her ruling. We denied the Town's motion for an interlocutory appeal. (29 PERB ¶3028 (1996)).

^{3/}Town of Penfield, 29 PERB ¶4007 (1996). The petition was subsequently dismissed after an election where the majority of ballots cast was against representation. (29 PERB ¶3032 (1996)).

scheduled for Monday, October 30, 1995. Marini, an administrative assistant in the Town's Building and Planning Services Department, had apparently been active in CSEA's efforts to organize the Town employees. She had been advised by Miguel Ortiz, CSEA's attorney, sometime during the week prior to the scheduled date for the hearing, that he might need her at the scheduled hearing, to take place on Monday at PERB's Buffalo offices. On Friday, October 27, 1995, Marini received a Federal Express package from Ortiz at the Town offices around 10:00 a.m. Having been counselled previously by her supervisor, James Costello, that no union business was to be conducted during working hours, she put the Federal Express envelope into her bag and did not open it until she arrived home after leaving the Town offices at 4:00 p.m. Marini returned to the Town offices, arriving at 4:50 p.m. She photocopied the nonjudicial subpoena she had found when she opened the Federal Express envelope, then left a copy of the subpoena in the mailbox of Rose Iascone, the Town budget and personnel officer, and another copy in the mailbox of Douglas Fox, the Deputy Director of the Building and Planning Services Department. She did not leave a copy for Costello, the Director of the Building and Planning Services Department, because he was not in that day and she knew that he would be absent on Monday to attend the PERB hearing. Marini saw Costello and Town Supervisor Channing Philbrick that evening at a social event, but she did not tell either of them that she would be absent from work on Monday.

On Monday, October 30, Marini went to the Town offices around 7:15 a.m. to make coffee, pick up some paper work and make sure her supervisors knew she would be absent. While there, she saw both Iascone and Philbrick and told them she would be taking a personal day to go to the PERB hearing, which she had been subpoenaed to attend. Philbrick commented that she should have notified the Town earlier.

Marini assisted Ortiz at the October 30 hearing, although she did not testify until the second day of hearing held on November 13, 1995. Philbrick, Costello and Iascone were present at the October 30 hearing on behalf of the Town.

On October 31, Marini was called into a meeting with Philbrick and Costello. Marini told them that she had received a Federal Express package from Ortiz on October 27, but had not opened it until she arrived home because of the Town's proscription against engaging in personal business during work hours. Although she told them she had returned to the Town offices on October 27 and left copies of the subpoena for Iascone and Fox, Philbrick told her that she had used poor judgment in failing to notify the Town earlier and that she would not be paid for the previous day spent at the hearing.

On November 6, 1995, Marini received a counselling memorandum from Philbrick chastising her for not notifying the Town of her anticipated absence on October 30 during the day on October 27, at the social occasion that evening or by voice mail. She was reminded that absences from work were to be communicated

to supervision on a timely basis and any further disregard of Town practices would not be tolerated and would lead to disciplinary action. A copy of the memorandum was then placed in Marini's personnel file.

The Town's Employer Handbook, Section II-D & E, requires employees to notify supervision as early as possible in the case of absence. But testimony elicited at the hearing showed, and the ALJ so found, that the established Town practice was that employees who called on the day of an absence due to vacation or personal leave were neither interrogated about the reasons for the absence or when they first knew of the need to take time off, nor penalized for failure to notify the Town in advance.

In preparation for the litigation of this charge, the Town solicited statements from other Town employees who claimed Marini knew early in the day on October 27 that she had been subpoenaed to testify on October 30. Robert Schwartz, Real Property Appraiser for the Town, stated, and so testified at the hearing in this matter, that Marini had commented to him at some time during the day on October 27 that she was going to the PERB hearing on October 30. Schwartz told Regina Kennedy, the Assistant Town Assessor, who told Michael Spiegel, the Town Assessor. Marini testified that she spoke to Schwartz as she left the Town offices at 4:00 p.m. on October 27, 1995. In response to his inquiry about where everyone was going on Monday, October 30, Marini told him they were going to the PERB hearing and that she might be going also. Neither Philbrick nor Costello

was aware of these statements on October 31, when they counselled Marini, or on November 6, when Philbrick issued the counselling memorandum to Marini. CSEA then filed the instant charge.

On December 20, 1995, Marini received a call at work, forwarded to her by the switchboard operator. It was from the secretary at PERB's Buffalo offices, informing her that the conference in this improper practice case had been adjourned due to inclement weather. The operator asked Iascone, who was standing nearby when the call came through, who "CSEA" was and told her the call was for Marini. Iascone then informed Philbrick that Marini had received a call at work from CSEA. On December 22, 1995, Marini received a counselling memorandum from Costello referencing the telephone call, reminding her that she could not conduct personal business during work hours and advising her that any further violation of Town policy would result in disciplinary action.^{4/} Marini testified that she told Costello at the time he handed her the memorandum that the call was from PERB, not from CSEA. Deborah Rautenstrauch, the secretary in PERB's Buffalo office, testified that she placed a call to Marini on the morning of December 20, identified herself to the operator as being from PERB and referenced the call as involving the "Town of Penfield and CSEA".^{5/} Neither Costello

^{4/}Philbrick, after he was told by Iascone about the telephone call, directed Costello to issue a counselling memorandum to Marini. Philbrick co-authored the memorandum.

^{5/}Rautenstrauch was subpoenaed by CSEA to testify, with no objection from the Town.

nor Philbrick made any inquiry of Marini before Costello issued the memorandum.^{6/} The memorandum was placed in Marini's personnel file. CSEA thereafter amended the charge to include this incident. The record reflects that one other employee had, in the past, received a counselling memorandum for utilizing the Town telephones to receive personal calls. However, in that case, the memorandum was only issued after three or four warnings about the use of the Town's telephones had been given to the employee. Marini had not received any warnings about telephone usage until December 22, 1995, when she received the counselling memorandum.

On December 22, 1995, Marini received her annual evaluation for 1994-1995. Costello prepared the evaluation, then made some changes desired by Philbrick during his review of the evaluation. Marini was rated as "needs improvement" by Costello and Philbrick, who testified that the negative comments on the evaluation referring to her use of poor judgment were related to her request for time off to attend the PERB hearing on October 30, 1995. Her previous evaluations had been "satisfactory" or "above average". As a result of her "needs improvement" rating, Marini only received a cost of living increase. To receive a merit increase, an employee must receive at least a

^{6/}Costello testified that Bernard Winterman, the Town's labor relations representative, told him at some point that the call might have been from PERB and not CSEA.

"satisfactory" rating. CSEA timely amended the original charge to include this evaluation.

The Town first argues that the ALJ was not impartial or unbiased and should have recused herself from hearing this case. We earlier decided that all of these allegations of the Town,^{7/} which included the ALJ's suggestion as to a basis for settlement of the original charge; her raising an issue that had not at the time been raised by CSEA; her adjournment of the February 27 hearing date to a date less than two weeks away when the Town had requested at least a two-week adjournment, coupled with her statement that no further adjournments would be granted; and her later adjournment of a scheduled hearing date due to inclement weather, did "not set forth any basis upon which it must be concluded either that a fair decision cannot be reached or that there is any per se basis presented for recusal."^{8/} We indicated, however, that our denial of the interlocutory appeal did not in any way prejudice the Town's right to file exceptions to the ALJ's decision pursuant to §204.10 of the Rules.

^{7/}The Town argues for the first time in its exceptions that the ALJ should have disclosed on the record that Rautenstrauch is the secretary in PERB's Buffalo office, where the ALJ is assigned. As the Town makes this objection for the first time in its exceptions, we need not reach it. We do note, however, that Rautenstrauch was identified on the record as the secretary in the Buffalo office of PERB and that the representatives of the Town have had contact with both the ALJ and Rautenstrauch on many occasions in PERB's Buffalo office. It is, therefore, reasonable to conclude that further affirmative disclosure of Rautenstrauch's status was unnecessary as redundant of information already known.

^{8/}29 PERB ¶3028, at 3063-64 (1996).

The record provides no basis to sustain any of the Town's exceptions related to the ALJ's processing of this case or her conduct of the hearing. The Town's representatives at the pre-hearing conference, the hearing and on the exceptions are all experienced labor relations professionals who have appeared before PERB on numerous occasions. They know, or should know, that one of the roles of the ALJ at or before the prehearing conference is to assist the parties in attempting to settle the case and to make suggestions as to possible settlements, without expressing an opinion about or deciding the merits of the case. Here, the ALJ merely related to the Town's representative the terms that might resolve the improper practice charge. When the Town rejected the ALJ's suggestion, the matter proceeded to hearing. In addition, our procedures for the scheduling of hearings require that the party requesting the adjournment ascertain the position of the other representatives and obtain possible dates for rescheduling. The Town's representative did neither when he requested a two-week adjournment of the originally scheduled hearing date. The ALJ, nonetheless, granted the Town's request, but had to set the adjourned date for the hearing based on her calendar and properly advised the Town that no further adjournments would be granted, given that the Town did not follow proper procedures. That the ALJ later, due to a snow storm, adjourned the hearing date evidences no impropriety on her part.

The Town next argues that the ALJ improperly allowed amendments to the original charge. This, too, is an unpersuasive argument, as is the Town's allegation that the ALJ improperly allowed Marini's rebuttal testimony in violation of her sequestration order. Both of CSEA's amendments were timely made and were in accordance with §204.1(d) of our Rules. That the ALJ pointed out that she had become aware of the Town's counselling memorandum relating to the alleged telephone call from CSEA to Marini at work and advised the parties that it would be an issue covered at the hearing, does not establish bias on the part of the ALJ.^{2/}

Finally, CSEA requested at the outset of the hearing that all witnesses be sequestered. Each attorney was permitted to have one representative stay in the hearing room to provide information and assistance. Marini was the first witness to

^{2/}This exception of the Town does raise some concerns, particularly as to the unknown and unexplained source of the ALJ's information about this allegation. However, the manner in which the ALJ received this information and her acceptance of this allegation as an amendment to the charge before CSEA had properly amended the charge and before the Town was given an opportunity to state its position, does not establish reversible error by the ALJ. While the ALJ should have awaited a timely amendment to the charge by CSEA before notifying the parties that this allegation would be part of the hearing in this case, there was no prejudice to the Town because it was allowed to amend its answer and to fully litigate this allegation at the hearing. Our finding in this regard notwithstanding, the undisputed record evidence fully supports a conclusion that the Town's conduct toward Marini was improperly motivated. It is highly unlikely, given the nature of the original charge, that a second counselling memo, relating to Marini's involvement in the charge, would not have become part of the charge by amendment regardless of the ALJ's comment.

testify and, as the CSEA representative chosen by Ortiz, she stayed throughout the subsequent questioning. At the close of the Town's case, Marini was called as a rebuttal witness by CSEA. The Town objects because Marini was allowed to hear all the testimony, assertedly in violation of the sequestration order. Marini, however, was exempted from the sequestration order, as was one of the Town's representatives. Therefore, the sequestration order was not violated by Marini's rebuttal testimony. Further, it is consistent with our practice that each party representative may have a resource person present, even if that individual may be called upon to testify thereafter. The Town's exceptions to the ALJ's conduct and processing of this charge are, therefore, denied.

Turning to the Town's substantive exceptions that the ALJ's decision is not supported by the evidence, we find that these exceptions must, likewise, be denied.

The ALJ found that all of the Town's actions against Marini stemmed from her appearance at the representation hearing. Such an appearance is protected by the Act and an employee can be subjected to discipline for appearing at a PERB proceeding pursuant to subpoena only if the employer acts in furtherance of legitimate management concerns.^{10/} The record shows that Marini

^{10/}Deer Park Union Free Sch. Dist., 22 PERB ¶3014 (1989), conf'd, Deer Park Union Free Sch. Dist. v. PERB, 167 A.D.2d 398, 23 PERB ¶7021 (2d Dep't 1990).

advised the Town that she would be appearing at the PERB representation hearing pursuant to subpoena at least by the morning of the day she would be absent. The record establishes that the Town subjected her to different treatment than other employees who have requested personal or vacation time by questioning her about the time frame in which her request was made, by counselling her for failing to notify it earlier and by denying her use of personal leave credit. There is no legitimate business concern articulated by the Town which justifies its investigation of Marini, the issuance of a counselling memorandum and the refusal to grant her the time off with pay. Following as it does her appearance at the PERB hearing and her assistance to CSEA at the hearing, the ALJ correctly determined that the Town treated Marini disparately because she was actively aiding the employees' representation efforts.

The counselling memorandum issued to Marini for receiving the alleged telephone call from CSEA also represents a divergence from the Town's practice. The only counselling memorandum the Town had previously issued for utilizing Town telephones for personal business followed three or four warnings to an employee. Here, the Town issued a counselling memorandum to Marini after only one instance of telephone use, a much more drastic action than it had previously taken with any other employee. Moreover, the Town did not investigate the circumstances of the call even after it suspected the call was not from CSEA, and it did not

retract the memorandum from Marini's file even after it knew the telephone call had not been made by CSEA. We, therefore, find that the Town did not act out of any legitimate managerial interest but out of anti-union animus when it once again treated Marini disparately.

Finally, both Costello and Philbrick testified that Marini's negative evaluation was not based on the quality or quantity of her work but primarily on the circumstances which were set forth in the November 6, 1995 counselling memorandum. As we have found that the issuance of that memorandum was improper, the Town's reliance on it for Marini's rating as "needs improvement" and her loss of a merit increase for 1994-1995 are likewise improper. Without that negative aspect of the evaluation, Marini would have received at least a satisfactory evaluation, which would have entitled her to the merit increase.

Marini exercised protected rights by supporting CSEA, the Town was aware of her involvement with CSEA, specifically her attendance at the October 30, 1995 hearing, and the Town's actions against Marini were taken due to the exercise of rights protected by the Act. We find, therefore, that the Town has violated §209-a.1(a) and (c) of the Act.

The exceptions of the Town are, therefore, denied and the ALJ's decision is affirmed.

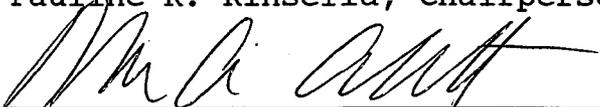
IT IS, THEREFORE, ORDERED, that the Town:

1. Rescind its November 6 and December 21, 1995 counselling memoranda to Patricia Marini and remove copies of those memoranda from her file.
2. Rescind the December 22, 1995 evaluation of Patricia Marini and remove copies of it from her file.
3. Make Patricia Marini whole for lost wages and benefits, if any, with interest at the currently prevailing maximum legal rate, resulting from the Town's denial of pay for October 30, 1995, and for any salary lost as a result of the December 22, 1995 annual evaluation.
4. Sign and post the attached notice at all locations normally used to communicate with Town employees.

DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the Town of Penfield will:

1. Rescind its November 6 and December 21, 1995 counselling memoranda to Patricia Marini and remove copies of those memoranda from her file.
2. Rescind the December 22, 1995 evaluation of Patricia Marini and remove copies of it from her file.
3. Make Patricia Marini whole for lost wages and benefits, if any, with interest at the currently prevailing maximum legal rate, resulting from the Town's denial of pay for October 30, 1995, and for any salary lost as a result of the December 22, 1995 annual evaluation.

Dated

By
(Representative) (Title)

TOWN OF PENFIELD
.....

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

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,
WESTCHESTER COUNTY LOCAL 860,
WESTCHESTER COUNTY UNIT 9200,**

Charging Party,

-and-

CASE NOS. U-17309
& U-17367

COUNTY OF WESTCHESTER,

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Charging Party**

MICHAEL WITTENBERG, for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester County Local 860, Westchester County Unit 9200 (CSEA) to two decisions of the Director of Public Employment Practices and Representation (Director). The Director conditionally dismissed CSEA's charge in U-17309 that the County of Westchester (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally contracting with a private contractor to provide food services at the Westchester County Correctional Facility. The Director also conditionally dismissed CSEA's charge in U-17367 that the County violated §209-a.1(a) and (d) of the Act by unilaterally subcontracting the operation of the Woodfield Cottage Secure Detention Program (Woodfield

Cottage) to a private company. CSEA alleges in both charges that the work had been exclusively performed by employees in its unit. The County raised several affirmative defenses to the charges, including jurisdiction and waiver.

The Director determined that PERB had jurisdiction over the charges under the Board's decision in City of Saratoga Springs^{1/} (hereafter Saratoga). He conditionally dismissed the charges, however, because a clause in the County-CSEA collective bargaining agreement was a reasonably arguable source of right to CSEA with respect to the actions at issue under the charges.^{2/} The decisions deferring consideration of the merits of the charges were made subject to a motion to reopen should the County object to arbitrability of the grievance or should the arbitrator's award not satisfy the criteria set forth in New York City Transit Authority (Bordansky).^{3/}

CSEA excepts to the Director's decisions, arguing that PERB has jurisdiction and that the contractual language relied upon by the Director does not evidence a waiver by CSEA of its right to negotiate the contracting out of the Correctional Facility's food service and the operation of Woodfield Cottage. CSEA further

^{1/}18 PERB ¶3009 (1985).

^{2/}The Director dismissed the allegation that the County had violated §209-a.1(a) of the Act raised by CSEA in Case No. U-17367 as being derivative of the alleged §209-a.1(d) violation. No exceptions have been filed as to that part of the Director's decision and it is, accordingly, not before us.

^{3/}4 PERB ¶3031 (1971).

argues that a merits deferral is inappropriate because Article 16, Section 3 of the collective bargaining agreement is not a reasonably arguable source of right to it with respect to the subcontracting of exclusive unit work. The County has not filed a response to the exceptions.

Based upon our review of the record and consideration of CSEA's arguments, we affirm the decisions of the Director.

The parties' 1993-1995 collective bargaining agreement, Article 16, Section 3, provides:

Rates of pay, hours of work, and conditions of employment in effect prior to the Agreement and not covered by the agreement shall not be reduced without good cause during the term of the Agreement. "Good Cause" may be determined through the grievance procedure herein, including step 4.^{4/}

This clause has been in the parties' collective bargaining agreement since the early 1970's. The Director determined that the charges were within PERB's jurisdiction based on the Board's decision in Saratoga, wherein it was held that a general past practice clause in a current contract does not divest the agency of jurisdiction. The Board held also in Saratoga, however, that the charge was appropriately deferred on the merits. Pursuant to our decision in Saratoga and our more recent decision in Town of Carmel^{5/}, the Director decided that the charges were appropriately deferred on the merits to the parties' contractual

^{4/}Step 4 is the final stage, which results in binding arbitration.

^{5/}29 PERB ¶13073 (1996).

grievance procedure because a disposition of the charges required an interpretation of the parties' collective bargaining agreement and a grievance might be dispositive of the underlying disputes.

Here, CSEA alleges that it has exclusively performed food service work at the County Correctional Facility and has exclusively performed the in issue work at Woodfield Cottage. The language of Article 16, Section 3 covers conditions of employment not otherwise specifically covered by the contract. The transfer of exclusive bargaining unit work is, at least arguably, a condition of employment. The definition of unit work is not covered elsewhere in the agreement and the alleged transfer of the work claimed by CSEA occurred during the term of the contract. As we held in Town of Carmel:

When ... disposition of a refusal to bargain charge necessitates an interpretation of an agreement which is arguably a source of right to the charging party, and an award rendered under a binding arbitration procedure is potentially dispositive of the issues underlying the charge, we have been persuaded that the policies of the Act favoring an accommodation of the parties' dispute resolution procedures are again advanced by a conditional dismissal of the charge, even when the charging party union has elected not to invoke the grievance arbitration provisions of its contract.^{6/}

Resolution of these charges necessarily requires an interpretation of Article 16, Section 3 of the parties' collective bargaining agreement, which is a reasonably arguable source of right to CSEA potentially dispositive of the underlying disputes. Therefore, the charges were appropriately deferred by

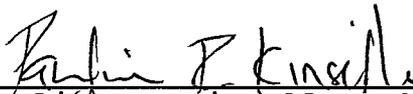
^{6/29} PERB ¶3073, at 3175 (1996).

the Director to the parties' contractual grievance procedure ending in binding arbitration without further consideration of any arguments regarding the meaning of the parties' agreement.^{1/}

For the reasons set forth above, we dismiss CSEA's exceptions and affirm the decisions of the Director.

IT IS, THEREFORE, ORDERED THAT the charges are conditionally dismissed, subject to a motion to reopen in accordance with our merits deferral policy.

DATED: November 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member

^{1/}State of New York (Dep't of Taxation and Finance), 30 PERB ¶3054 (1997).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1126,

Petitioner,

-and-

CASE NO. C-4694

TOWN OF WHITESTOWN,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Communications Workers of America, Local 1126 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: Working Foreman, Heavy Equipment Operator, Motor Equipment Operator and Laborer in the Highway Department.

Excluded: Seasonal and all other employees.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1126,

Petitioner,

-and-

CASE NO. C-4694

TOWN OF WHITESTOWN,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Communications Workers of America, Local 1126 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: Working Foreman, Heavy Equipment Operator, Motor Equipment Operator and Laborer in the Highway Department.

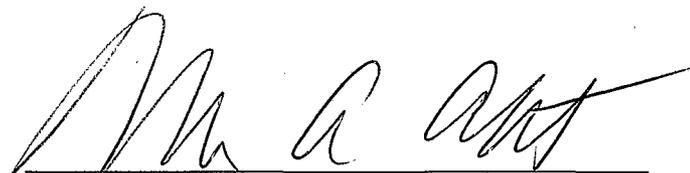
Excluded: Seasonal and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Communications Workers of America, Local 1126. 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 4, 1997
Albany, New York



Pauline R. Kinsella, Chairperson



Marc A. Abbott, Member