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10-27-1998

## State of New York Public Employment Relations Board Decisions from October 27, 1998

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from October 27, 1998

### Keywords

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

### Comments

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

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In the Matter of

**COUNCIL 82, AFSCME, AFL-CIO,**

Charging Party,

- and -

**CASE NO. U-18683**

**STATE OF NEW YORK (DEPARTMENT OF  
CORRECTIONAL SERVICES - DOWNSTATE  
CORRECTIONAL FACILITY),**

Respondent.

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**HITE & CASEY, P.C. (CHRISTOPHER H. GARDNER of counsel), for  
Charging Party**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the State of New York (Department of Correctional Services - Downstate Correctional Facility) (State) to a decision of an Administrative Law Judge (ALJ) on a charge filed by Council 82, AFSCME, AFL-CIO (Council 82), alleging that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the procedure for requesting sick leave for scheduled medical appointments. Finding that the State had changed the requirements for using sick leave for scheduled visits with a health care provider, a

mandatory subject of negotiation, the ALJ determined that the State had violated the Act as alleged.

The State excepts to the ALJ's decision, arguing that the ALJ erred in finding that requests for sick leave use for scheduled medical visits is a mandatory subject of negotiation, that §21.3 of the New York State Department of Civil Service Attendance and Leave Manual (Manual)<sup>1</sup> authorizes it to require proof to justify the use of sick leave credits, and that its actions were necessary to curb sick leave abuse, a management prerogative. Council 82 has not responded to the State's exceptions.

Based upon our review of the record and our consideration of the State's exceptions, we affirm the decision of the ALJ.

From April 1987 to January 9, 1997, unit employees at the State's Downstate Correctional Facility who used more than four hours of sick leave for a scheduled

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<sup>1</sup>That section, in relevant part, provides:

Before absence for personal illness may be charged against accumulated sick leave credits, the appointing authority may require such proof of illness as may be satisfactory to it, or may require the employee to be examined, at the expense of the department or agency, by a physician designated by the appointing authority. In the event of failure to submit proof of illness upon request, or in the event that, upon such proof as is submitted or upon the report of medical examination, the appointing authority finds that there is not satisfactory evidence of illness sufficient to justify the employee's absence from the performance of his duties, such absence may be considered as unauthorized leave and shall not be charged against accumulated sick leave credits. Abuse of sick leave privileges shall be cause for disciplinary action.

medical appointment were required to provide documentation upon their return to work.<sup>2</sup> If the employee was on the Time and Attendance list,<sup>3</sup> he or she needed to provide documentation regardless of the length of the medical appointment.

Effective January 9, 1997, the State required that all requests by unit employees at its Downstate Correctional Facility for time off to attend a scheduled appointment with a health care provider must be accompanied by the name and office phone number of the health care provider and the time of the appointment or an appointment card that contains the same information. Council 82 alleges that the change in the type of documentation required and the circumstances under which it is required are changes in a mandatory subject of negotiation.

It is well settled that sick leave is a mandatory subject of negotiation.<sup>4</sup> It is likewise well established that the procedures and policies for granting or terminating sick leave are mandatory.<sup>5</sup> The new requirements for documentation instituted by the State affect both sick leave and sick leave procedures and are, therefore, mandatory subjects of negotiation. The State was, therefore, required to negotiate the new sick leave procedures with Council 82 before they were implemented, unless there is merit to any of its other defenses.

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<sup>2</sup>The documentation required was a dated and signed note on the doctor's stationery, stating the nature of the visit and its duration.

<sup>3</sup>This list is for employees whose time and attendance is being monitored by the State.

<sup>4</sup>*Village of Spring Valley Policemen's Benevolent Ass'n*, 14 PERB ¶3010 (1981).

<sup>5</sup>*Triborough Bridge and Tunnel Auth.*, 27 PERB ¶3076 (1994).

The State argues that its January 9, 1997 memorandum was issued pursuant to the authorization in §21.3(d) of the Manual, which allows the State to require proof of illness satisfactory to it prior to allowing an employee to charge an absence for an appointment with a health care provider. Although §21.3(d) of the Manual gives the State the authority to require such proof as it may deem sufficient to justify use of sick leave, it does not privilege the State to act unilaterally with respect to changes in mandatory subjects of negotiation.<sup>6</sup> The State has discretion to determine what constitutes satisfactory proof of a scheduled appointment before such absences may be charged to accumulated sick leave. It is the existence of this discretion which enables the State to bargain. Were there no discretion, there would be nothing to negotiate. The only question we need decide,<sup>7</sup> therefore, becomes whether the State's exercise of that discretion must be bargained or whether §21.3(d) of the Manual plainly and clearly exempts the State from its statutory duty to bargain. There is no explicit language exempting the State from its bargaining obligation and nothing inescapably implicit in the Manual which establishes a plain and clear intent to exempt the State from the strong public policy favoring the negotiation of all terms and conditions of

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<sup>6</sup>*Newburgh Enlarged City Sch. Dist.*, 21 PERB ¶13036 (1988), *conf'd*, 22 PERB ¶17009 (Alb. County Sup. Ct. 1989), *motion to dismiss appeal granted by default*, 25 PERB ¶17008 (3d Dep't 1992).

<sup>7</sup>Given our disposition of this question, we have no occasion to consider whether provisions of the Manual or any regulatory provisions pertaining thereto could serve to exempt the State from its duties under the Act. See *Town of Cortlandt*, 30 PERB ¶13031 (1997).

employment.<sup>8</sup> Therefore, we hold that the State is not privileged pursuant to the Manual to change the sick leave use procedures without negotiations with Council 82.<sup>9</sup>

The State argues lastly that it has the managerial right to control sick leave abuse and that the procedures it implements in that regard are not mandatory subjects of bargaining. In *County of Nassau*,<sup>10</sup> an employer's right to control sick leave abuse was acknowledged. However, that same decision emphasizes that it is only demands or practices which can cause an employer to relinquish all control over sick leave abuse which are nonmandatory. Moreover, it was also noted in *County of Nassau*, as applicable here, that where an employer acts to discourage or regulate sick leave abuse by implementing or unilaterally changing a mandatory subject of negotiation, a

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<sup>8</sup>*City of Schenectady v. PERB*, 85 N.Y.2d 480, 28 PERB ¶7005 (1995).

<sup>9</sup>4 NYCRR §26.3, provides:

[T]he provision of these attendance Rules, insofar as they apply to employees in the negotiating units established pursuant to Article 14 of the Civil Service Law shall be continued; provided, however, that during periods of time when there is in effect an agreement between the State and an employee organization reached pursuant to the provisions of said Article 14, the provisions of such agreement and the provisions of such rules shall both be applicable. In the event the provisions of the agreement are different from the provisions of the attendance rules, the provisions of the agreement shall be controlling.

The State argues that because there is no provision in the parties' collective bargaining agreement relating to medical documentation, the provisions of §26.3 apply and that it is free to require whatever proof it deems is sufficient for the use of sick leave for medical appointments. We reject this argument for the reasons stated in our discussion of §21.3(d).

<sup>10</sup>18 PERB ¶3034 (1985).

violation of the Act occurs. In *County of Nassau*, in an attempt to address sick leave abuse, the County sought to regulate work schedules, a mandatory subject of negotiation. But for a contractual waiver of the right to negotiate the change in schedules, the County would have violated its duty to negotiate. Here, the State has changed its sick leave use procedure, also a mandatory subject of negotiation, without the benefit of any waiver defense. Accordingly, we hold that the State violated §209-a.1(d) of the Act when it changed the documentation requirements for the use of sick leave for scheduled appointments with a health care provider.

Based on the foregoing, we deny the State's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the State:

1. Forthwith rescind, as to Council 82 unit employees, its January 8, 1997 memorandum relating to time off for scheduled appointments with health care providers.
2. Forthwith restore the practice as it existed prior to January 8, 1997 with respect to time off for scheduled appointments with health care providers for Council 82 unit employees.
3. Forthwith make all unit employees whole for any wages and benefits lost as a result of the January 8, 1997 memorandum.

4. Sign and post the attached notice at all locations within the Downstate Correctional Facility normally used to post notices of information to unit employees.

DATED: October 27, 1998  
Albany, New York



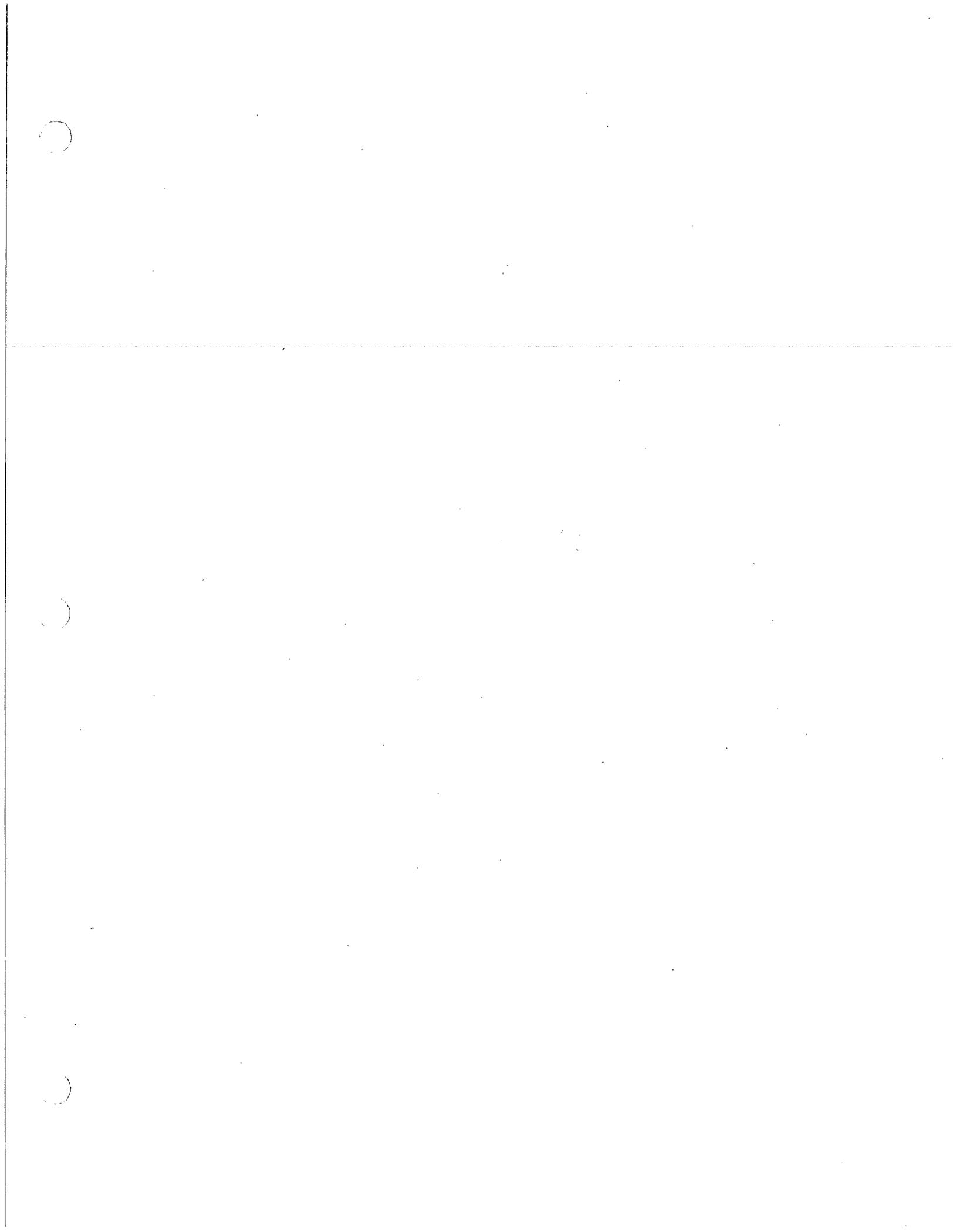
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Michael R. Cuevas, Chairman



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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 State of New York (Department of Correctional Services - Downstate Correctional Facility) (State) in the unit represented by Council 82, AFSCME, AFL-CIO (Council 82) that the State will:

1. Forthwith rescind, as to Council 82 unit employees, its January 8, 1997 memorandum relating to time off for scheduled appointments with health care providers.
2. Forthwith restore the practice as it existed prior to January 8, 1997 with respect to time off for scheduled appointments with health care providers for Council 82 unit employees.
3. Forthwith make all unit employees whole for any wages and benefits lost as a result of the January 8, 1997 memorandum.

Dated .....

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

State of New York (Department of Correctional  
Services - Downstate Correctional Facility)

.....

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

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

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In the Matter of

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

Charging Party,

- and -

**CASE NO. U-17366**

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

Respondent.

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**GOODSTEIN AND WEST (NANCY ZECCA of counsel) and SUSSMAN,  
BERGSTEIN, WOTORSON & WHATELEY (STEPHEN BERGSTEIN of  
counsel), for Charging Party**

**JOSEPH E. SUAREZ, ESQ., for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the County of Rockland and the Rockland County Sheriff (County) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Correction Officer Benevolent Association of Rockland County (Association). The ALJ read the Association's charge, as amended, to allege that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it failed to negotiate the impact of a decision to double-cell inmates at the County's jail and unilaterally increased the workload of unit employees. After a hearing, the ALJ held that the County violated the Act on both impact and unilateral change allegations.

The County argues the following in its exceptions: that the subject of the charge is staffing, a nonmandatory subject of negotiation; that workload increases and safety

hazards were either nonexistent, not proven, or *de minimus*; that the ALJ's decision was the product of a pervasive bias against the County; that the decision contains certain mistakes and misrepresentations of fact; and that the County's timeliness defense was not given adequate attention. The Association has not filed any exceptions or a response to the County's exceptions.

Having reviewed the record and considered the exceptions, we affirm the ALJ's decision as to the violation premised on the County's failure to negotiate the impact of its decision to double-cell inmates, but reverse as to the violation found upon a unilateral change in workload. We reverse the latter aspect of the ALJ's decision because the charge did not include any allegation of violation grounded upon a unilateral change in workload. Therefore, we do not address the merits of the ALJ's holding as to the negotiability of decisions about employee workload.

We have held repeatedly and recently<sup>1</sup> that we will not find a violation of the Act upon an allegation which has not been pleaded, even if that allegation has been litigated. No matter how broadly this charge is read in favor of the Association, it is not reasonably susceptible to a conclusion that the Association based any claim of impropriety on a unilateral change in employee workload. The charge as filed, amended, explained during the hearing and briefed thereafter is consistent with, at most, only two allegations of impropriety: first, an allegation that the County failed or refused to negotiate upon demand the safety and workload effects of its decision to double-cell inmates; second, an allegation that the decision to double-cell was itself

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<sup>1</sup>*New York City Transit Auth.*, 31 PERB ¶3024 (1998).

mandatorily negotiable because of the effects that decision had upon unit employees' safety and workload.

During his opening statement, the Association's counsel stated repeatedly that the charge, as amended, concerned only the effects of the double-celling on the unit employees' safety and workload. After summarizing those safety and workload concerns, the Association's counsel stated: "We're addressing the effects [double-celling] has on officers." After the County's attorney gave his opening statement, and in response to the ALJ's request for clarification of the charge, the Association's counsel stated, "[O]ur position is that management had an obligation to negotiate the impact double celling would have." In response to a specific question from the ALJ as to whether the charge was limited to a failure to negotiate the impact of the decision to double-cell inmates, the Association's counsel stated: "This charge concerns the failure to negotiate the impact of the decision to double cell." Thereafter, the Association's counsel indicated to the ALJ that the decision to double-cell was perhaps itself subject to a duty to negotiate prior to the implementation of that decision "as it had an effect on job conditions."

The Association's statements at the hearing as to the limited scope of its charge were reinforced by its post-hearing memorandum. The County's failure to negotiate the impact of double-celling and the County's duty to negotiate that decision were the only allegations briefed by the Association.

Further persuasive evidence that the charge did not allege a unilateral change in workload as a violation of the Act lies in the safety allegations contained within the charge and the ALJ's treatment of those safety allegations. The unit employees' stated

concerns with the safety effects of the decision to double-cell were at least equal to, if not greater than, the articulated workload concerns. Indeed, it was the safety concerns which were detailed in the charge as originally filed, not the workload concerns, which were not specifically identified until the charge was amended. The safety allegations in the charge are at least as numerous and specific as the workload concerns, yet the ALJ did not read the charge as one incorporating an alleged unilateral change in safety. The ALJ treated the safety allegations correctly "as part of the Association's claim that the [County] failed to negotiate impact." No exceptions were taken to the ALJ's disposition of the safety allegations. Just as the safety allegations were treated, the workload allegations should have been considered under this charge only as a part of the County's alleged failure or refusal to negotiate the impact of the decision to double-cell.

The workload allegations were in the charge for several reasons. They were part of the effects of the decision to double-cell, effects which the County allegedly failed to negotiate pursuant to the Association's demand. Those same allegations also supported the Association's request for injunctive relief. The workload allegations were also recited in conjunction with the alleged negotiability of the decision to double-cell. But those workload allegations were never presented as a separate improper practice resting on a unilateral change in terms and conditions of employment.

The ALJ's conclusion that the County failed to negotiate pursuant to the Association's demand the safety, workload and other mandatorily negotiable effects of its decision to double-cell inmates is unassailable under this record upon any ground

stated in the exceptions. The ALJ's decision in this regard is affirmed without further comment.<sup>2</sup>

For the reasons set forth above, the ALJ's decision that the County violated §209-a.1(d) of the Act by a unilateral increase of unit employees' workload is reversed and the remedial order issued pursuant thereto is rescinded. The decision is otherwise affirmed.

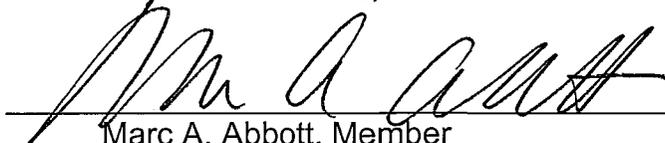
IT IS, THEREFORE, ORDERED that the County:

1. Negotiate the impact of double-celling on unit employees' terms and conditions of employment.
2. Post notice in the form attached at all locations ordinarily used to post notices of information to employees in the unit represented by the Association.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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<sup>2</sup>Our affirmance does not mean that there are, in fact, safety hazards or workload increases caused by the double-celling or what those exact effects are, to the extent they exist at all. The ALJ held, and we hold, only that the Association was entitled pursuant to its demand to negotiate to more than the informal, off-the-record conversations which were held with the Sheriff.

# 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 County of Rockland and Rockland County Sheriff (County) in the unit represented by the Correction Officer Benevolent Association of Rockland County that the County will negotiate the impact on unit employees' terms and conditions of employment of double-celling of inmates incarcerated at the County jail.

Dated .....

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

County of Rockland and Rockland County Sheriff  
.....

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

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

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In the Matter of

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

Petitioner,

- and -

**CASE NO. CP-503**

**OGDENSBURG CITY SCHOOL DISTRICT,**

Employer.

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

**FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C. (MARC H.  
REITZ of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Ogdensburg City School District (District) to a decision by the Director of Public Employment Practices and Representation (Director) on the unit placement aspect of a petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

On a stipulated record, the Director placed approximately fifty noninstructional part-time employees who are regularly scheduled to work less than twenty hours per week into CSEA's existing unit. That unit includes approximately 120 full-time and part-

time noninstructional employees who are regularly scheduled to work twenty hours or more per week.

The District argues in its exceptions that the at-issue part-time employees are most appropriately placed in a separate unit because they do not have a strong community of interest with the employees in the existing unit, primarily because they do not enjoy any of the fringe benefits or job protections afforded the noninstructional employees who are currently represented. CSEA argues in response that the Director's decision is correct and should be affirmed.

Having reviewed the record, we dismiss the petition without reaching the uniting question decided by the Director. A unit placement petition may not be used in the circumstances of this case because a question as to CSEA's continuing majority status is raised by the petition.

Our unit placement rules are intended to permit relatively minor adjustments to the composition of an existing negotiating unit. That intent was manifest when the rule applied only to newly created or substantially altered positions. Although the rule has been amended to open the unit placement process to "a position", without qualification by type, the intent was only to allow for the placement into the appropriate unit of established, unchanged positions which had been excluded historically from representation. The rule change was not intended to make a unit placement petition a substitute for a certification/decertification proceeding, which is the only appropriate mechanism for the resolution of questions concerning a union's majority support. When majority status questions are presented, the policies of the Act mandate that the representation questions be channeled for decision under a petition for certification/

decertification. Only the rules applicable to the filing and processing of a petition for certification/decertification, which incorporate fixed filing periods and showing of interest requirements, protect the multiple interests at stake when a question as to an incumbent union's continuing majority status is raised.

Although our unit placement rules cannot be used when the number of positions sought to be added to a unit is large enough to put the incumbent union's majority status reasonably in dispute, we do not have any decisions at any level as to when a majority status question is raised for purposes of a unit placement petition.<sup>1</sup> For purposes of a unit placement petition, we hold that a majority status question is presented if the number of employees proposed to be added to a unit is thirty percent or more of the number of employees in the existing unit. This numbers' comparison gives, we believe, the fairest indication as to whether an incumbent union's majority status has been placed in issue and the one which is best suited to the limited purposes of a unit placement petition.

CSEA would add at least fifty employees to an existing unit of 120, an increase of approximately forty-two percent. The number of employees to be added under this petition to CSEA's existing unit being more than thirty percent of the number of employees in the existing noninstructional unit, the unit placement petition must be dismissed in favor of a timely filed, adequately supported petition for certification/decertification.

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<sup>1</sup>In different context and for other purposes, it has been suggested that a majority status question is presented if the number of employees to be added to a unit is equal to or greater than thirty percent of the unit found to be appropriate. See *New York Convention Ctr. Operating Corp.*, 27 PERB ¶13034 (1994).

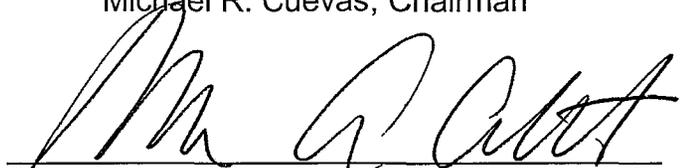
For the reasons set forth above, the petition must be, and it hereby is, dismissed.

SO ORDERED.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

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In the Matter of

**MERSUDA GUICHARD,**

Charging Party,

- and -

**CASE NO. U-18935**

**TRANSPORT WORKERS UNION, LOCAL 100,**

Respondent,

- and -

**NEW YORK CITY TRANSIT AUTHORITY,**

Employer.

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**MERSUDA GUICHARD, *pro se***

**O'DONNELL, SCHWARTZ, GLANSTEIN & ROSEN (HOWARD WIEN of  
counsel), for Respondent**

**MARTIN B. SCHNABEL, ACTING VICE-PRESIDENT AND GENERAL  
COUNSEL (DANIEL TOPPER of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Mersuda Guichard to a decision of an Administrative Law Judge (ALJ) dismissing her improper practice charge against the Transport Workers Union, Local 100 (TWU).<sup>1</sup> Guichard alleges that the TWU violated

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<sup>1</sup>Pursuant to §204.2 of the Rules of Procedure, the Director of Public Employment Practices and Representation (Director) declined to process the charge as deficient as to the allegations against Guichard's employer, the New York City Transit Authority (Authority). His determination was confirmed by the ALJ. No exceptions have been filed regarding this aspect of the ALJ's decision. The Authority is a statutory party to the case pursuant to §209-a.3 of the Public Employees' Fair Employment Act (Act).

§209-a.2 (c) of the Act when it refused to introduce into evidence at her disciplinary arbitration hearing a revised physician's certification of illness in support of her disciplinary grievance.

The ALJ dismissed the charge on two grounds. Crediting the testimony of TWU's witnesses, she found that Guichard had not presented the document in question to the TWU representatives at or before the disciplinary arbitration. The ALJ further found that even if Guichard had proffered the doctor's certificate to the TWU's representatives at the arbitration, the record did not establish that TWU's position at the disciplinary arbitration was taken in bad faith, or was arbitrary or grossly negligent.

Guichard excepts to the ALJ's decision, arguing that she is a diabetic and that her use of sick leave should be governed by the Americans With Disabilities Act (ADA)<sup>2</sup> and the Family and Medical Leave Act (FMLA)<sup>3</sup>. She asserts that TWU breached its duty of fair representation by failing to invoke the ADA and the FMLA, which should take precedence over any provisions of the collective bargaining agreement between TWU and the Authority. TWU supports the ALJ's decision.

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

Guichard is employed by the Authority as a railroad clerk. She reported that she became ill while on duty on July 27, 1996 and went home. She was then absent from work on July 30 and 31, and August 1, 1996. She returned to work on August 2, 1996.

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<sup>2</sup>42 U.S.C. §12101 *et seq.* (1990).

<sup>3</sup>29 U.S.C. §2601 *et seq.* (1993).

Pursuant to the Authority-TWU collective bargaining agreement,<sup>4</sup> within the requisite time period, she submitted medical proof of illness for a paid leave of absence from work on July 27, 30 and 31 and August 1, 1996. On August 27, 1996, Guichard was served with a notice of discipline charging her with failure to provide medical documentation certifying her inability to perform her duties on all four days of her absence and seeking her discharge.<sup>5</sup> Guichard filed a disciplinary grievance and was represented by TWU at both the Step I and Step II hearings. The notice of discipline was sustained at both levels so Guichard appealed to the Authority-TWU Tripartite Arbitration Board.

At the arbitration, Guichard was represented by John Borrero, a TWU representative, and Edmond Pendleton, a TWU attorney. Guichard asserts that she gave them a revised medical certification<sup>6</sup> at the arbitration but that they refused to

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<sup>4</sup>Section 2.6, paragraph I of the Authority-TWU contract, in relevant part, provides:

The burden of establishing that he/she was actually unfit for work on account of illness shall be upon the employee. Every application for sick leave, whether with or without pay, for more than two days, must be accompanied by medical proof satisfactory to the Transit Authority and upon a form furnished by the Transit Authority, setting forth the nature of the employee's illness and certifying that by reason of such illness the employee was unable to perform his/her duties for the period of the absence.

<sup>5</sup>The leave form submitted by Guichard was signed by a physician from her regular physician's office and certified her inability to work only on August 1 and 2, 1996. On the bottom was a handwritten note stating: "Above named patient states that she has not been feeling well on the following dates 7/27 - 7/28, 7/29, 7/30, 7/31, 8/1 and could not come to work."

<sup>6</sup>The leave form was signed by Guichard's regular physician on December 2, 1996. It certified that she had been unable to work for the period July 27, 1996 to August 1, 1996.

introduce it into evidence at the hearing. Both Borrero and Pendleton, according to the ALJ, credibly testified that Guichard did not give them the revised form and that, in fact, Pendleton asked her when the arbitration began if she wanted an adjournment to try to obtain an acceptable medical certification. The ALJ credited Borrero and Pendleton and the record fully supports her credibility resolution. Guichard could not remember what Pendleton told her at the arbitration about his reasons for keeping the revised medical certification out of evidence, she had mistakenly identified Borrero as her Step II representative, and the revised medical certification she introduced at the hearing before the ALJ, although signed by Guichard's physician in December 1996, was not signed by Guichard's supervisor until February 1997. As Guichard failed upon the credibility resolution made by the ALJ to establish that she presented the revised medical certification to Borrero and Pendleton at the arbitration, her charge alleging that they improperly refused to introduce it into evidence must be dismissed.

Guichard's arguments that she is covered by the provisions of the ADA and the FMLA and that they supersede the provisions of the Authority-TWU collective bargaining agreement are not properly before us.<sup>7</sup> In addition, her assertions that the TWU was negligent or acted in bad faith by negotiating contractual provisions that differ from the provisions of the ADA and the FMLA and by failing to invoke the provisions of the ADA and the FMLA in prosecuting her grievance were raised for the first time in the exceptions and we will not, therefore, address them.<sup>8</sup>

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<sup>7</sup>*Ballston Spa Cent. Sch. Dist.*, 25 PERB ¶3084 (1992).

<sup>8</sup>*Smithtown Fire Dist.*, 28 PERB ¶3060 (1995).

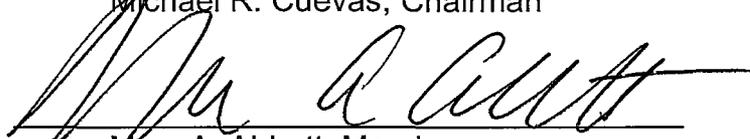
Based on the foregoing, Guichard's exceptions are denied and the decision of the ALJ is affirmed.

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

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**NASSAU COMMUNITY COLLEGE AND  
COUNTY OF NASSAU,**

Petitioner,

- and -

**CASE NO. CP-432**

**ADJUNCT FACULTY ASSOCIATION,**

Intervenor,

- and -

**NASSAU COMMUNITY COLLEGE FEDERATION  
OF TEACHERS,**

Intervenor.

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**INGERMAN SMITH, L.L.P. (JOHN H. GROSS of counsel), for Nassau  
Community College**

**BEE, EISMAN & READY (HOWARD B. COHEN of counsel), for County of  
Nassau**

**PRYOR CASHMAN SHERMAN & FLYNN LLP (RICHARD M. BETHEIL of  
counsel), for Adjunct Faculty Association**

**CLAUDIA SHACTER-deCHABERT, for Nassau Community College  
Federation of Teachers**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Nassau Community College  
(College) and the County of Nassau (County) to a decision by the Director of Public  
Employment Practices and Representation (Director) on a petition for unit

clarification/placement (UC/UP). The College/County filed this UC/UP petition for a determination as to whether the "position" of "mini-semester instructor" is in or should be placed into either the unit of adjunct faculty represented by the Adjunct Faculty Association (AFA) or the unit of full-time faculty represented by the Nassau Community College Federation of Teachers (Federation).

The Director declined to process the petition for two reasons. He held that the UC/UP processes are inapplicable because there is no "position" of mini-semester instructor, only assignments to teach. He also held that processing the petition would not be consistent with the policies of the Act because arbitration awards, as judicially confirmed, would be thereby undermined. Those arbitration awards, which are mutually inconsistent, have awarded the work of teaching during the mini-semester exclusively to both the adjunct faculty and the full-time faculty.

The College/County argue that the Director erred in not processing the petition because there is a "position" within the meaning of §201.2(b) of our Rules of Procedure (Rules). Moreover, they argue that the policies of the Act calling for PERB to assist parties in resolving disputes without service disruption<sup>1</sup> demand that we process this petition. The Federation also urges that we process this petition. The AFA argues that the Director was correct in not processing the petition for the reasons stated in his decision. Accordingly, the AFA asks us to dismiss the exceptions and affirm the Director's decision.

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<sup>1</sup>The mini-semester program has been canceled until such time as the dispute presented is somewhere or somehow resolved.

Having reviewed the record and considered the parties' arguments, including those at oral argument, we affirm the Director's decision on the first of his stated reasons.

The UC/UP rules have always pertained to a "position" without, however, defining that word. The Director determined that the "position" to which the UC/UP rules apply is a job title, not a work assignment, and we agree with the Director's interpretation.

There is no circumstance in which the UC/UP rules have been applied to a work assignment dispute. Although a dictionary definition of the word "position" might be broad enough to capture a work assignment of the type at issue in this proceeding, our UC/UP rules were simply never intended to be read that expansively. We intended "position" for purposes of §201.2(b) of our Rules to refer to that for which there exists a title with a duties description and a specification of qualifications as generally required, for example, for positions under the Civil Service Law.

It is only a "position" as defined in this sense which can be subject to a uniting determination. The negotiating units we have established are most often defined specifically by reference to job title. We have accepted stipulated units defined more generally by types of employment, e.g., all blue-collar employees, but even then, our operative assumption is that the unit description corresponds to job titles. Uniting by work assignment only, devoid of underlying positions, would not be done. What is inappropriate in defining the unit in the first instance cannot become appropriate pursuant to a request made later to clarify or adjust the composition of that unit.

In this case, there is admittedly no title of "mini-semester instructor". There is only an opportunity for persons who are already employed in other job titles and represented in either the Federation's or AFA's unit to teach for a short period of time between semesters. There being no title of mini-semester instructor, the indicia of a "position" advanced by the proponents of the petition are not material.<sup>2</sup>

This case does not involve the uniting of a "position", instead, a dispute as to whether employees in one or the other or both of the existing faculty units should be assigned to teach during the mini-semester. Resolution of this work assignment dispute simply lies beyond our power under existing law and rules.<sup>3</sup>

Our inability to process this petition is not an indication of a disinterest in the dilemma confronting those who would like to see the mini-semester program continue, which we take to include all of the parties to this proceeding. We would expect that a good faith pursuit of common interests would yield a satisfactory compromise ensuring a continuation of educational opportunity.

We do not process this petition only because we cannot. There is no "position" within the meaning of §201.2(b) of our Rules as to which a uniting determination can be made, whether clarification or placement. Whether the arbitration awards would provide a policy reason for not processing a petition if there were a position of mini-

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<sup>2</sup>It is argued, for example, that mini-semester work is separate from the work regularly done by either the full-time or adjunct faculty and recognized by the employees in both of those units to be separate from their regular work.

<sup>3</sup>Compare the power of the National Labor Relations Board over work assignment disputes under §§8(b)(4)(D) & 10(k) of the National Labor Relations Act as amended in 1947.

semester instructor is an issue we need not decide given the basis for our dismissal of this petition.

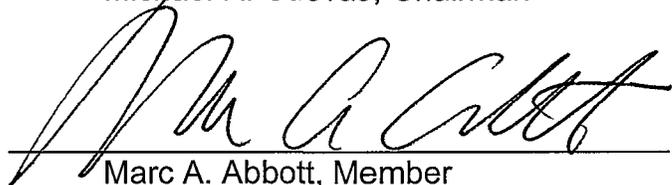
For the reasons set forth above, the exceptions are denied and the Director's decision is affirmed.

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

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

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In the Matter of

**POLICE BENEVOLENT ASSOCIATION OF THE  
POLICE DEPARTMENT OF THE COUNTY OF  
NASSAU,**

Charging Party,

- and -

**CASE NO. U-17985**

**COUNTY OF NASSAU (POLICE DEPARTMENT),**

Respondent.

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**SOLOMON RICHMAN GREENBERG, P.C. (HARRY GREENBERG of  
counsel), for Charging Party**

**BEE & EISMAN (HOWARD COHEN of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the County of Nassau (Police Department) (County) to a decision by an Administrative Law Judge (ALJ) on a charge filed against the County by the Police Benevolent Association of the Police Department of the County of Nassau (PBA). As relevant to the exceptions, the ALJ held that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it did not respond to the PBA's demand to negotiate the safety effects caused by the County's decision to reduce the staffing levels on marine patrol boats.<sup>1</sup>

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<sup>1</sup>The ALJ dismissed an allegation that the County's unilateral reduction in crew size separately violated the Act. No exceptions were taken to that part of the ALJ's decision.

The County excepts to the ALJ's characterization of the at-issue boats as "long" or "small" as inaccurate, her finding that staffing levels were "changed" as unsupported by the record or one resting on evidence which should not have been received, and to parts of the decision which it argues are internally inconsistent. The County's main contentions, however, are that the PBA's demand was overboard and too vague to trigger any impact bargaining obligation, that the ALJ erred in concluding that a waiver/zipper clause in the parties' agreement was inapplicable because it had sunsetted, and erred also in holding that the staffing level agreement in §9.23-7 of the parties' contract did not waive any safety impact bargaining rights the PBA might have had regarding any unilateral change in crew size.

The PBA in its response denies the County's enumerated exceptions and argues that the ALJ's decision is correct as a matter of fact and law.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision because the staffing level agreement satisfies the County's obligation to negotiate the safety impact or effects of reductions in crew size made to a level consistent with the parties' agreement.

We take the opportunity at the outset of our decision to clarify the nature of a defense grounded upon a claim that the subject(s) sought to be bargained pursuant to a charging party's demand have already been negotiated to completion. This Board's decisions have sometimes characterized this defense as duty satisfaction, sometimes waiver by agreement, and sometimes simultaneously both duty satisfaction and waiver. Although the second and third characterizations cannot be considered wholly

inaccurate, we believe that the first most accurately describes the true nature of this particular defense.

Waiver concepts suggest that a charging party has surrendered something.<sup>2</sup> Although waiver may accurately describe a loss of right, such as one relinquished by silence, inaction, or certain other types of conduct, the defense as described is not one under which a respondent is claiming that the charging party has suffered or should be made to suffer a loss of right. Under this particular defense, a respondent is claiming affirmatively that it and the charging party have already negotiated the subject(s) at issue and have reached an agreement as to how the subject(s) is to be treated, at least for the duration of the parties' agreement. By expressing this particular defense as duty satisfaction, we give a better recognition to the factual circumstances actually giving rise to it and expect to avoid the confusion and imprecision in analysis which have sometimes been caused by the other noted characterizations of this defense.

Section 9.23-7 of the parties' agreement provides as follows:

There shall be a minimum of two (2) employees in the Marine Bureau assigned to the operation of all boats during the hours of darkness or in the operation of boats in excess of 20 feet in length . . . or three (3) employees in the operation of boats in excess of 40 feet in length.

The ALJ found the County changed staffing from three employees to two on boats thirty feet or longer in length, when only one such boat was deployed on the day tour. That

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<sup>2</sup>Waiver has been defined, for example, as the intentional relinquishment of a known right. *Civil Serv. Employees Ass'n. v. Newman*, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982) (subsequent history omitted).

change was to a level consistent with the parties' agreement because three employees are required under the parties' agreement only on boats in excess of forty feet in length.

The PBA has a right under the Act to negotiate, pursuant to its impact demand, only the mandatorily negotiable effects of the County's decision to reduce staffing to contractual levels. As a general proposition, safety issues are mandatory subjects of negotiation. Like all bargaining obligations, however, an employer's duty to negotiate the mandatorily negotiable effects of its managerial decisions can be satisfied.

Although recognizing the principles stated above, the ALJ read the Board's decision in *International Association of Firefighters of the City of Newburgh, Local 589*<sup>3</sup> (hereafter *Newburgh*) to reveal a caution against exempting an employer from its duty to negotiate safety issues under a broadly worded impact demand. The ALJ's reading of *Newburgh* is a good illustration of the confusion which can be caused by analyzing a duty satisfaction defense as a waiver of bargaining rights. The County is not being exempted from its duty to negotiate safety impact nor has the PBA lost its bargaining rights in that regard. The County has recognized its duty and has satisfied it during negotiations which culminated with §9.23-7 of the parties' agreement. The caution noted in *Newburgh* simply has no application in circumstances in which a party's bargaining obligation has been satisfied.

The PBA agreed that the County could fix the crew size on boats within limits and upon conditions. The County acted in accordance with that contract. No safety impact bargaining demand, no matter how broadly that demand was worded, could

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<sup>3</sup>10 PERB ¶13001 (1977)

expose the County to a safety impact bargaining obligation because the full range of safety issues, whether general or specific, were inherently and inextricably entwined as a matter of law with the staffing level decisions the County implemented. The PBA and the County necessarily settled all safety impact issues flowing from a contractually authorized change in crew size upon the totality of the terms and conditions, financial and otherwise, contained within the parties' collective bargaining agreement. The PBA effectively agreed that whatever safety concerns it had regarding staffing determinations were satisfied, given all other considerations in the contract, with boat crews of certain sizes as fixed by length of boat and operating conditions. To the extent the County changed the crew size, it was to a level authorized by contract. In that circumstance, there could not be any safety issues that had not already been addressed, albeit nonspecifically, during the negotiations leading up to §9.23-7. In this latter regard, there is a suggestion in the ALJ's decision that a safety impact bargaining obligation could be fully satisfied only if the parties' agreement specifically addressed safety issues, e.g., a general safety clause or some safety procedures or standards. We do not agree with that proposition. As with any issue, safety issues can be settled upon an exchange of other promises even if they are not directly related to safety.

The PBA is not by this decision, of course, permanently deprived of the right to negotiate safety issues raised by changes in staffing levels or otherwise. We hold only that those safety issues were not negotiable pursuant to an impact bargaining demand arising from the County's exercise of its contractual staffing rights.

Having concluded that §9.23-7 satisfied the County's duty to negotiate safety impact issues arising from changes in staffing levels permitted by agreement, we do not consider any of the parties' other arguments.

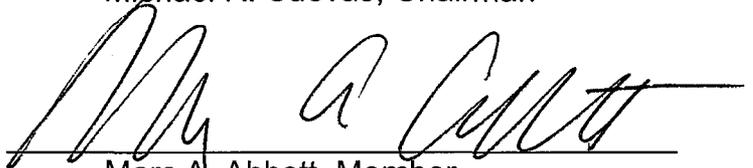
For the reasons set forth above, the ALJ's decision is reversed.

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

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

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In the Matter of

**PLAINEDGE FEDERATION OF TEACHERS,**

Charging Party,

- and -

**CASE NO. U-17456**

**PLAINEDGE UNION FREE SCHOOL DISTRICT,**

Respondent.

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**SCHLACHTER & MAURO (DAVID SCHLACHTER of counsel), for Charging Party**

**INGERMAN SMITH, L.L.P. (NEIL BLOCK of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Plainedge Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Plainedge Federation of Teachers (Federation).<sup>1</sup> The ALJ determined that the District had violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it placed a disciplinary memorandum into the

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<sup>1</sup>This charge was consolidated for hearing and decision with Case No. U-17595, another improper practice charge filed by the Federation against the District. No exceptions to the ALJ's decision dismissing that charge have been filed. *Plainedge Union Free Sch. Dist.*, 31 PERB ¶4538 (1997).

personnel file of Vita Bottitta-Isaacs, a Federation officer, for her having engaged in protected activities.

The ALJ found that Bottitta-Isaacs had made remarks about teacher solidarity, in which she also questioned the administration at an end-of-the-year breakfast for faculty and administrators at the District's high school, and that the District issued a memorandum to her correcting the "inaccuracies" in her statement and placed the memorandum in Bottitta-Isaacs' personnel file. Bottitta-Isaacs grieved the disciplinary memorandum, which an arbitrator found to be inaccurate and ordered removed from her file. The District thereafter removed that memorandum from Bottitta-Isaacs' personnel file. Finding that the District had violated the Act, the ALJ ordered the District to remove the memorandum from Bottitta-Isaacs' file, to not retaliate against her for the exercise of protected rights and to post a notice.

The District excepts to the ALJ's decision, arguing that the ALJ erred in failing to dismiss the charge as moot, in finding that the District was improperly motivated, and in ordering that a notice be posted. The Federation filed cross-exceptions, arguing that the remedial order should cover retaliation against any unit employees, but in all other respects, supporting the ALJ's decision.

Based upon our review of the file and our consideration of the parties' arguments, we affirm the decision of the ALJ, but modify the remedy.

Bottitta-Isaacs has been employed by the District for over thirty years as a Library Media Specialist. She also served as president of the Federation from 1978 to 1984, and as vice president, grievance chair and head negotiator from 1984 to 1994.

Labor relations in the District were characterized by the parties as harmonious until 1994, when the District began experiencing budget difficulties. The record shows that during the 1994-1995 school year, the Federation filed many more grievances and improper practice charges than it had in prior years and the relationship between the Federation and the District became strained. Bottitta-Isaacs was involved in these actions.

At the hearing, the ALJ correctly accepted into evidence the arbitrator's decision and advised the parties that she was deferring to the factual findings of the arbitrator.<sup>2</sup> The record shows that at the end of the 1994-1995 school year, Bottitta-Isaacs was reassigned from the high school to a split assignment between two elementary schools. On the last day of school, an informal breakfast, which was an annual event, was held for staff at the high school. Teachers who would no longer be working at the high school were the recipients of gifts. When Bottitta-Isaacs accepted her gift, she was greeted with a standing ovation from the teachers and, thereafter, made some remarks to those assembled. She spoke about teacher unity, teachers speaking up when they saw something improper, teachers standing up for a fellow teacher who was not being treated properly, and urged them to question the administration because she would no longer be there to do it for them. Several administrators who were present heard a different message, one which they interpreted as being a call for teachers to disregard or disobey administrators.

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<sup>2</sup>*State of New York (Ben Aaman)*, 11 PERB ¶3084 (1978); *New York City Transit Auth. (Bordansky)*, 4 PERB ¶3031 (1971).

On September 6, 1995, Bottitta-Isaacs received a memorandum from the high school principal, Jeffrey Hollman, which stated:

At the final breakfast on Friday, June 23, 1995 you made certain comments to the high school teaching staff which were inaccurate, and I am writing this letter as a form of caution and guidance in this matter. You told teachers they should not listen to what administrators tell them to do.

The district holds that it is the duty and obligation of teachers to cooperate with supervisory and administrative staff. Failure to cooperate would constitute inappropriate behavior. If a teacher feels an administrator has asked a teacher to do something that violates the contract or appears to be improper, there are appropriate channels for that teacher to follow to settle the matter. I am writing this memo, therefore, to inform you that it was inaccurate information that you delivered to teachers when you said the above.

I think it is incumbent upon you to give proper advice to teachers and make them aware that it would be inappropriate not to cooperate with supervisory and administrative staff. I trust you will do so at the first opportunity.

A copy of the memorandum was placed in Bottitta-Isaacs' personnel file.

Pursuant to Article IV, section 1 of the parties' collective bargaining agreement, Bottitta-Isaacs filed a grievance seeking to have the memorandum removed from her file.<sup>3</sup> The grievance went to advisory arbitration and, by a decision dated March 13,

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<sup>3</sup>Article IV, section 1, in relevant part, provides:

Communications concerning teacher conduct and performance, other than evaluative materials prepared according to district policy, shall not be filed in the folder prior to the conclusion of a waiting period of ten (10) school days, such waiting period to provide the teacher an opportunity to initiate a grievance..... Any material judged inaccurate or incorrect as the result of the grievance procedure shall not be placed in the folder.

1997, an arbitrator found that Hollman's memorandum constituted incorrect information and ordered it removed from Bottitta-Isaac's personnel file. The District complied and removed the memorandum from Bottitta-Isaac's personnel file.<sup>4</sup>

The District argues that there is no evidence of improper motivation on Hollman's part and that, therefore, the ALJ erred in finding a violation of §209-a.1(a) and (c) of the Act. The District, in this respect, misconstrues the elements of proof necessary in establishing a charge of interference and discrimination. In *Town of Independence*,<sup>5</sup> we reiterated the required standard of proof in a case involving a claimed violation of §209-a.1(a) or (c):

It is well settled that the elements necessary to prove a case of discrimination for union activity under the Act are that the affected individual was engaged in protected activity, that such activity was known to the person(s) making the adverse employment decision, and that the action would not have taken place but for the protected activity.

Union animus or other motive improper under the Act is not an indispensable element of an interference or discrimination violation.<sup>6</sup>

Here, the ALJ adopted the factual findings of the arbitrator that Bottitta-Isaac's statements were clearly intended to be a call for unification of the teachers and a plea that they continue to engage in mutual support. That her statements are of the type

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<sup>4</sup>The instant improper practice charge was filed on January 2, 1996.

<sup>5</sup>23 PERB ¶3020, at 3038 (1990).

<sup>6</sup>*State of New York*, 25 PERB ¶3050 (1992).

protected by the Act is not in dispute.<sup>7</sup> Neither can there be any argument that Hollman heard the remarks. Additionally, he received a call from the Superintendent of Schools within an hour of the breakfast. He subsequently received memoranda from several administrators who were present at the breakfast about what they felt was the inappropriate and insubordinate nature of the remarks. Finally, it is clear that Hollman would not have issued the memorandum "but for" Bottitta-Isaac's remarks at the breakfast meeting. On that basis, the charge must be sustained because there was an action taken by the District that was admittedly a response to Bottitta-Isaac's remarks to the employees, an exercise of protected rights.<sup>8</sup>

The District argues that the ALJ erred in refusing to dismiss the charge as moot because it removed Hollman's memorandum from Bottitta-Isaac's personnel file upon receipt of the arbitrator's award. The District's withdrawal of the memorandum does not render moot the District's violation of Bottitta-Isaac's rights under the Act, although it does affect the remedy.<sup>9</sup>

The ALJ ordered Hollman's memorandum removed from Bottitta-Isaac's personnel file. As the record establishes that the memorandum had already been

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<sup>7</sup>*New York City Transit Auth. (Alston)*, 20 PERB ¶3065 (1987); *Plainedge Public Sch.*, 13 PERB ¶3037 (1980).

<sup>8</sup>*Uniondale Union Free Sch. Dist. v. PERB*, 167 A.D.2d 475, 23 PERB ¶7022 (2d Dep't 1990), *conf'g* 21 PERB ¶3044 (1988); *City of Salamanca*, 18 PERB ¶3012 (1985).

<sup>9</sup>*Wappingers Cent. Sch. Dist. v. PERB*, 215 A.D.2d 669, 28 PERB ¶7007 (2d Dep't 1995); *Town of Huntington*, 27 PERB ¶3039 (1994); *Onondaga-Cortland-Madison BOCES v. PERB*, 198 A.D.2d 824, 26 PERB ¶7015 (4<sup>th</sup> Dep't 1993); *New York City Transit Auth. (Alston)*, *supra* note 7.

removed at the time of the hearing, the District's exception that the remedy needs modification to reflect that fact should be granted.

Finally, the Federation argues that the remedy ordered by the ALJ that the District not retaliate against Bottitta-Isaacs for the exercise of protected rights is too narrow and should instead cover all unit employees. As was decided in *County of Orleans*<sup>10</sup> (hereafter *Orleans*), when presented with a similar argument that a cease and desist order directed only to the employee affected by the employer's discriminatory conduct be broadened to cover all unit employees:

Section 213 of the Act provides a procedure for the judicial review and enforcement of PERB's final orders. This enforcement mechanism and the respondent's right to be held accountable only for those violations charged necessitate that our orders be limited to the facts reflected in the record, be stated with as much specificity as is reasonably possible, and be tailored to meet the particular circumstances of the proceeding. A broad cease and desist order raises difficulties in subsequent enforcement proceedings involving facts unlike and unrelated to those originally charged. In an enforcement proceeding brought under a broad cease and desist order, the court could assume the role of finder of fact, becoming a labor tribunal of first instance, forced to make the very factual determinations which §205.5(d) of the Act expressly vests in PERB.

Accordingly, we dismiss the Federation's cross-exception which is directed to the scope of the ALJ's order. Indeed, the ALJ's order is too broad under *Orleans* and we have modified the order accordingly.

Based on the foregoing, we dismiss the District's exceptions, except as to modification of the remedy ordered by the ALJ, and we affirm the decision of the ALJ.

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<sup>10</sup>25 PERB ¶3010, at 3028 (1992).

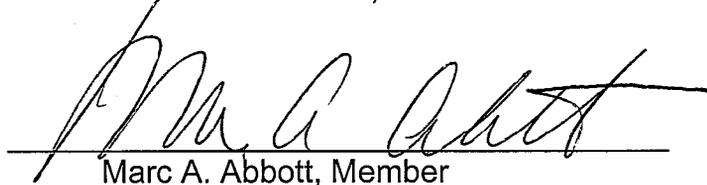
IT IS, THEREFORE, ORDERED that the District:

1. Cease and desist from disciplining Vita Bottitta-Isaacs for remarks she made at a high school breakfast on June 23, 1995, and
2. Sign and post the attached notice at all locations ordinarily used to post informational notices to unit employees.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



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 Plainedge Union Free School District that it will not discipline Vita Bottitta-Isaacs for remarks she made at a high school breakfast on June 23, 1995.

Dated .....

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

PLAINEDGE FEDERATION OF TEACHERS  
.....

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

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

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In the Matter of

**NORTH TARRYTOWN POLICE BENEVOLENT  
ASSOCIATION, INC.,**

Charging Party,

- and -

**CASE NO. U-19257**

**VILLAGE OF SLEEPY HOLLOW,**

Respondent.

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**KENNETH J. FRANZBLAU, ESQ., for Charging Party**

**RAINS & POGREBIN, P.C. (CRAIG L. OLIVO of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the North Tarrytown Police Benevolent Association, Inc. (PBA) to a decision by an Administrative Law Judge (ALJ) on its charge against the Village of Sleepy Hollow (Village). The Association alleges in its charge that the Village violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when the Village submitted a salary proposal lower than any it made during negotiations in its response to the PBA's petition for compulsory interest arbitration.<sup>1</sup>

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<sup>1</sup>The Village proposed in its response a two-year freeze on salary. During negotiations, the Village proposed a one-year freeze followed by a salary increase of 2.5% for the second year. The Village alleges in its answer that changed economic conditions caused it to alter its salary proposal at arbitration.

The ALJ dismissed the charge as untimely filed. Concluding that the charge raised an objection to arbitrability, the ALJ held that the timeliness of the PBA's charge was governed by §205.6(b) of our Rules of Procedure (Rules). That section of the Rules requires charges raising objections to arbitrability be filed by the party seeking interest arbitration within ten working days after its receipt of the response to the petition for arbitration. The PBA received the Village's arbitration response on May 14, 1997. This charge was filed more than three months later, on August 18, 1997.

The PBA argues that the ALJ's decision should be reversed because it is inconsistent with a "ruling" made earlier by another ALJ in a letter sent to different parties in another improper practice proceeding.<sup>2</sup>

The Village argues that the ALJ's decision in this case is correct and that a statement by another ALJ in a different proceeding should not be considered a ruling binding in this proceeding.

Having considered the parties' arguments, we affirm the ALJ's dismissal of this charge as untimely filed.

There are two issues on this appeal. First, whether the ALJ correctly held that the PBA's charge raises an objection to arbitrability which had to have been filed within ten working days after the PBA's receipt of the Village's response. On that issue, we affirm the ALJ's decision. The allegations in this charge fall literally within the language of the Rules that lists the submission to arbitration of matters not previously negotiated

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<sup>2</sup>The other charge was docketed as Case No. U-18094 and involved the Town of Ossining Police Association, Inc., which was represented by the same attorney as represents the PBA in this case, and the Town of Ossining.

as an objection to arbitrability.<sup>3</sup> The two-year wage freeze proposed by the Village at arbitration was not the subject of the parties' negotiations. Moreover, the allegation in this charge should be treated as an objection to arbitrability for the policy reasons stated in the ALJ's decision.

The second issue actually poses two questions. We are asked to decide whether the ALJ's statement in the Town of Ossining proceeding is inconsistent with the ALJ's decision in this case, and, if so, the effect of that inconsistency.

In the proceeding involving the Town of Ossining,<sup>4</sup> the union alleged that the employer had submitted to arbitration matters that had not been previously negotiated. The union then tried to amend that charge to include an allegation that the employer had omitted a salary proposal in its response to the petition for arbitration despite the employer's having made a salary proposal during negotiations and mediation. The ALJ assigned to the Town of Ossining proceeding wrote a letter to the parties declining to accept the amendment because the "allegation raised in the attempted amendment . . . does not raise issues of arbitrability". A second improper practice charge was then filed by the union to incorporate the allegation it had sought to raise by the amendment. The charges in the Town of Ossining proceeding were withdrawn before any decision issued.

The allegation sought to be raised by the amendment to the charge in the proceeding involving the Town of Ossining is not comparable to the allegation in this

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<sup>3</sup>Rules §205.6(a)(2).

<sup>4</sup>We have taken notice of the documents in that case file, the content of which is not in dispute.

charge. There is a difference between a response to a petition for arbitration which is silent upon a given issue, as in the Town of Ossining proceeding, and one which affirmatively contains a proposal on an issue materially different from the offers which had actually been made on that issue prior to arbitration, as is the circumstance here. Arguably, the first may not be an objection to arbitrability, while the second, in our view, clearly is.

We do not consider it appropriate, however, to end our analysis of this second issue on what might be characterized by some as an overly fine distinction.

Even if the circumstances in the Town of Ossining proceeding and this proceeding were precisely the same, an ALJ's statement or ruling or order in one case is not binding upon another ALJ in a different proceeding, and certainly never binding upon this Board. For example, if the ALJ had accepted the PBA's arguments, and had held in this case that the timeliness of the PBA's charge was to be assessed under the generally applicable four-month period of limitations under §204.1(a)(1) of the Rules, we would not be bound by that determination simply because it was consistent with another ALJ's earlier articulated opinion.

The PBA, like all parties to any of our improper practice proceedings, always ran a risk that one ALJ might disagree with another ALJ on any given issue, or that our opinion would be different from that of one or more ALJs, or that a court's opinion would be different from ours or the ALJ's on judicial appeal. There was never any guarantee, assurance or expectation that the ALJ in this case would hold in accordance with an unpublished statement made by a different ALJ in the earlier proceeding, or even if she did, that we would be in agreement with her holding or ruling. In filing its charge

months after the Village presented its allegedly "regressive" salary demand, the Association quite simply exposed itself to the possibility its charge would be held to have been untimely filed.

For the reasons set forth above, the PBA's exceptions are denied and the ALJ's decision dismissing this charge as untimely filed is affirmed.

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

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

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In the Matter of

**STEVEN D. HEADY, et al.,**

Charging Parties,

- and -

**CASE NO. U-19707**

**COUNTY OF DUTCHESS and DUTCHESS  
COUNTY DEPUTY SHERIFFS' PBA, INC.,**

Respondents.

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**JOHN W. WHITTLESEY, ESQ., for Charging Parties**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions to a decision of the Director of Public Employment Practices and Representation (Director) dismissing an improper practice charge filed by Steven D. Heady and twelve other former employees (charging parties) of the County of Dutchess (County) alleging that the County and the Dutchess County Deputy Sheriffs' PBA, Inc. (PBA) had violated, respectively, §209-a.1(a), (b), (c), (d) and (e) and §209-a.2(a), (b) and (c) of the Public Employees' Fair Employment Act (Act). The charging parties were notified that the charge was deficient in several respects. They filed an unsworn amendment and declined to withdraw the charge, which was thereafter dismissed by the Director.

The charge alleges that the County and the PBA violated the Act by entering into a collective bargaining agreement which excluded any employees who had resigned or transferred to other jobs during the period of retroactivity from eligibility for the negotiated retroactive salary increases.<sup>1</sup> The Director dismissed the alleged §209-a.1(d) and (e) and §209-a.2(b) violations, finding that individual employees lack standing to allege violations of these sections of the Act. The remaining allegations were dismissed upon the Director's finding that no facts were alleged which would support a finding that either the County or the PBA had violated the Act.

The charging parties except to the Director's decision, arguing that they have standing and that the County-PBA 1993-1998 contract discriminates against them as former employees. Neither the County nor the PBA has responded to the exceptions.

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

It is well settled that a public employee has no standing to allege a violation of the duty to negotiate in good faith, as that duty runs between the public employer and

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<sup>1</sup>The prior County-PBA contract had expired on December 31, 1992. Protracted negotiations resulted in a collective bargaining agreement, reached in August 1997 and adopted by the County on October 9, 1997. That agreement, at Article IV, section 2(h) provides:

Retroactive salary increases will be paid only to those Employees who are on the payroll on the date of the final ratification, or had retired between January 1, 1993 and the date of final ratification. Retroactive salary increases shall be paid to the estate of any Employee who died between January 1, 1993 and the date of final ratification.

the employee organization.<sup>2</sup> The same rationale applies to claimed violations of §209-a.1(e) of the Act.<sup>3</sup>

Likewise, the charging parties, as former employees of the County in a unit represented by the PBA, may not claim a violation of §209-a.2 (a) and (c) of the Act by the PBA. We most recently held in *Westchester County Correction Officers'*

*Benevolent Association, Inc.*<sup>4</sup>

A union's duty of fair representation springs from its status under the Act as the exclusive negotiating agent for a unit of employees. The statutory grant of exclusivity to the bargaining agent entitles it to represent all persons in the unit, whether or not they choose to become members of the union, but it also imposes upon that union an obligation to represent all of those employees fairly, impartially and in good faith. But the union's duty is owed only to the persons it represents. When an employee's employment relationship is severed, the union's representation duties to that former employee end, except in circumstances in which the severance from employment is being contested or there is some other basis upon which to conclude that there is a continuing nexus to employment notwithstanding the individual's relinquishment or loss of employment.

Finally, even if we were to find some duty owing to these charging parties on the part of the County or the PBA, there are no facts pled which would support a finding of a violation of §209-a.1(a) and (c) or §209-a.2(a) and (c) of the Act. The fact that these charging parties did not receive retroactive pay increases to which they would likely have been entitled had they continued their employment with the County in the unit represented by

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<sup>2</sup>CSEA, *Local 1000, AFSCME and County of Nassau*, 28 PERB ¶3054 (1995); *City Sch. Dist. of the City of New York*, 27 PERB ¶3072 (1994).

<sup>3</sup>*Queens College of the City Univ. of New York*, 21 PERB ¶3024 (1988).

<sup>4</sup>30 PERB ¶3075, at 3184 (1997).

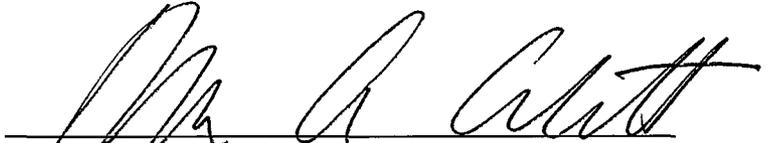
the PBA does not by itself evidence the discriminatory intent necessary to sustain the alleged violations.<sup>5</sup>

Based on the foregoing, the charging parties' 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: October 27, 1998  
Albany, New York

  
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Michael R. Cuevas, Chairman

  
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Marc A. Abbott, Member

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<sup>5</sup>*County of Erie and Erie County Sheriff and Teamsters Local 264, 27 PERB ¶3081 (1994). See also Plainview-Old Bethpage Cent. Sch. Dist. and Local 237, Int'l. Brotherhood of Teamsters, 7 PERB ¶3058 (1974).*

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

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In the Matter of

**CONNETQUOT CLERICAL ASSOCIATION,**

Petitioner,

- and -

**CASE NO. C-4722**

**CONNETQUOT CENTRAL SCHOOL DISTRICT,**

Employer,

- and -

**CIVIL SERVICE EMPLOYEES ASSOCIATION,  
INC., LOCAL 1000, AFSCME, AFL-CIO,  
CONNETQUOT CENTRAL SCHOOL DISTRICT  
UNIT OF LOCAL 870 CSEA,**

Intervenor.

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**KAPLOWITZ AND GALINSON (DANIEL GALINSON of counsel), for  
Petitioner**

**GUERCIO & GUERCIO (THOMAS VOLZ of counsel), for Employer**

**NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN CRAIN of  
counsel), for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Connetquot Central School District Unit of Local 870 CSEA (CSEA) to a decision by the Director of Public Employment Practices and Representation (Director) rendered under a petition filed by the

Connetquot Clerical Association (Association). The Association seeks to replace CSEA as the bargaining agent for regular full-time and part-time clerical employees of the Connetquot Central School District.

In relevant part, the Director held after a hearing that the Association is an employee organization within the meaning of §201.5 of the Public Employees' Fair Employment Act (Act).

CSEA argues that the Director erred in holding the Association to be an employee organization because it presently lacks a constitution and by-laws and certain other allegedly required indicia of an employee organization. The Association argues in response that CSEA's exceptions are wholly without basis in fact or law and that the Director's decision should be affirmed. The District has not filed any exceptions or response.

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

CSEA's arguments to us are the same as those made to the Director. The Director considered those arguments and correctly rejected them. As the Director held, a constitution or by-laws is not a prerequisite for employee organization status. The indicia of employee organization status recited in the Director's decision fully satisfy the minimal requirements of the Act as interpreted and applied. That the Association could have had additional indicia of employee organization status is immaterial.

The exceptions are denied and the Director's decision is affirmed for the reasons set forth in his decision. The case is remanded to the Director for purposes of

ascertaining the unit employees' choice of employee organization to serve as their representative pursuant to §207.2 of the Act. SO ORDERED.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

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In the Matter of

**THE PATROLMEN'S BENEVOLENT  
ASSOCIATION OF NEW WINDSOR, INC.,**

Petitioner,

- and -

**CASE NO. IA97-043; M97-327**

**TOWN OF NEW WINDSOR,**

Employer.

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**HITSMAN, HOFFMAN AND O'REILLY (JOHN F. O'REILLY of counsel), for  
Employer**

**JOHN K. GRANT, ESQ. , for Petitioner**

**BOARD DECISION AND ORDER**

The Town of New Windsor (Town) has filed exceptions to rulings made by the Director of Conciliation (Director) in conjunction with compulsory interest arbitration proceedings initiated by the Patrolmen's Benevolent Association of New Windsor, Inc. (PBA) under §209.4 of the Public Employees' Fair Employment Act (Act) and Part 205 of our Rules of Procedure (Rules).

By letter dated April 15, 1998, the Director declined the Town's request to hold the interest arbitration proceedings in abeyance pending the disposition of improper practice charges which the Town and the PBA had filed against each other. The PBA has since withdrawn its improper practice charge against the Town, but the Town's

charge against the PBA is still pending. The Director in the same letter also extended the time within which the Town had to designate its member of the arbitration panel and directed both the Town and the PBA to strike names from the list of persons submitted to them for purposes of their selecting the public member of the interest arbitration panel. By letter dated May 15, 1998, the Director denied the Town's request for a face-to-face meeting among representatives of the Town, the PBA and the agency for purposes of conducting this name-striking process. Instead, the Director conducted the process by telephone conference call.

The Town argues that the interest arbitration should not proceed until the improper practice charge against the PBA is decided because a finding that the PBA had not negotiated in good faith the items it submitted to arbitration would likely result in the arbitration being stayed.<sup>1</sup> The Town further argues that the Director's ruling compels it to undertake extensive and costly preparations for an arbitration which would be futile if the improper practice charge were to be decided in its favor. The Director's concern about delaying the conduct of the arbitration proceeding could be minimized, according to the Town, by an expedited processing of the improper practice charge. The Town also argues that the Director's April 15 ruling ignores *City of Kingston*<sup>2</sup> (hereafter *Kingston*), in which the Board ordered that an interest arbitration petition not be processed.

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<sup>1</sup>See *Binghamton Fire Fighters Local 729*, 9 PERB ¶3072 (1976); *Town of Haverstraw Patrolman's Benevolent Ass'n*, 9 PERB ¶3063 (1976).

<sup>2</sup>18 PERB ¶3036 (1985).

The Town argues that the Director's May 15 ruling violated §205.7 of the Rules which requires the parties "meet" for the stated purposes and entitles either party upon request to the presence of a Board representative during the name-striking process.<sup>3</sup> The Town requests that the Director be ordered to undertake the striking process anew.

The PBA argues in response that the Board does not have "jurisdiction to determine the exceptions." On the merits, the PBA argues that the Director's rulings are correct in all respects and should be affirmed.

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

We turn first to the PBA's argument that the Board is powerless to review the Director's determinations because neither the Act nor our Rules specifically provides a mechanism for the review of such rulings. Although the factual representation is correct, the conclusion the PBA would have us draw from it is not.

We have for many years reviewed Director determinations involving the compulsory interest arbitration provisions of the Act and Rules.<sup>4</sup> Contrary to the PBA's claim, our review is not dependent upon the Director granting a party a right to appeal

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<sup>3</sup>Section 205.7(b) of the Rules provides, in relevant part, as follows:

The parties shall be required to meet and make their selection . . . . If either party so desires, a representative of the board will be present during the name-striking process.

<sup>4</sup>*Niagara Frontier Transp. Auth.*, 30 PERB ¶¶3009 (1997) (subsequent history omitted); *County of Oneida and Oneida County Sheriff*, 20 PERB ¶¶3044 (1987); *Village of Southampton*, 16 PERB ¶¶3049 (1983).

the determination which is sought to be reviewed.<sup>5</sup> Our right and power to review staff determinations is inherent in our delegation<sup>6</sup> to those persons of the power to make them. Moreover, our review is necessary for there to be a final order which can be appealed judicially.<sup>7</sup> The absence from our Rules of an express procedure for the appeal of Director determinations may be an inconvenience to parties, but it is not a bar to our review of those determinations.

As to the merits of the Director's April 15 ruling, neither the interest arbitration provisions of the Act nor our implementing Rules contemplates the cancellation of all arbitration proceedings when an objection to arbitration in the form of an improper practice charge is pending before the agency. The terms of the Act reflect the Legislature's desire for the prompt resolution of disputes pending at arbitration. This public policy is expressed by the provision of specific time frames for the accomplishment of the various steps to be taken during the arbitration process.<sup>8</sup> The Legislature's expression of a need for speed in interest arbitration is reflected in our own Rules, under which an objection to arbitrability postpones only the issuance of an award of the contested issues,<sup>9</sup> not the arbitration proceedings themselves. Certainly, the very preliminary processing of the petition for interest arbitration ordered by the

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<sup>5</sup>See *City of Kingston*, 18 PERB ¶8002 (1985), in which the Director informed the aggrieved party that exceptions to his ruling could be taken under §201.12 of the Rules.

<sup>6</sup>Act §§205.5(k) & (l).

<sup>7</sup>*Russell v. PERB*, 13 PERB ¶7015 (Sup. Ct., Albany Co. 1980).

<sup>8</sup>Act §§209.4(b) & (c)(ii).

<sup>9</sup>Rules §205.6(d).

Director cannot be said to be affected by the pendency of an improper practice charge. Expedited treatment<sup>10</sup> of improper practice charges raising objections to arbitrability is intended to minimize delays in the release of arbitration awards. Expedited treatment was never intended to prevent the agency from taking the preliminary steps necessary to the appointment of an arbitration panel.

There is yet another basic reason to affirm the Director's April 15 ruling. The negative effects allegedly caused the Town by the Director's decision to process the petition relate to consequences arising only after the arbitration panel is appointed. The matters addressed in the Director's April 15 ruling relate only to panel appointment and those preliminary matters are not complicated, time-consuming or costly. Once an arbitration panel is created, the conduct of the arbitration proceeding is not within this agency's direction or control. Under §205.8 of our Rules, the "conduct of the arbitration panel shall be under the exclusive jurisdiction and control of the arbitration panel." Therefore, requests for adjournment of arbitration proceedings for the reasons stated by the Town are properly referred to the panel,<sup>11</sup> not the Director. A request that the Director not process the petition even insofar as the appointment of panel members was correctly addressed to the Director, but that request was properly denied by him because the Town's arguments do not relate to panel appointment, but to matters within the arbitration panel's exclusive control.

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<sup>10</sup>Rules §205.6(b).

<sup>11</sup>A panel has been appointed since the date of the Director's ruling and hearings have begun.

The Town's reliance on *Kingston* is misplaced. Without deciding whether *Kingston* was correctly decided, it is plainly distinguishable.

In *Kingston*, the Board ordered that an employer's petition for interest arbitration not be processed because the union refused to participate in the interest arbitration proceedings and asserted its rights under §209-a.1(e) of the Act to the continuation of the terms of its expired agreement until a new agreement was negotiated. Expressing a belief that an arbitration award could not issue in that circumstance, other than one preserving the status quo under the expired agreement, the Board concluded in *Kingston* that processing that arbitration petition would be futile.

The controlling difference between this case and *Kingston* is that here the cited futility of the arbitration proceedings is only potential. These arbitration proceedings are arguably futile only if the Town prevails on its improper practice charge. In *Kingston*, on the stated principles, the futility of the arbitration process was a certainty.

Having affirmed the Director's ruling not to stop the processing of this petition,<sup>12</sup> the other aspects of his April 15 ruling are also properly affirmed. The Director did not require the Town to appoint its member to the arbitration panel. The Director only granted the Town some additional time from his ruling to make its designation. The directive to both parties to strike names from the list used to designate the public member of the panel was proper as it was in strict compliance with the statutory directive in §209.4(c)(ii) of the Act.

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<sup>12</sup>*Accord Schenectady Patrolmen's Benevolent Ass'n*, 20 PERB ¶3029 (1987) (Director declined union's request to delay filing a response to employer's interest arbitration petition pending disposition of union's improper practice charge against employer).

We also affirm the Director's May 15 ruling to conduct the name-striking process by telephone conference call. Section 205.7(b) of our Rules, even when read literally, does not require a physical presence by anyone. A "meeting" for the purposes of §205.7(b) of our Rules can be one conducted telephonically. As the parties are clearly present at such a meeting, the PERB representative holding the conference call is necessarily and equally "present" at that meeting. Moreover, as the Director noted, meetings for purposes of striking names from a list from which the public member of an interest arbitration panel is appointed have been conducted telephonically as a matter of routine practice since the interest arbitration provisions of the Act were added. The Town acknowledges that meetings have been held by telephone, but argues that at least the telephone meetings in which it was a participant were held with its consent. Without its consent, the Town concludes that a name-striking meeting can only be held in person.

As a meeting conducted by telephone complies with our rules, the issue becomes whether holding such a meeting without all participants' consent violates due process. Since adjudicatory principles of confrontation do not apply in this context, the due process argument must rest on a theory that a practice fair in fact becomes one unfair in appearance because the parties cannot see each other. Given the nature and limited purpose of the name-striking meeting, we do not find any appearance of unfairness in the conduct of the meeting by telephone conference call. In this age of technology, it would be inadvisable for us to define a meeting as restrictively as the

Town requests. Telephone conference meetings are a standard business practice. In fact, telephone conference hearings are conducted by government agencies even where the rights to confront and cross-examine witnesses attach.

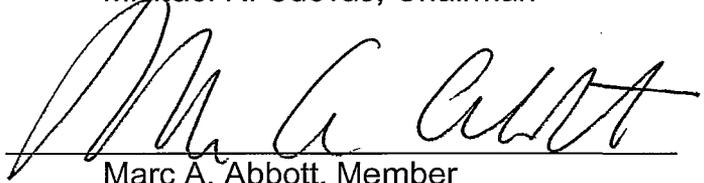
As the conduct of a name-striking meeting by telephone conference is entirely consistent with even a literal reading of the rule and any due process considerations, we are persuaded that the Director's May 15, 1998 ruling was correct.

For the reasons set forth above, the Town's exceptions are denied and the Director's rulings are affirmed. SO ORDERED.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

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In the Matter of

**NEW YORK STATE CORRECTIONAL OFFICERS  
AND POLICE BENEVOLENT ASSOCIATION, INC.,**

Petitioner,

- and -

**CASE NO. C-4800**

**STATE OF NEW YORK,**

Employer,

- and -

**NEW YORK STATE LAW ENFORCEMENT  
OFFICERS UNION, DISTRICT COUNCIL 82,  
AFSCME, AFL-CIO,**

Intervenor.

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**HINMAN, STRAUB, PIGORS & MANNING, P.C. (WILLIAM F. SHEEHAN and  
JOHN R. SACCOGIO of counsel), for Petitioner**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL of  
counsel), for Employer**

**HITE & CASEY, P.C. (ROBERT S. HITE and KEVIN S. CASEY of counsel),  
for Intervenor**

**BOARD DECISION AND ORDER**

The New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82) seeks permission to appeal from a decision by the Director of Public Employment Practices and Representation (Director). Pursuant to a petition filed by the New York State Correctional Officers and Police Benevolent

Association, Inc. (NYSCOPBA), the Director ordered an election between NYSCOPBA and Council 82 in the Security Services Unit of approximately 25,000 employees of the State of New York (State).

Addressing allegations raised by Council 82 in its response to the petition, the Director held that NYSCOPBA is an employee organization within the meaning of §201.5 of the Public Employees' Fair Employment Act (Act) and that its petition was supported by a valid showing of interest from thirty percent of unit employees, as evidenced by individually signed employee petitions submitted on the form prescribed by the Director pursuant to §201.4(b) of our Rules of Procedures (Rules). The Director did not count designation cards submitted by NYSCOPBA in determining that it had filed a numerically sufficient showing of interest because it was unnecessary given his determination on the employee petitions. For the same reason, the Director also did not count any showing of interest which had been revoked, although he observed that employee petitions are incapable of being revoked. The Director denied Council 82's request for an investigation into its separate allegations that names on NYSCOPBA's showing of interest were forgeries upon the conclusion that the allegations did not evidence "a fraud or misrepresentation so as to compromise the integrity of PERB's procedures." Council 82's allegations that employees were told the petitions they signed would only be used to send them information were disregarded by the Director because the petition form they signed clearly states that its purpose is to cause NYSCOPBA's certification and the decertification of Council 82.

Council 82 requests that we review those aspects of the Director's decision concerning NYSCOPBA's showing of interest.<sup>1</sup> Council 82 alleges the following as errors by the Director:

1. His decision to count signatures on the petition form which consist of an initial instead of a full first name.
2. His declination to conduct an investigation into the allegations of possible forgery and misrepresentation.
3. His decision to count signatures allegedly obtained upon a misrepresentation by NYSCOPBA's officers and agents as to the purpose or effect of the signature on the showing of interest.
4. His alleged decision to count illegible signatures.
5. His declination to rule on the validity of the designation cards obtained by NYSCOPBA through the mail.
6. His alleged failure to exclude from the calculation of the showing of interest any evidences from employees who had submitted a revocation.

NYSCOPBA argues in a multi-point response to the exceptions that interlocutory review of Council 82's exceptions is not warranted and that none of the Director's several determinations regarding the sufficiency of the showing of interest are reviewable by the Board because they all are necessarily encompassed within the Director's ministerial conclusion that the showing of interest is numerically sufficient. If

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<sup>1</sup>No exceptions were taken to the Director's holding that NYSCOPBA is an employee organization within the meaning of the Act.

and to the extent we should review any of the Director's determinations, NYSCOPBA argues that those determinations are correct and within the range of discretion bestowed upon the Director under the Rules. Should the Director's decision not be reviewed in a timely fashion, be reversed in any respect, or remanded on any point, NYSCOPBA requests that we order an election in which the ballots would be impounded upon return for such time as may be necessary.

The State has not responded to the arguments advanced by either of the other parties.

Having reviewed the record, and having considered the parties' arguments, we affirm the Director's decision in part and remand the matter to him for further investigation into the showing of interest submitted by NYSCOPBA.

Preliminarily, we must decide whether to grant permission to appeal from any of the Director's several rulings. Appeal at this point in the representation proceeding is by permission only pursuant to §201.9(c)(4) of our Rules.

It has been held repeatedly that rulings incidental to the processing of a representation petition will not be reviewed while the petition is pending before the Director unless there are extraordinary circumstances warranting that interlocutory review.<sup>2</sup> We are persuaded upon consideration of the totality of circumstances in this case that we should not withhold review of the issues raised by the exceptions and response until after an election is held.

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<sup>2</sup>See, e.g., *County of Putnam*, 31 PERB ¶3031 (1998).

The exceptions question the very propriety of conducting an election because preconditions to that election have allegedly not been satisfied. A post-election review of Council 82's exceptions would not allow for a meaningful review of those exceptions. The election to which objection is made would have been conducted before any decision on the propriety of the Director's having ordered that election would have issued. Moreover, many of the issues presented for decision are novel and affect all certification/decertification proceedings before this agency. As explained more fully in our discussion which follows, there is no decision at any level on several issues raised by the exceptions. There are Director level decisions on certain others, and any Board precedent with respect to any other issues is general, at best. Accepting this appeal at this point will permit for a consideration of these largely novel and important issues without risking that those issues will be mooted by the results of an election or that they will not be pursued after an election for other reasons. The agency staff who are responsible for the processing of representation petitions and our clientele deserve guidance on the several issues presented by these exceptions. Only by reviewing these exceptions now can we ensure that this guidance is supplied. Finally, extraordinary circumstance is presented by the practical realities associated with the conduct of a mail ballot election involving 25,000 employees. This is, quite simply, not a typical election proceeding. Postponing consideration of the issues raised by these exceptions opens the possibility, were NYSCOPBA to win the election, that the results might have to be set aside and the petition dismissed. The waste of time and money occasioned in that circumstance and the resulting voter frustration, confusion and anger should be avoided. Nor do we believe it is conducive to the conduct of a fair election

and informed voter choice to have either party campaign under such a cloud of unresolved allegations. These circumstances can only be avoided if we entertain the exceptions now. Accordingly, we exercise our discretion to grant permission for review of the Director's several rulings, a review which will not delay an election because the election which had been scheduled tentatively has been postponed by the Director.

Before reaching the showing of interest exceptions, we must determine the effect of §201.4(c) of our Rules on our power to do so.

Section 201.4(c) of our Rules provides as follows:

The determination by the Director as to the timeliness of a showing of interest and of its numerical sufficiency is a ministerial act and will not be reviewed by the Board.

As this rule is aberrational in that it bars our review of certain Director determinations, which are otherwise all reviewable, it should be and has been construed narrowly. For example, notwithstanding the phrase "numerical sufficiency", it has been held that §201.4(c) of the Rules does not bar the Board's review of the Director's determination that a showing of interest is numerically insufficient.<sup>3</sup> In our view, the Board's power to review the several showing of interest determinations made by the Director in this case is much clearer than the exercise of review power undertaken in the stated example.

The issues we are asked to review pursuant to Council 82's exceptions involve the types of evidences which can be counted as a showing of interest. There is a plain difference between the types of a showing of interest which may be properly considered

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<sup>3</sup>*State of New York*, 11 PERB ¶3106 (1978).

by the Director and his calculations based thereon once the evidences are accepted as valid as to type and form. The former is primarily, if not exclusively, a question of law, not fact, and there is nothing "ministerial" in the Director's determination as to what types of evidences may be accepted as a showing of interest.

The Board specifically reviewed and affirmed the Director's determination that a showing of interest was sufficient in *State of New York (Office of Employee Relations)*.<sup>4</sup> The decisions in *State of New York (Division of State Police)*<sup>5</sup> and *Board of Education of the City of Yonkers*<sup>6</sup> are not to the contrary of our conclusion in this respect. In both of those cases, the showing of interest as submitted was unquestionably in permissible form. Neither case supports a proposition that the Director's acceptance of a showing of interest submitted in impermissible form is beyond our power to review pursuant to exceptions raising that issue.

Having decided these two preliminary issues, we proceed to an analysis of Council 82's exceptions, certain of which do not require any extensive discussion.

#### ILLEGIBILITY

Nothing in the Director's decision supports a conclusion that he counted toward satisfaction of the showing of interest requirements any names which are illegible. Indeed, the content of the Director's decision reflecting what he actually counted

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<sup>4</sup>10 PERB ¶3108 (1977)(subsequent history omitted).

<sup>5</sup>15 PERB ¶3014 (1982).

<sup>6</sup>10 PERB ¶3100 (1977).

suggests clearly that only names which were legible were included in the Director's calculation of the numerical sufficiency of the showing of interest.

To provide guidance to the Director and clientele for the filing and processing of future petitions, we venture to state the obvious. Names of unit employees as submitted on a showing of interest must be legible to the point of enabling the Director to identify that person as one on the list of unit employees submitted by the employer. Names which the Director finally determines to be illegible are not to be counted.

#### MISREPRESENTATIONS

We deny any of Council 82's exceptions grounded upon allegations that certain unit employees were persuaded to sign NYSCOPBA's petition upon representations that their signing would only lead to their being sent additional information.

We have not discovered from our research any decision in which the Board has addressed this issue. The Director, however, has long held that allegations of misrepresentation will be disregarded if the purpose of the showing of interest is clear from its face.<sup>7</sup>

NYSCOPBA's showing of interest, as counted by the Director, consists of employee petitions submitted on a form currently prescribed by the Director pursuant to our Rules. That petition form was drafted in a manner to ensure that employees would understand its purpose and the effect of their signing it. The showing of interest petitions submitted by NYSCOPBA state clearly that the signatures will be used to support a petition to be filed with PERB for the purpose of certifying NYSCOPBA and

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<sup>7</sup>*Niagara County Community College and County of Niagara*, 23 PERB ¶4014 (1990); *State of New York*, 17 PERB ¶4075 (1984).

decertifying Council 82 as the negotiating agent for the Security Services Unit. There would be no point in having a prescribed form if, when that form were used, the Director were still required to investigate allegations that persons were in some way misled as to the purpose of the showing of interest petition.

When the showing of interest consists of employee petitions submitted on the agency's prescribed form, or the showing of interest of different type is otherwise clear as to its purpose on its face, we will not entertain or investigate allegations that persons were induced to sign that showing of interest by misrepresentations as to its purpose.

#### REVOCATIONS

Council 82 urged the Director not to count toward NYSCOPBA's satisfaction of the showing of interest requirements the names of any persons who had revoked their support for NYSCOPBA's representation petition before it was filed. It submitted to the Director revocations from approximately forty-five employees who claimed to have earlier signed NYSCOPBA's showing of interest petition. The Director did not count these revoked signatures because they did not affect the numerical sufficiency of the showing of interest. Nonetheless, the Director went on to state that under §201.4(b) of the Rules only dues deduction authorizations are capable of being revoked.

As with the preceding misrepresentation issue, our research has not disclosed any Board decision about whether and when revocations of any form of a showing of interest should be honored. As this is a recurring issue at the Director level, we once again take this opportunity to provide instruction in this respect both for purposes of this proceeding on remand and for petitions filed hereafter.

As we understand the Director's policy and practice from this and prior decisions,<sup>8</sup> the Director will only honor revocations of dues deduction authorizations and only then if the revocation is clear and tendered to the petitioner before it files the representation petition. We conclude that the policy as articulated above is one consistent with the Act and Rules, with the proviso that it applies equally to revocations of all permissible forms of a showing of interest, not just dues deduction authorizations.

Although §201.4(b) of our Rules requires that dues deduction authorizations not be revoked as a condition to their being considered "timely", that does not mean, and is not intended to mean, that all other forms of a showing of interest are incapable of being revoked under any circumstances. Showings of interest are, in essence, nothing more than an expression of an employee's state of mind regarding a representation question as of a certain date. Underlying all showings of interest of any type is an individual's authorization for the petitioner to submit that showing of interest on the employee's behalf. An individual who has authorized the submission of an evidence to establish that person's interest in a representation proceeding should be and is empowered to revoke that authorization in a timely and proper manner.

Revocations of a showing of interest are to be on notice from the employee to a petitioner stating clearly that permission to use that person's name for the stated purposes has been rescinded. Without notice, a petitioner would not have any reason to suspect that there was a need to collect any additional showing of interest. The prejudice to a petitioner and the employee interests that the petitioner represents is

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<sup>8</sup>See *County of Erie and Sheriff of Erie County*, 13 PERB ¶4060 (1980).

unreasonable and is easily avoided by the requirement of advance notice.

Furthermore, to be honored, a revocation must be actually received by the petitioner at a date sufficiently in advance of the filing of the petition to permit a petitioner a reasonable opportunity to remove the name from the showing of interest. If by the date a petition is filed a showing of interest has not been revoked by the employee who had authorized submission of that evidence in the manner prescribed, that showing is to be counted, assuming it is otherwise proper in form. Employee revocations submitted after a petition is filed are to be disregarded by the Director.

The three remaining showing of interest issues are those which we conclude necessitate a remand to the Director for investigation.

#### DESIGNATION CARDS

The Director did not decide whether designation cards obtained by NYSCOPBA through the mail should be counted because he determined that the showing of interest in the form of employee petitions was otherwise sufficient. NYSCOPBA argues that we should not consider any issues associated with the designation cards because Council 82 is not aggrieved by the Director's declination to rule on the validity of those cards such that it is without standing to raise those issues. Moreover, as a matter not decided by the Director, NYSCOPBA submits that the issues associated with the designation cards are not ripe for our review.

In the context of a representation proceeding, our review of Director determinations is not and should not depend upon notions of standing or ripeness. Representation proceedings are investigatory in nature and they involve issues which transcend the interests of the parties to a particular proceeding. The validity of a

showing of interest obtained through the mail is an issue which has not been the subject of any decision by this agency at any level. However, we understand it may be a common campaign tool, particularly in large, geographically wide-spread units with remote work locations, as is the case here. For this reason, it is an issue that is likely to lead to future litigation. Indeed, we know from notice taken of documents on file with the Director that this same issue has been raised under a petition (C-4810) filed by NYSCOPBA with respect to the Security Supervisors Unit, which is also currently represented by Council 82. By declining to consider the designation card issue in this case, we do little more than postpone the inevitable for no persuasive reason. Moreover, as we are remanding for further investigation the showing of interest resting upon the employee petitions, the designation cards may assume an importance not present when the Director issued his decision.

Council 82 argues that the designation cards are invalid because NYSCOPBA cannot vouch with certainty that the cards were signed by unit employees. That is likely true for designation cards sent and returned by mail, but that same proposition is equally true for most face-to-face solicitations of a showing of interest. Unless a solicitor asks for identification from each signatory, or each signatory is known personally by the solicitor, neither of which is required under our Rules or expected, there is never a guarantee that the person signing the showing of interest is, in fact, that person.

We should not erect insurmountable barriers to an exercise by unit employees of their right to reassess periodically their choice of a bargaining agent. That right is fundamental. Therefore, there is nothing, *per se*, which invalidates a showing of

interest solicited and/or obtained through the mail. At the same time, however, we cannot permit a showing of interest to be obtained in a manner which provides no reasonable assurance that the evidences accurately reflect the desires of persons who are unit employees.

The broad outlines of NYSCOPBA's solicitation of the designation cards do not appear to be in dispute on this record. Thousands of cards were mailed by NYSCOPBA to persons whom it believed to be unit employees at their home addresses. Accompanying the cards were two letters. One explained the legal aspects of decertification; the other, the benefits of joining NYSCOPBA in its efforts to decertify Council 82. Certain of the cards were distributed to employees at work locations. Some others may have been left at unspecified locations for pickup by unit employees. Of the designation cards obtained by NYSCOPBA, most were returned through the mail. Employees were not supplied either a return envelope or postage. It is unclear whether any were returned in other ways. The designation cards themselves attest that the person signing is a State employee and is supporting NYSCOPBA's petition for its certification and the decertification of Council 82. The card contains spaces for the insertion of name, address, home phone number, work department/facility, job title, signature, and date. The particulars regarding the distribution, collection and return of those cards are not, however, as clear. It is for this reason that the issues concerning the designation cards are appropriately remanded to the Director for investigation as necessary<sup>9</sup> as to the precise manner of their distribution and return and the

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<sup>9</sup>Depending upon the outcome of the investigation ordered as to the employee petitions, the Director may not need to examine the designation cards. The order in which the Director conducts the investigations is at the Director's discretion.

circumstances upon which the declaration of authenticity, as it pertains to those cards, was made. If and to the extent the Director concludes from this investigation that there is a reasonable degree of assurance that the cards were executed by an employee in the Security Services Unit, and that the declaration of authenticity requirements are satisfied as to those cards, the cards may be counted, provided they are otherwise in proper form and all other conditions to those cards being counted are satisfied.

Alternatively, if the Director concludes that there is not from a totality of all relevant circumstances a reasonable assurance that the designation cards were signed by unit employees, or that the declaration of authenticity requirements are not satisfied, then, like any other form of a showing of interest, the designation cards should not be counted.

We are left with two questions concerning the showing of interest. First, whether evidences of a showing of interest bearing only an initial for a first name<sup>10</sup> were properly counted by the Director. Second, whether the Director reasonably declined to conduct any investigation into Council 82's allegations of possible forgery and fraud in conjunction with the collection and submission of the showing of interest.

#### SIGNING BY INITIALS

Section 201.4(b) of our Rules requires both designation cards and employee petitions to be "signed" and refers to the persons who sign those evidences as "signatories". Lacking any special definition for those words, they can only be given their common legal meaning. By any definition, those quoted words plainly incorporate

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<sup>10</sup>There is no indication that the Director counted any evidence bearing an initial only for a last name.

a requirement that the showing of interests in the form submitted by NYSCOPBA bear the signature of a unit employee. Although a signature can be in any number of forms,<sup>11</sup> including initials<sup>12</sup> and print,<sup>13</sup> when the first name of a signature is represented by initials only, extrinsic evidence establishing the identity of the signer is necessary before a signature requirement is satisfied.<sup>14</sup>

[A]n initial letter may denote any one of a great number of names, and, unaided by proof of any other fact, designate the person with but little more certainty than as though the name abbreviated by the initial was wholly omitted.<sup>15</sup>

A showing of interest petition is signed for purposes of §201.4(b) of our Rules only if it satisfies two conditions. The name as signed must identify the signer,<sup>16</sup> and when the showing is in support of a petition for certification/decertification, as is NYSCOPBA's, it must establish that the person signing is included in the unit which the petitioner seeks to represent. Without additional evidence, an initial in place of a full first name cannot do either.

NYSCOPBA's arguments are directed to an invalidation of signatures containing initials. As we are not invalidating any signature, NYSCOPBA's arguments that signatures containing initials for first names can be valid miss the point. We recognize

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<sup>11</sup>N.Y. Gen. Constr. Law §46.

<sup>12</sup>In *re Mack's Will*, 21 A.D.2d 205 (3d Dep't 1964).

<sup>13</sup>*Mesibov, Glinert & Levy, Inc. v. Cullen Bros. Mfg. Co.*, 245 N.Y. 305 (1927); *Pearlberg v. Levisohn*, 112 Misc. 95 (2d Dep't 1920).

<sup>14</sup>*People v. Smith*, 45 N.Y. 772 (1871).

<sup>15</sup>*Id. at 779.*

<sup>16</sup>*Wagner v. Chemical Bank & Trust Co.*, 154 Misc. 123 at 125 (N.Y. Mun. Ct. 1934): "The all-important thing is the question of identification."

that signatures can be in the form of a first name as represented by an initial. Indeed, a person may not have a full first name, only an initial: If the employee list submitted by an employer identifies that the employee is carried on its official records with only an initial as a first name, a signing corresponding to that initial would be a valid signature. Apart from this unusual circumstance, we hold only that what can be a signature does not become one until and unless the identity of the person signing a first name with initials is established by extrinsic evidence. We do not specify what types of extrinsic evidence will serve to establish the identity of the signer for there are likely many.

Notwithstanding the clear law pertaining to signatures, NYSCOPBA argues that we can do nothing but accept signatures in which the first name is abbreviated by an initial because the Director stated in his decision that this is how our rules regarding signed showing of interests have been "historically applied".

There are two basic responses to NYSCOPBA's argument in this regard. As NYSCOPBA itself admits, this issue has never been presented for decision at any level within the agency. Therefore, it is simply not possible to conclude reasonably that any Director has ever made a conscious decision to accept initials as signatures with knowledge that the use of initials do not, without more, identify the signer, for that would represent a knowing rejection by the Director of the basic required elements of a signature. Even were we to assume that the Director came to that conclusion, the Director's alleged historical practice taken pursuant to that conclusion is not attributable to this or any other Board. It has never been any Board's policy or practice to examine any showing of interest, or any other substantive or procedural issue, except in the context of exceptions raising that issue. As this showing of interest issue has never

before been submitted to any Board, no Board could have adopted a policy or practice reflecting a determination that signatures embodying initials for a first name are identifying and valid *per se*. Therefore, NYSCOPBA's arguments that a decision contrary to the Director's would retroactively change Board policy or practice in violation of its due process rights is without merit.

Upon remand, the Director must conduct a further investigation to ascertain by resort to extrinsic evidence whether the noted conditions to a valid signature can be satisfied in signings with first name initials. To aid that investigation upon remand, we can offer only little guidance. The prescribed petition form contains lines for both a printed and scripted signature. As a signature can be made in either form, if a full first name and last name is printed or scripted, the noted conditions are satisfied, barring any issues as to the authenticity of that signature. Beyond this, the nature and extent of the investigation rest within the Director's discretion if the investigation is objectively reasonable and conducive to ascertaining that the stated signature conditions have been satisfied.

#### FORGERY AND FRAUD ALLEGATIONS

Section 201.4(e) of our Rules authorizes the Director to investigate a showing of interest and the accompanying declaration of authenticity whenever the Director deems it appropriate to guard against forgery and fraud in the collection and submission of these documents. The conduct of such an investigation is within the Director's sound discretion under the Rules. This does not mean, however, as NYSCOPBA argues, that the Director's decision not to conduct an investigation is one we cannot review, only that the Director's decision to that effect may be set aside only for an abuse of that

discretion. It has been held generally that an investigation into a showing of interest or declaration of authenticity is not warranted unless there is information, beyond mere conjecture, which casts doubt upon the authenticity of the showing of interest.<sup>17</sup> What we are asked to decide in this case for the first time is what level of proof is necessary to support a conclusion that the Director has abused discretion in deciding not to conduct any investigation into allegations of fraud and forgery made by a party to a representation proceeding.

Just as we did for the issues earlier discussed, in answering this question, we must strike a balance which accommodates what are at times competing interests and conflicting demands upon the agency. On the one hand, we cannot set a standard of proof so low that the Director would always be forced to investigate showings of interest and declarations of authenticity for forgery and falsity. That result would unreasonably and unnecessarily delay the representation process itself and burden this agency's resources. On the other hand, we cannot set a standard of proof so high that it encourages the very forgery and fraud we strive to prevent by creating a circumstance in which no petitioner need reasonably fear an investigation into its showing of interest submissions and declarations. As earlier parts of our decision reflect, we are sensitive to the many problems confronting a petitioner which is attempting to collect a showing of interest, particularly in a large unit. We can be no less sensitive to the problems confronting the challenged employee organization, which is required to make a detailed response to a representation petition, including any allegations pertaining to showing of

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<sup>17</sup>*State of New York (Office of Employee Relations)*, *supra* note 4.

interest, which it may not review, within ten working days after its receipt of the representation petition from the Director.<sup>18</sup>

Having carefully considered this issue in light of the considerations stated above, we conclude that there was enough objective and persuasive evidence presented to the Director to warrant some further investigation into the showing of interest and accompanying declaration of authenticity. We emphasize that our remand does not suggest that there are, in fact, any forgeries in the showing of interest, or, to whatever extent there may be forgeries, that those are attributable to any malfeasance or misfeasance by NYSCOPBA. We simply hold that the Director abused his discretion in not undertaking some further investigation of these allegations.

We agree with the Director that Council 82's articulated belief that NYSCOPBA could not have collected signature petitions and cards from thirty percent of the unit employees would not, by itself, warrant investigation. We conclude, however, that the objective evidence relating to Council 82's observation of NYSCOPBA's solicitation efforts lend support to other evidences warranting an investigation in this respect. These other evidences are in essentially two parts.

First, wide-spread use has been made of initials on the showing of interest petitions. The very form of this showing of interest opens itself to the possibility of forgery and fraud.<sup>19</sup> Again, we are not suggesting that there is, in fact, forgery or fraud in the showing of interest or the declaration of authenticity, only that the form of the

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<sup>18</sup>Rules §201.5(d).

<sup>19</sup>See *Parcel 242 Realty v. New York State Div. of Housing and Community Renewal*, 215 A.D.2d 132 (1<sup>st</sup> Dep't 1995).

showing of interest actually submitted lends itself to that misuse. Second, Council 82 was able to secure, within the time limits allowed, witnessed but unsworn statements from twenty-two unit employees stating that they had not signed any showing of interest on behalf of NYSCOPBA. The Director found the names of eight of these twenty-two employees on the showing of interest, but proceeded no further than to not count those eight showings.

As relevant to the conduct of this aspect of a showing of interest investigation, the issue is not whether showing of interest evidences of arguably "dubious validity"<sup>20</sup> affect the numerical sufficiency of the showing of interests submitted by NYSCOPBA. Standing alone, they almost certainly do not. The significance of the discovery of arguable forgeries in eight showings of interest out of a universe of twenty-two employees from whom Council 82 was able to secure statements is that they reasonably suggest a possibility of forgeries within the showing of interest evidences which are identical in type and which were obtained in similar fashion. Without suggesting, as did the Director, that the only concern to the agency in relevant respect is forgery and fraud at a level so high that it actually affects the numerical sufficiency of a showing of interest, an investigation beyond the eight signatures is appropriate to determine whether and to what extent there are, in fact, forgeries within the showing of interest and, if so, whether NYSCOPBA bears responsibility for those forgeries.

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<sup>20</sup>The Director's statement in this regard did not represent a finding by him that any of the eight showings of interest were, in fact, of "dubious validity", only that the conclusion could be arguably derived from the nature of the evidences submitted by Council 82.

As NYSCOPBA itself recognizes, statements by individuals attesting that they did not sign the showing of interest evidences bearing their name are serious ones and we have taken them seriously. At this point, those statements, even though unsworn, are entitled to weight in considering whether to require the Director to conduct some further investigation.

In furtherance of its argument that no investigation in this regard is warranted, NYSCOPBA has submitted to us a copy of the showing of interests bearing the signatures of the eight persons who stated that they did not sign any showing of interest, and a copy of the statements those eight persons submitted to Council 82, which also bear their signature. NYSCOPBA asks us to compare the two signatures of each of the eight individuals as they appear on the two documents. It argues that even a cursory comparison will reveal that the signatures on the two documents are the same, such that there is no reasonable basis to conclude that there is any forgery or fraud in the showing of interest. As those signatures are on documents of record, we have done as requested and we cannot come to a conclusive determination as to whether and to what extent the signatures are similar or dissimilar or whether each signature within the pair was signed by the same person. This is, therefore, appropriately a matter for the Director's determination after such investigation as he considers to be appropriate.

As with the investigation ordered to establish the identity and unit inclusion of persons whose signature includes an initial for, or as, a first name, we do not order that the investigation into allegations of fraud and forgery take any particular form or proceed in any particular order. That is a matter reserved to the Director's discretion

provided that the methods chosen are objectively reasonable and suited to accomplishment of the stated ends. An acceptable investigation, however, might be one comparing signatures using a statistically relevant random sampling of the signatures on the showings of interest and the signatures of unit employees on documents submitted to the Director by Council 82 for the very purpose of comparison.

This suggestion is, of course, illustrative only and it is not intended to prevent the Director from opting for a different type or multiple types of investigation.

NYSCOPBA requests we order an election notwithstanding the pendency of any investigation we might order. Since the date of his decision, the Director has postponed the election for reasons unrelated to those pending before us. An order requiring the Director hold an election is inappropriate in this circumstance. Rescheduling of the election should be at the Director's order.

For the reasons set forth above, the matter is remanded to the Director for the conduct of investigations consistent with our decision herein. In all other respects, the exceptions are denied. SO ORDERED.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**ULSTER COUNTY COMMUNITY COLLEGE  
FACULTY ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-4785**

**COUNTY OF ULSTER and ULSTER COUNTY  
COMMUNITY COLLEGE,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the Ulster County Community College Faculty Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All adjunct/part-time faculty.

Excluded: All other employees.

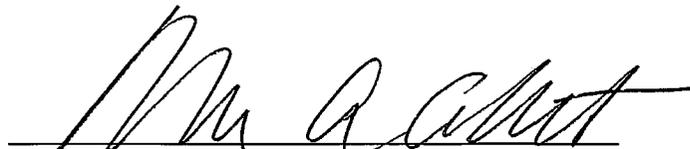
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Ulster County Community College Faculty Association.

The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**COUNCIL 66 AFSCME, AFL-CIO,**

Petitioner,

-and-

**CASE NO. C-4787**

**COUNTY OF ONEIDA,**

Employer,

-and-

**UNITED PUBLIC SERVICE EMPLOYEES UNION,  
UNITED SERVICE WORKERS OF AMERICA,  
SEIU, AFL-CIO a/k/a UNITED PUBLIC SERVICE  
EMPLOYEES UNION LOCAL 424,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union, United Service Workers of America, SEIU, AFL-CIO a/k/a United Public Service Employees Union Local 424 has been designated and selected by a majority of the

employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Attachment A.

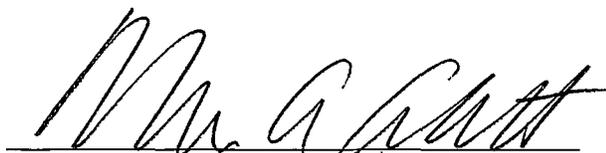
Excluded: All other employees.

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

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

## White Collar (Administrative) Unit

Account Clerk  
 Account Clerk Typist  
 Accounting Supervisor  
 Accounting Supervisor Grade B  
 • Administrative Asst  
 Administrative Officer  
 Alcoholism Counselor Trainee  
 Alcoholism Counselor I  
 Alcoholism Counselor II  
 Alcoholism Counselor III  
 Assoc Employment & Training Coord  
 Assoc Planner  
 Assoc Graphic Artist  
 Assistant Building Superintendent (NYCC)  
 Asst Motor Vehicle Bureau Supervisor  
 Auditor  
 Auditor I  
 Auditor II  
 Automotive Mechanic (NYCC)  
 Activity Therapist  
 Building Maintenance Helper (NYCC)  
 Building Maintenance Mechanic (NYCC)  
 Building Maintenance Worker (NYCC)  
 Building Maintenance Supervisor (NYCC)  
 Building Superintendent (NYCC)  
 Buyer  
 Campus Security Officer (NYCC)  
 CAP Coordinator  
 CAP Nurse  
 CAP Social Worker  
 Case Supervisor Grade A  
 Case Supervisor Grade B  
 Caseworker  
 Cashier  
 Chief Social Welfare Examiner  
 Child & Family Specialist  
 Clerk  
 Clerk Typist  
 Central Stores Clerk  
 Community Service Aide  
 Community Service Worker  
 Community Service Worker (Spanish Speaking)  
 Computer Programming Technician  
 Computer Operator  
 • Confidential Investigator  
 • Confidential Support Investigator  
 • Contract Administrator  
 Crisis Intervention Counselor  
 Customer Relations Supervisor  
 Data Entry Machine Operator  
 • Director of Data Processing Services  
 Director of Records Management  
 Disbursements Officer

## White Collar (Administrative) Unit

Electrician (NYCC)  
 Electronic Data Processing Clerk  
 Employment & Training Counselor  
 Employment & Training Special Project Coord  
 Environmental Health & Safety Specialist (NYCC)  
 • Finance Administrative Officer  
 Family Service Specialist  
 General Stores Clerk (NYCC)  
 Grand Jury Steno  
 Graphic Artist  
 Head Social Welfare Examiner  
 Home Economist  
 Home Health Aide  
 Inventory Records Clerk  
 Job Development & Placement MH  
 Jr Planner  
 Lab Tech - Substance Abuse  
 LPN Substance Abuse  
 Library Clerk (NYCC)  
 Light Meter Equipment Operator (NYCC)  
 Mail Clerk (NYCC)  
 Mail Courier  
 Map Room Clerk  
 Medical Auditing Supervisor  
 Medical Records Clerk  
 Medical Service Coord  
 Medical Social Work Supervisor  
 Medical Social Worker  
 Medical Worker  
 Micro Computer Specialist  
 Microfilm Operator  
 Motor Vehicle Representative  
 Motor Vehicle Operator (NYCC)  
 Motor Vehicle Bureau Supervisor  
 Nutrition Outreach Coord  
 Outreach Services Rep  
 Outreach Worker  
 Offset Duplicating Machine Operator  
 Painter (NYCC)  
 • Para Legal Asst  
 Parent Aide  
 Parent Aide Supervisor  
 Phlebotomist Outreach Worker  
 Photo Machine Operator  
 Physical Educ Specialist  
 Planner  
 Preventive Maintenance Coordinator (NYCC)  
 Principal Account Clerk  
 • Principal Accounting Supervisor  
 Principal Social Welfare Examiner  
 Principal Clerk  
 Principal Typist (See Sec only)  
 Printing Helper

## White Collar (Administrative) Unit

Printing Supervisor  
Probation Asst  
Probation Officer  
Probation Supervisor  
Program Analyst  
Psychology Intern  
Public Health Engineer  
Public Health Sanitarian  
Public Health Technician  
Purchasing Agent (NYCC)  
Research Specialist  
Real Property Tax Service Coord.  
Resource Investigator  
Social Service Investigator  
Secretary to Real Property Tax Service  
Social Welfare Examiner  
Social Work Asst  
Sr Account Clerk  
Sr Account Clerk Typist  
Sr Administrative Asst  
Sr Audit Clerk  
Sr Building Maintenance Mechanic (NYCC)  
Sr Buyer  
Sr Caseworker  
Sr Clerk  
Sr Computer Operator  
Sr Confidential Investigator  
Sr Data Entry Machine Operator  
Sr Draftsman  
Sr E&T Coord  
Sr E&T Counselor  
Sr Nutrition Outreach Worker  
Sr Payroll Clerk  
Sr Planner  
Sr Probation Officer  
Sr Public Health Sanitarian  
Sr Social Welfare Examiner  
Sr Stenographer  
Sr Support Collector  
Sr Support Investigator  
Sr Tax Map Technician  
Sr Typist  
Stenographer  
Stop-DWI Program Administrator  
Storekeeper (NYCC)  
Substance Abuse Counselor Trainee  
Substance Abuse Counselor I  
Substance Abuse Counselor II  
Substance Abuse Counselor III  
Support Investigator  
Supervisor of Building Service (NYCC)  
Supervising Campus Security Officer (NYCC)  
Supervising CAP Nurse

**White Collar (Administrative) Unit**

Supervising Support Collector  
Supervising Support Investigator  
Systems Analyst  
Substance Abuse Nurse Practitioner  
Telephone Operator (MVCC)  
Trans Analyst  
Transport Coord  
Typist  
Victim Witness Coord  
Vocational Educational Counselor  
• Welfare Management Coord  
WIC Nutrition Technician  
WIC Nutritionist  
Working Foreman (MVCC)

- Oneida County titles
- MVCC position Human Resources only

TITLES: EXCLUDED

A Schedule titles

Deputy Director of Veteran's Svcs.  
1st Deputy County Clerk  
Highway Maintenance Supervisor  
Staff Development Supervisor  
Deputy Commissioner of DPW -Highways & Bridges  
Secretary to Commissioner of Aviation  
Secretary to DPW Commissioner  
Asst. Civil Engineer  
Secretary to Commissioner of Mental Health  
Director of Staff Development  
Deputy County Clerk (5)  
Director of Nursing  
Asst. County Attorney  
Special Asst. County Attorney  
Alternatives to Incarceration Director  
1st Asst. District Attorney (2)  
Supervising Nurse  
Director of Weights and Measures  
Secretary to Commissioner of Personnel  
Staff Development Asst.  
Executive Secretary  
Supervisor of Education Handicapped Children  
Chief Planner  
Resource Consultant  
Stenographer  
FBO Manager  
Coordinator Child Support Enforcement  
Principal Typist  
Project Director  
Motor Pool Coord.  
Secretary to the Board  
Deputy Clerk of the Board  
Secretary to County Clerk  
Secretary to Employment & Training Director  
Director of Administrative Services  
Director of Residential Services  
Secretary to Commissioner of Finance  
Secretary to County Attorney  
Legislative Analyst - Minority  
Legislative Analyst - Majority  
Substance Abuse Clinical Program Supervisor  
Director of Income Maintenance  
Asst. Executive Director of Substance Abuse Svcs.  
Asst. Director of Nursing  
Public Education Coord.  
Secretary to Public Defender  
Secretary to Administrator of Broadacres  
Social Service Attorney (3)  
Deputy Commissioner of Mental Health  
Director of Patient Services  
Supervising Public Health Nurse  
Asst. Engineer (2)  
1st Asst. Public Defender (6)

STATE OF NEW YORK )  
COUNTY OF ONEIDA ) ss:

RE: COUNTY OF ONEIDA WHITE  
COLLAR/(ADMINISTRATIVE) UNIT  
DECLARATION OF AUTHENTICITY

In accordance with PERB Rules and Regulations Section 201.4 ff., as amended, the following Declaration is submitted along with the Filing of the Showing of Interest with Certification/Decertification Petition herewith:

1. (A) Individual Executing the Declaration: Eugene Capicotto

(B) Declarant's authority: Declarant Eugene Capicotto is Second Vice-President for AFSCME Council 66 and has been authorized by an overwhelming majority of effected individuals to submit to PERB their original Authorization Cards. AFSCME Council 66, AFL-CIO is a servicing labor organization representing affiliated labor organizations throughout New York State; its Syracuse Area Office is located at 8180 Cazenovia Road, Manlius, New York 13104 (Tel.# (315) 682-9198).

2. Upon Declarant's information and belief, based upon inquiries made, the persons who names appear upon the Authorization Cards submitted have themselves signed such evidences on the dates specified thereon and that inquiry was made regarding their inclusion in any existing negotiating unit which is the subject of the representation petition by reviewing the Certification list from PERB dated 1/3/96 for Local 424, and the persons specified thereon are currently members of said County of Oneida White Collar/(Administrative) Unit.

  
\_\_\_\_\_  
Eugene Capicotto, Declarant

Sworn to before me this

17 day of June, 1998.

  
\_\_\_\_\_  
Notary Public

FREDERICK J. PFEIFER  
Notary Public, State of New York  
Qualified in Onondaga Co. No. 4709939  
Commission Expires May 31, 1997

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 138, 138A & 138B,**

Petitioner,

-and-

**CASE NO. C-4791**

**VILLAGE OF KINGS POINT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the International Union of Operating Engineers Local 138, 138A & 138B has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All operating engineers, equipment operators and labor supervisor employed by the Village of Kings Point.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Union of Operating Engineers, Local 138, 138A and 138B. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-4798**

**JONESVILLE FIRE DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union 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: Full-time station-keepers.

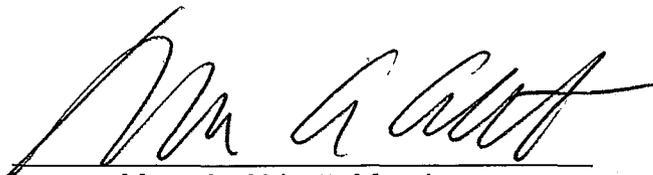
Excluded: All other employees.

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

DATED: October 27, 1998  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member