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State of New York Public Employment Relations Board Decisions from March 31, 2000

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from March 31, 2000

Keywords

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Comments

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

In the Matter of

**AFSCME, NEW YORK COUNCIL 66,
LOCAL 2574, COUNTY OF ALLEGANY
EMPLOYEES (GENERAL UNIT)**

Charging Party,

- and -

CASE NO. U-20123

COUNTY OF ALLEGANY,

Respondent.

JOEL POCH, ESQ., for Charging Party

**BOND, SCHOENECK & KING, LLP (JOSEPH RANDAZZO of counsel), for
Respondent**

BOARD DECISION AND ORDER¹

This case comes to us on exceptions filed by AFSCME, New York Council 66, Local 2574, County of Allegany Employees (General Unit) (AFSCME) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge alleging that the County of Allegany (County) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally contracted with a private employer for an excavator and an excavator operator, work that has been exclusively performed by a Heavy Motor Equipment Operator II (HMEO II), a title within AFSCME's unit. The County has also filed exceptions to the ALJ's decision.

¹Member Abbott did not participate in this decision.

The ALJ found that the work in issue had been exclusively performed by unit employees in the past. The charge was nevertheless dismissed by the ALJ based upon the language of the management rights clause of the parties' January 1, 1997 - December 31, 1999 collective bargaining agreement, which, the ALJ found, satisfied the County's duty to negotiate the assignment of unit work to nonunit employees.

AFSCME excepts to the ALJ's determination that the management rights clause evidences a satisfaction of the County's duty to negotiate a decision to subcontract. The County excepts to the ALJ's finding that the work in issue had been exclusively performed by unit employees.

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

It is undisputed that the County undertook a culvert work project for the Village of Alfred in May 1998. Finding that other projects required the presence of the County's bridge construction crew and the County's two excavators, the County hired a private contractor to provide an excavator and an excavator operator to work with the County's bridge maintenance crew on the culvert work project. For several days in May 1998, the contractor's excavator operator excavated soil and assisted unit employees in setting new sluice pipe, backfilling soil and the demolition of the existing culvert - duties normally performed by an HMEO II in AFSCME's unit.

The County-AFSCME contract contains a Management's Rights clause, Article XXIV, which provides:

The Employer retains the sole right to manage its business affairs and services and to direct the working force, including the right ... to determine when and to what extent the work required in operating its business and supplying its services [is] to be performed by employees governed by this Agreement....

In *County of Livingston*² (hereafter *County of Livingston*), a case which also involved the unilateral transfer of unit work, the Management Rights clause in the parties' collective bargaining agreement contained the following language, almost identical to the Management's Rights clause here:

The employer retains the sole right ... to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this Agreement....³

We there determined:

A union and an employer may satisfy by agreement their mutual duty to bargain a given subject, and thereby waive any further bargaining rights regarding the exercise of that contract right, without expressly stating in their contract that it was reached pursuant to the Act and was intended to fulfill the entirety of their statutory bargaining duty on that particular subject. Such a level of specificity has never been required as a condition to a finding of waiver by agreement either by this Board or in any other forum of which we are aware. We have, to the contrary, found a waiver by agreement in contract clauses which are broad when we have been persuaded that the language is a clear grant of right to the employer with respect to the subject matter of the improper practice charge. The particular management rights clause in issue here, which gives the County the right "to determine whether and to what extent the work required in

²26 PERB ¶3074 (1993).

³*Id* at 3142.

operating its business and supplying its services shall be performed by employees covered by [the] Agreement" is at least as specific as other agreements which have been held to constitute a waiver of further bargaining rights.⁴ (citations omitted)

AFSCME correctly argues in its exceptions that a generally worded management rights clause does not evidence a clear and explicit waiver of the right to negotiate or clear evidence that the employer has satisfied its duty to negotiate.⁵ Here, however, the language of the County's Management's Rights clause represents the same type of specific evidence as the Management Rights clause in *County of Livingston* that the County has satisfied its duty to negotiate with AFSCME about the assignment of unit work to nonunit employees.⁶

⁴*Id.* at 3143.

⁵See *New York City Transit Auth.*, 30 PERB ¶3004 (1997); *State of New York (Unified Court Sys.)*, 28 PERB ¶3014 (1995); *County of Broome*, 22 PERB ¶3019 (1989).

⁶AFSCME also argues that the County should have been held to a higher standard of proof in the assertion of the defense that its duty to bargain had been satisfied by the Management's Rights clause and should have presented evidence of the parties' intent in reaching agreement on the language of the clause. However, such evidence would be parol evidence and, as we explained in *Hempstead Public Sch. Dist.*, 25 PERB ¶3025, at 3055 n.1 (1992):

The parol evidence rule basically provides that an agreement which is clear in its terms and purports to express the parties' entire agreement on a subject cannot be contradicted, varied, or explained by the parties' prior or contemporaneous communications. Conversely, only contractual language which is vague, ambiguous or otherwise subject to more than one interpretation may be explained by parol evidence. See 58 N.Y. Jur.2d *Evidence and Witnesses*, §§ 555-618 (1986); Fisch, *New York Evidence*, §§ 41-64 (2d ed. 1977).

We have endorsed the application of the parol evidence rule in our proceedings where appropriate. See *Village of Port Chester*, 18 PERB ¶3058 (1985).

AFSCME also argues that there is limiting language in Article XXIV of the collective bargaining agreement. The language relied upon by AFSCME provides that the County

retains the sole right...to maintain order and efficiency in all its departments and operations, (including the procedures set forth in the Civil Service Law and other laws of the State of New York)....

The ALJ addressed this argument in her decision. Pointing to both *County of Livingston and City of Poughkeepsie v. Newman* (hereafter *City of Poughkeepsie*),⁷ the ALJ determined that the language of Article XXIV was not of the type of limiting language as was found in *City of Poughkeepsie*. Rather, the reference to the Act is of the general type found in *County of Livingston and Garden City Union Free School District*,⁸ where we held:

The employer's right in *City of Poughkeepsie* was specifically subjected to the requirements of the Act, which include a duty to bargain. In this case, the District's exercise of a contract right to subcontract which has been obtained as a result of collective bargaining under the Act is simply not "inconsistent" with the Act. In that circumstance, the decisional bargaining obligations under the Act have been satisfied as a result of the bargaining that produced the agreement.

Here, as the ALJ found, the County's right to assign unit work to nonunit employees is unqualified and unrestricted by the reference in the Management's Rights

⁷95 A.D.2d 101, 16 PERB ¶7021 (3d Dep't 1983), *appeal dismissed*, 60 N.Y.2d 859, 16 PERB ¶7027 (1983).

⁸27 PERB ¶3029, at 3071 (1994).

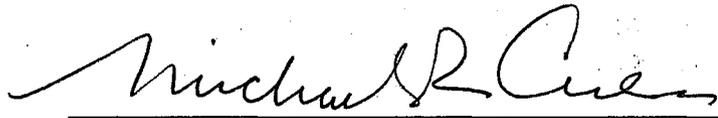
clause to procedures under the Civil Service Law. We find, therefore, that the County has satisfied its duty to negotiate about the subject matter of the charge.⁹

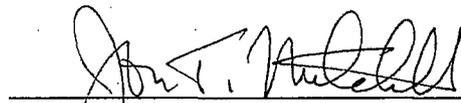
As to AFSCME's final exception, that the ALJ erred by not finding that the County had violated §209-a.1(a) of the Act, there is no evidence in the record which would support a finding that the County violated this section of the Act.¹⁰ The allegation was, therefore, properly dismissed by the ALJ.

Because of our finding as to duty satisfaction, we do not reach the County's exceptions.¹¹ Based upon the foregoing, we deny AFSCME's exceptions and affirm the decision of the ALJ.

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

DATED: March 31, 2000
Albany, New York


Michael R. Cuevas, Chairman


John T. Mitchell, Member

⁹See *County of Nassau (Police Dep't)*, 31 PERB ¶3064, at 3142 (1998), where we held that whether characterized as waiver, contract reversion or duty satisfaction, "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."

¹⁰See *Town of North Hempstead*, 32 PERB ¶3006 (1999), for the necessary elements of a violation of §209-a.1(a) of the Act.

¹¹See *State of New York (Dep't of Health)*, 32 PERB ¶3067 (1999).

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

In the Matter of

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

Charging Party,

- and -

CASE NO. U-20986

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

Respondent.

**HINMAN, STRAUB, PIGORS & MANNING, PC (EDWARD J. GREENE,
JR., of counsel), for Charging Party**

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

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the State of New York (Department of Correctional Services - Wendé Correctional Facility) (State) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) alleging that the State had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally ending a practice or policy of allowing

correction officers at Wende Correctional Facility (Wende) to depart the facility within three minutes of the end of a shift.

The parties entered into a Stipulation of Facts. The factual record was then reviewed by the ALJ who found that the State had violated §209-a.1(d) of the Act.

~~The State excepts to the findings made by the ALJ on both factual and legal~~ grounds. The State contends that there was no practice, that Article 27 of the parties' collective bargaining agreement is a source of right for NYSCOPBA thereby divesting PERB of jurisdiction, and that the ALJ erred in finding a violation. NYSCOPBA supports the ALJ's decision.

After our review of the record and consideration of the parties' arguments, we reverse the decision of the ALJ.

On the basis of the stipulated record, the ALJ found, without any further evidence, either testimonial or documentary, regarding the attendance procedure at Wende, that a practice existed of permitting employees to leave up to three minutes prior to the end of their shift without charge to leave accruals.

We have consistently held that, in order to prove a past practice, a party must demonstrate that the "practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances [footnote omitted] to create a reasonable expectation among the affected unit employees that the [practice] would continue."¹

¹*County of Nassau*, 24 PERB ¶3029, at 3058, *aff'g* 24 PERB ¶4523 (1991).

Section 209-a.1(d) presumes that the employer's duty to negotiate in good faith under the Act "includes an obligation to continue past practices that involve mandatory subjects of negotiation, even in the absence of a provision to that effect in the [collective bargaining agreement]."²

The stipulated record consists of the collective bargaining agreement and four memoranda discussing time and attendance work rules and a three minute discrepancy in the time clock. Prior to the 1993 memorandum noting the time clock discrepancy, there is no record evidence of a procedure and/or practice authorizing employees to punch out three minutes early. Significantly, the Stipulation of Facts contains the 1989 memorandum which outlined the department's time and attendance rules governing the normal workday, tardiness, early departure and excused absences.³ The normal workday is 8 hours for 40-hour employees and 7½ hours for 37½-hour employees. Early departures without a payroll deduction must be authorized or directed. An unauthorized early departure results in a payroll deduction and possible disciplinary action.

The memoranda discussing the three-minute time clock discrepancy cover the period of 1993 to 1999. The 1993 memorandum⁴ merely indicated that due to the time clock discrepancy "a recorded time of up to three minutes prior to the actual dismissal

²*County of Nassau*, 13 PERB ¶¶3095, at 3153 (1980), citing *Queens Borough Public Library*, 8 PERB ¶¶3085 (1975).

³Exhibit 5, Stipulation of Facts.

⁴Exhibit 6, Stipulation of Facts.

time will not be regarded as an unauthorized early departure." There is nothing in this language that authorizes early departure, except as in accordance with the 1989 time and attendance memorandum.

The 1998 memorandum⁵ attempted to clarify any confusion that existed concerning the 1993 memorandum vis-a-vis the 1989 time and attendance memorandum. The 1998 memo also reiterated that there was no authorization for employees to punch out three minutes prior to the end of their work shift.

NYSCOPBA contends that the 1999 memorandum⁶ unilaterally canceled the disputed practice. In this memorandum, Superintendent Donnelly again reiterated that the employees at Wende were not authorized to punch out three minutes prior to the end of their shift. Rather, he provided an example of how a nonchargeable three minute discrepancy could occur on an employee's time card. This example was provided to the employees in order to correct any mistaken interpretation of the two previous facility memoranda. He noted that a practice apparently had developed and, at the same time, acknowledged that such a practice resulted from the employees "misinterpretation of Directive #2201, revision notice dated March 6, 1993." The use of the word practice was a mischaracterization of the events surrounding the memoranda.

The alleged practice was not unequivocal because the stipulated record fails to demonstrate that the State had consented to it. The memoranda of 1998 and 1999

⁵Exhibit 7, Stipulation of Facts.

⁶Exhibit 8, Stipulation of Facts.

merely notified the employees of a continuing problem the administration at Wende experienced with employee time card records as the result of the malfunctioning time clock. It cannot be concluded from the stipulated record that the State acquiesced in the employees construing the memoranda that advised them of the time clock malfunction as permitting them to leave work three minutes before the end of their shift.

It is well settled that requiring employees to participate in recording attendance is a mandatory subject of bargaining.⁷ We have also held that once an attendance recording system is in place, the mere substitution of one manner of employee participation for another does not constitute a change in terms and conditions of employment.⁸

There is no record evidence that employees' shifts, the length of the workday, or the manner of recording employees' working hours, that is, the time clock, was changed by virtue of the memoranda dated 1993, 1998 and 1999. The only effect of these memos was to alert employees who punched their time card at the conclusion of their shift that a three-minute time discrepancy on their time card at the end of their shift would not affect their pay. The fact that the State is still relying on the time cards as a record-keeping device, albeit that they could contain up to a three-minute time

⁷*Triborough Bridge and Tunnel Auth.*, 21 PERB ¶3065, *aff'g* 21 PERB ¶4561 (1988) [citing *County of Monroe*, 20 PERB ¶4598 (1987)]; *Buffalo Sewer Auth.*, 18 PERB ¶4615 (1985); *County of Nassau*, 13 PERB ¶4612 (1980); *East Quogue Union Free Sch. Dist.*, 12 PERB ¶4555 (1979)]. See also *Newburgh Enlarged City Sch. Dist.*, 20 PERB ¶3053 (1987), and the cases cited therein at note 2.

⁸See *Triborough Bridge and Tunnel Auth.*, *supra* note 7, at 4655. *County of Nassau*, 31 PERB ¶3032 (1998), *aff'g* 30 PERB ¶4690 (1997).

discrepancy, does not constitute a material alteration in the degree of employee participation that has been required since 1989.

The memoranda found in the record did not, therefore, change the employees' terms and conditions of employment. In point of fact, the memoranda reiterated the time and attendance rules and merely indicated how discrepancies caused by the time clock would be treated, consistent with those rules. Thus, the 1999 memorandum did not unilaterally discontinue a past practice which would have given rise to a §209-a.1(d) violation.

Having determined that the State had no duty to negotiate the terms of the 1999 memorandum, it is not necessary to reach the State's other exceptions.

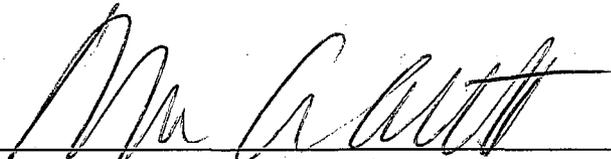
Based on the foregoing, we reverse the ALJ's decision.

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

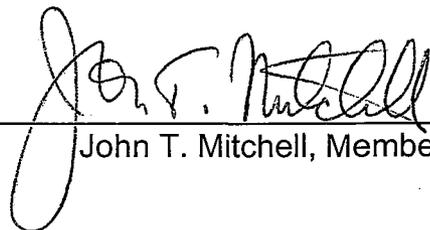
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Charging Party,

- and -

CASE NO. U-20348

**STATE OF NEW YORK (STATE UNIVERSITY
OF NEW YORK AT BUFFALO),**

Respondent.

JANICE L. MORITZ, for Charging Party

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

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the United University Professions (UUP) to an Administrative Law Judge's (ALJ) decision which dismissed its charge against the State of New York (State University of New York at Buffalo) (State).

UUP filed a charge alleging violations of §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act), asserting among other things, that the State denied Dr. Joan M. Sulewski access to the University Physicians Office (UPO) on June 5, 1998 in retaliation of her protected activities as UUP Buffalo Health Sciences Center Chapter President.

The State moved to dismiss the charge at the conclusion of UUP's case. The ALJ reserved decision on the motion. The ALJ then directed the State to present its case.¹ After reviewing the record, the ALJ dismissed the charge.² We agree.

The UUP filed exceptions to the ALJ's decision. UUP generally excepts to the factual determinations made by the ALJ and the conclusions drawn therefrom.

We have held that in order to establish improper motivation under §209-a.1(a) and (c) of the Act, a charging party must prove that (a) he/she had been engaged in protected activities, (b) the respondent had knowledge of and (c) acted because of those activities.³ If the charging party proves a *prima facie* case of improper motivation, the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons.⁴

We have held that the charging party can establish "[t]he existence of anti-union animus . . . by statements or by circumstantial evidence, which may be rebutted by

¹Transcript, p. 99.

²Since the ALJ considered the testimony of the State's witness and its explanation of the business reasons for its determination, the charge was dismissed on the merits even though the State's motion to dismiss was not specifically addressed in the ALJ decision.

³*Town of Independence*, 23 PERB ¶¶3020 (1990). See also *City of Salamanca*, 18 PERB ¶¶3012 (1985); *City of Corning*, 17 PERB ¶¶3022 (1984); *City of Albany*, 4 PERB ¶¶3056 (1971); *Town of Newark Valley*, 16 PERB ¶¶4621, *aff'd*, 16 PERB ¶¶3102 (1983).

⁴*City of Salamanca, supra*; *Captain's Endowment Ass'n (Mallory)*, 15 PERB ¶¶3019 (1982); *City of Albany*, 3 PERB ¶¶4507, *aff'd*, 3 PERB ¶¶3096 (1970), *conf'd in pertinent part*, 36 A.D.2d 348, 4 PERB ¶¶7008 (3d Dep't 1971), *aff'd*, 29 NY2d 433, 5 PERB ¶¶7000 (1972). See *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

presentation of legitimate business reasons for the actions taken, unless found to be pre-textual."⁵ Proof that the employer's stated reasons for its conduct are pretextual may constitute such circumstantial evidence.⁶

On the record before us, we find no evidence of anti-union animus adduced at the hearing. The parties stipulated on the record that Dr. Sulewski was engaged in protected activity, i.e., UUP Chapter President since 1986 and in that capacity had filed grievances, all of which was well known to the State.

The uncontroverted record demonstrates that Dr. Sulewski is an Associate Professor of Obstetrics and Gynecology (OB/GYN) at the medical school of the State University of New York at Buffalo. As a faculty member, she participated in the OB/GYN's practice plan. This plan enabled faculty members to see patients and also served as a teaching tool for medical students. The University established an on-campus office (UPO).

On January 1, 1997, Dr. John Wright was appointed Interim Dean and Vice-President of Health Sciences at the Medical School. It was then that he learned that the Medical School had accumulated debt of some nine million dollars, of which four million dollars was directly attributed to the University Medical Physician's Services (UMPS), including the UPO. Consequently, in January 1998, Dr. Wright convened a

⁵*Town of Independence*, supra note 3, at 3038. See also *Convention Ctr. Operating Corp.*, 29 PERB ¶3022 (1996); *City of Rye*, 28 PERB ¶3067 (1995), *conf'd*, 234 A.D.2d 640, 29 PERB ¶7021 (3d Dep't 1996).

⁶See *City of Utica*, 24 PERB ¶3044 (1991); *Town of Henrietta*, 28 PERB ¶4605, *aff'd*, 28 PERB ¶3079 (1995).

meeting with the department chairs who had faculty involved with the UPO and informed them that the UPO would be closed.

Dr. Margaret McAloon, the Medical Director of the UPO, notified staff by memo dated April 17, 1998, that the UPO would close on May 29, 1998.

In response to Dr. Sulewski's need for an alternate practice site, Dr. Wright, together with Dr. Phyllis Leppert, the chairperson of the OB/GYN department, sought out alternate sites. After a failed attempt to establish a practice site at the nearby VA Hospital, Drs. Wright and Leppert sought to place Dr. Sulewski at Creekside, which was another local facility. On June 3, 1998, Dr. Sulewski was notified that Creekside had been secured as her practice site.

However, on June 5, 1998, Dr. Sulewski called the UPO to request permission to use the facility to remove staples from one of her patients. Dr. McAloon testified that the UPO was without supplies and support staff. Dr. Sulewski's request was denied.

Dr. Sulewski was UUP's only witness. The ALJ found that she failed to establish that the State denied her access to the UPO on June 5, 1998 because of her protected activity. We agree.

UUP contends in its exceptions that Creekside, the new outpatient clinic the State had secured for Dr. Sulewski, was unavailable to her on June 5, 1998. While this may be true, UUP has failed to demonstrate that the delay in securing this facility was in retaliation for Dr. Sulewski's protected activity. On the contrary, the record of correspondence from the State to Dr. Sulewski dates back to January 1998 when she was placed on notice that the UPO was to close on May 29, 1998. The

correspondence from the State to Dr. Sulewski demonstrated that the VA Hospital was the State's first alternate practice site for her to see her patients. However, during the period March 10, 1998 to May 4, 1998, requests from Dr. Leppert to Dr. Sulewski for information to complete the negotiations with the VA Hospital administration were ignored. Dr. Sulewski in her testimony provided no plausible explanation for her failure to respond to the requests for information. This delay occasioned by Dr. Sulewski made it impossible for the State to complete the negotiations with the VA Hospital administration by May 29, 1998. Consequently, the State was forced to look elsewhere for Dr. Sulewski's practice site and secured the Creekside clinic in June, 1998.

UUP also contends that the ALJ erred in making a credibility determination in favor of Dr. McAloon and Dr. Wright. We disagree. Credibility determinations are generally reserved until the conclusion of an entire case. It is only then that the witnesses have been examined and cross-examined and the trier of fact has had an opportunity to observe and evaluate the demeanor of all witnesses.⁷ We see nothing in the record to disturb the ALJ's finding.⁸ UUP contends that McAloon's testimony contradicts Dr. Wright. We see no such contradiction. UUP elicited testimony from

⁷*City of Lockport and AFSCME, Council 66*, 22 PERB ¶3059 (1989). See also *Davis v. Alaska*, 415 U.S. 308 (1974). "The Sixth Amendment . . . guarantees the right of... confrontation...cross-examination." See *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination . . ." 5 J. Wigmore, *Evidence*, §1395, p. 123 (3rd Ed. 1940). See also *Pointer v. Texas*, 380 U.S. 400 (1965). The value of cross-examination lies in its use to expose falsehood and bring out the truth.

⁸See *DeVito v. Kinsella*, 234 A.D.2d 640, 29 PERB ¶7021 (3d Dep't 1996). It is not the function of a reviewing court to reject testimony or substitute its judgment on matters of credibility.

Dr. McAloon regarding UPO's overhead expenses shared by the doctors, including Dr. Sulewski. Dr. Wright testified regarding his share of the expenses. He made no mention of rent and further testified that the University waived rent payment. In an attempt to discredit Dr. Wright, UUP has mischaracterized his testimony in its brief to the ALJ in order to reach a conclusion regarding physicians' expenses at the UPO which was unsupported by the evidence.

Lastly, UUP's reliance on *Rockville Centre Union Free School District* (hereafter *Rockville Centre*)⁹ is misplaced. We reversed the decision of the ALJ in *Rockville Centre*. We found, as here, that the conclusions made by the charging party were not supported by the evidence. Since UUP has failed to demonstrate a nexus between Dr. Sulewski's acknowledged protected activity and the State's management decision preventing her from using the UPO, we need not reach the State's legitimate business defense.

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

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

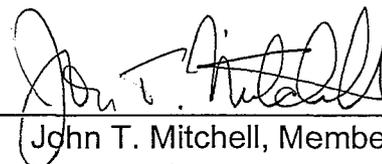
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RAMAPO POLICE BENEVOLENT ASSOCIATION,

Charging Party,

- and -

CASE NO. U-20685

TOWN OF RAMAPO,

Respondent.

SCHLACHTER & MAURO (REYNOLD A. MAURO of counsel), for Charging Party

ALAN M. SIMON, COUNTY ATTORNEY (JACK SCHLOSS of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Ramapo Police Benevolent Association (Association) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its improper practice charge alleging that the Town of Ramapo (Town) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it continued to assign police lieutenants, who had opted out of the bargaining unit, to the same assignments as they had been given prior to opting out of the unit.

The parties submitted the matter on stipulated facts. The factual record was then reviewed by the Director who dismissed the charge on the ground that there had been no change in practice.

The Association excepts to the Director's decision that there had been no change in practice, arguing instead that the parties never stipulated that the sergeants' duties in question were previously performed by the lieutenants prior to their opting-out of the unit.

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

It is well established that the duty to make a *prima facie* case rests with the charging party alone.¹

The parties limited the record before us to the stipulated facts.² The stipulated record contained certain salient facts that established:

- (a) the Recognition clause of the parties' collective bargaining agreement includes the title of Lieutenant.³
- (b) the parties' collective bargaining agreement permitted Lieutenants to "opt out" of the bargaining unit.⁴ Once the election to "opt out" had been made, it was to be effective for the Lieutenant's terms of employment with the Town.

¹County of Nassau (Police Dep't), 17 PERB ¶3013 (1984).

²¶Tenth of the Stipulated Facts.

³¶Second of the Stipulated Facts.

⁴¶Second of the Stipulated Facts.

- (c) Five of the six Lieutenants elected to "opt out".⁵
- (d) The Association filed an improper practice charge alleging:

That the Ramapo Police Benevolent Association (herein after referred to as the "PBA") on or about the 22nd day of February, 1999 filed the within unfair labor practice charge alleging inter alia as follows:

On October 25, 1998 and November 28, 1998, the Employer began scheduling Lieutenants, including non-unit Lieutenants to fill in gaps in the schedules created by absence of Sergeants. December 1998, the employer began scheduling Lieutenants, including non-unit Lieutenants to Sergeant's duties to fill in these gaps in the schedule. The duties of the Sergeants have exclusively been performed by members of the unit, to wit: Sergeants and Senior Police Officers, working shifts where a Sergeant is absent. The above constitutes an improper delegation of unit works to non-unit employees.

- (e) The Town denied any change in the assignment of unit or non-unit Lieutenants⁶
- (f) . . . the issue to be decided . . . did the Town violate §209-a.1(d) of the act when it continued to give Police Lieutenants who, pursuant to contract, opted out of the PBA unit, the same assignments as they had before opting out of the Unit?⁷

⁵¶Fourth of the Stipulated Facts.

⁶¶Seventh of the Stipulated Facts.

⁷¶Eighth of the Stipulated Facts.

The Director concluded that the parties' stipulated issue recognized that there had been no change in practice which would give rise to a violation of the Act simply by a continuation of the same assignment to Lieutenants who have opted out of the unit.

We agree.

The Association urges in its exceptions that the Director erred in the conclusion reached in his decision. The Association argues that the parties never stipulated that the duties in question were ever performed by those Lieutenants, as Lieutenants, prior to opting-out of the Unit, and that the Director erred by presuming that the duties in issue were previously performed by Lieutenants prior to opting-out. The Stipulated Facts, however, do not include any facts associated with the argument the Association makes in its exceptions. Since the Association had the duty to make out its *prima facie* case, it is clear from the record that there has been no unilateral change in the parties' practice.

The Association ignores the fact that the Recognition Clause includes the title of Lieutenant. Notwithstanding the discretion given to any one of the Lieutenants in the bargaining unit to "opt out", the title remained in the bargaining unit. Furthermore, the Recognition Clause expressly states that once a Lieutenant "opts out", it was to be effective for that Lieutenant's terms of employment with the Town. The Recognition Clause merely excluded a Lieutenant who "opted out" from coverage under the terms of the collective bargaining agreement. The agreement, therefore, did not prevent, exclude, limit or otherwise modify assignments Lieutenants may be required to perform.

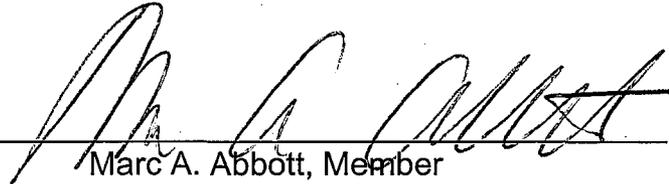
Based on the foregoing, we deny the Association's exceptions and affirm the decision of the Director.

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

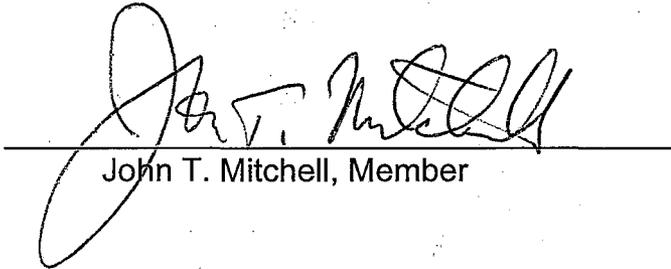
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 832S, AFL-CIO,**

Petitioner,

- and -

CASE NO. C-4930

TOWN OF COHOCTON,

Employer.

**SHAPIRO, ROSENBAUM, LIEBSCHUTZ & NELSON (PETER NELSON
of counsel), for Petitioner**

**HARRIS, BEACH & WILCOX (MELISSA A. FINGAR of counsel), for
Employer**

BOARD DECISION AND ORDER

On August 17, 1999, the International Union of Operating Engineers, Local 832S, AFL-CIO (petitioner), filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Cohocton (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All regular full-time employees of the Town's Highway Department.

Excluded: Office clerical, supervisory and managerial employees, and the Highway Assistant Superintendent.

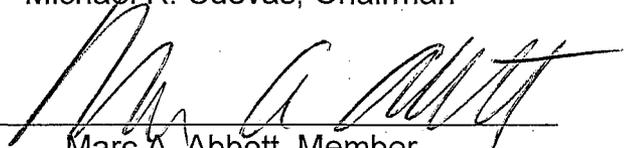
Pursuant to that agreement, a secret-ballot election was held on March 1, 2000, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

- and -

CASE NO. C-4946

ISLIP PUBLIC LIBRARY,

Employer.

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

MARY SCHUBART, for Employer

BOARD DECISION AND ORDER

On November 5, 1999, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (petitioner), filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Islip Public Library (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating units were appropriate:

Unit 1: Included: Librarian, Librarian Trainee, and Department Heads.

 Excluded: Director and all others.

Unit 2: Included: Custodial Worker, Monitor, Housekeeper, Library Clerk,
Library Clerk/Typist, Page, Clerk, and Clerk/Typist.

Excluded: Administrative Assistant to the Director, Account-Clerk
and all others.

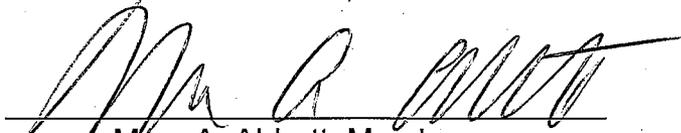
Pursuant to that agreement, a secret-ballot election was held on February 22,
2000, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible
voters in the units who cast ballots do not desire to be represented for the purpose of
collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and
it hereby is, dismissed.

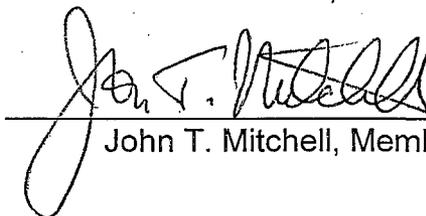
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

**NEW YORK STATE THRUWAY EMPLOYEES,
TEAMSTERS LOCAL 72, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO,**

Charging Party,

- and -

CASE NO. U-19497

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

BRIAN M. LUCYK, ESQ., for Charging Party

THOMAS FITZGERALD, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Thruway Authority (Authority) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the New York State Thruway Employees, Teamsters Local 72, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters). The ALJ found that the Authority violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted to private contractors, pavement marking, which had been exclusively performed by employees in the unit represented by the Teamsters.

The Authority argues that the ALJ erred in finding the charge to be timely filed, that the equipment used by the private contractor was not technologically different from the equipment used by unit employees, and that the tasks performed by the private contractor are substantially the same as those performed by unit employees. The Authority further argues that the ALJ erred as a matter of law and that the ALJ's order cannot be implemented because unit employees have not been trained to do the work in-issue. The Teamsters argue that the Authority's exceptions are without merit and that the ALJ's decision and order should be affirmed.

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

Facts

Among the functions performed by unit employees is the marking of pavement at toll stations, rest areas, parking lots and on the roads owned and operated by the Authority. The parties stipulated that the members of the unit represented by the Teamsters have exclusively been responsible for pavement marking using lead-based or water-based paint at all these locations except when such marking has been ancillary to a highway construction or rehabilitation project involving the roadways. On those occasions private contractors have used epoxy for pavement marking. Members of the bargaining unit have never been responsible for pavement marking that has utilized epoxy.

In 1993, the Authority contracted with a private contractor to mark pavement utilizing epoxy at certain locations in its Buffalo division.¹ Unit members testified that a supervisor, Calvin Fechter, a Thruway Maintenance Specialist, told them in 1993 that the Authority was experimenting with the use of epoxy for pavement marking in certain heavily trafficked interchanges and that they should avoid painting in those areas with water-based paint. After 1993, the Authority did not utilize epoxy for pavement marking until 1997.²

In 1996, the Authority purchased for \$232,000 a new road-marking vehicle, the LDI, that would be used only for the application of water-based paint. Prior to that time, a variety of machinery and vehicles had been use by the Authority to mark pavement. Some had to be pushed or pulled, some were vehicles with the pavement marking machinery already attached, some had furnaces to heat the lines and/or the paint, and some had gauges that had to be monitored by the driver or the operators. Initially, the paint applied was oil-based and required a toxic chemical to clean the paint feeding lines. The newer vehicle, the LDI, applied water-based paint and could be cleaned by using water to flush the lines. All of the equipment utilized paint mixed with glass beads

¹The Authority has four administrative divisions: New York, Albany, Syracuse and Buffalo.

²Apparently, in 1990, the Authority received budget approval for contract installation of epoxy pavement marking at all interchanges in the Buffalo division. There is nothing in the record to indicate that any such marking utilizing epoxy took place in 1990 or why it was not until 1993 that the Authority contracted with a private contractor for the approved pavement marking utilizing epoxy. The Authority never informed the Teamsters of the 1990 budget project approval or the 1993 subcontracting.

and applied either using gravity or under pressure on the roadway. The older equipment had a pointer mounted on the front to line up the line to be painted; the newer equipment uses a laser pointer to ensure a straight, even line. The older equipment required only one employee to operate it; the LDI is operated by a driver and two or more other employees working the painting equipment and inspecting the roadway. With the purchase of any new equipment, the employees were trained by factory representatives, usually for about two weeks, in the operation and maintenance of the new equipment. Unit employees have also experimented at the Authority's direction with other material and methods for pavement marking.

On August 14 and 28, 1997, the Authority subcontracted to private companies roadway pavement marking utilizing epoxy in the Buffalo and New York divisions, respectively. The Authority does not own any equipment suitable for use with epoxy. The price of epoxy-marking equipment is \$395,000 per vehicle. Like the LDI, the epoxy marking equipment is contained on a vehicle which requires a driver and operators. Two to three people operate the epoxy applying equipment, one driving the vehicle and monitoring gauges and the others applying the epoxy. The epoxy paint and the glass beads are mixed, heat is utilized in the mixing process and the paint is applied to the pavement using high pressure. The paint feeding lines are not cleaned with water but must be cleaned with a hazardous material to avoid having the paint mixture solidify. The amount of pressure used to apply the epoxy is much greater than that used to apply the water-based paint, but the unit employees operate other equipment - the grade-all and the bulldozer- which generate a similar amount of pressure during use.

Mistakes in the use of the epoxy equipment could result in physical injury to the operators or extensive damage to the equipment that could require replacement of the entire system. There is less chance of physical injury or such extensive damage to the LDI resulting from improper usage.

The Authority did not purchase epoxy pavement marking equipment because of the cost involved in purchasing four vehicles, the uneconomical return of having one machine transported from division to division for painting every other year and the need to train one to four crews in its use or to have a team of employees travel with the equipment from division to division.

The record does not evidence that any unit employees have lost their jobs or been transferred as a result of the Authority's decision to subcontract the epoxy pavement marking.

Discussion

The Authority argues in its exceptions that the charge is untimely filed as its decision to subcontract pavement marking using epoxy was first implemented in 1993 and the instant charge was not filed until 1997. The Authority's decision in 1993 to contract with a private company to mark pavement at certain, high traffic, interchanges in the Buffalo division was described by a nonunit supervisor to unit employees as an experiment in the use of epoxy by the Authority. That Fechter was not at the time the direct supervisor of the unit employees does not warrant a contrary finding. Indeed, Fechter, as a Thruway Maintenance Specialist, coordinated the purchase of paint and equipment for the Authority for pavement marking. It follows that the Teamsters would

rely upon his description of the 1993 project as experimental.³ That characterization is given support by the fact that the pavement marking using epoxy was not continued after 1993. In *County of Onondaga*,⁴ where the employer took action, but led the union to believe that its action was "experimental," a charge filed within four months of the date that the employer's action became final was found to be timely. Such a delay in the start of the filing clock will be countenanced only where, as here, the charging party may have a belief that the action at issue is not necessarily final and "that belief is reasonably attributable to statements and/or actions by the [employer]."⁵

Here, the record reveals that it was not until August 14 and 28, 1997, that the Authority's plan to use epoxy for pavement marking certain interchanges became final when it subcontracted roadway pavement marking utilizing epoxy to private companies. The Teamsters had no knowledge of the Authority's subcontracting until that time and the charge, filed November 19, 1997, is, therefore, timely.

We recently reiterated in our decision in *City of Rome*⁶, that in transfer of unit work cases, the charging party must establish that the work in issue was performed exclusively by unit employees and that the transferred work is substantially similar to the bargaining unit's work. The record supports the ALJ's finding that until 1993, any

³See *Deer Park Union Free Sch. Dist.*, 27 PERB ¶3064 (1994); *Mahopac Cent. Sch. Dist.*, 25 PERB ¶3051 (1992).

⁴ 12 PERB ¶3035 (1979), *conf'd*, 77 A.D.2d 783, 13 PERB ¶7011 (4th Dep't 1980).

⁵*Great Neck Water Pollution Control Dist.*, 27 PERB ¶3057, at 3134 (1995).

⁶32 PERB ¶3058 (1999).

pavement marking using epoxy was only done by private contractors incidental to highway construction or rehabilitation projects. The performance of unit work by nonunit personnel as an incident of a different set of tasks or a larger project does not breach a union's exclusivity over that unit work.⁷ Likewise, the Authority's decision to use a private contractor in 1993 when it was testing the utilization of epoxy for pavement marking does not breach the Teamsters' exclusivity.⁸

Relying upon our decision in *State of New York (Division of Military and Naval Affairs)* (hereafter, *State of New York (DMNA)*),⁹ the Authority argues that the use of private contractors to apply epoxy for pavement marking was the type of regular and open assignment "sufficient to prevent a union from establishing the needed exclusivity in fact over work transferred from a unit for performance by nonunit employees."¹⁰ Because we have found that the use by the Authority in prior years of private contractors to apply epoxy was incidental to and a part of larger highway construction or rehabilitation projects, and that the use of private contractor to apply epoxy in 1993 was "experimental", the Teamsters' awareness of the use of private contractors by the

⁷See *Town of Shawangunk*, 31 PERB ¶3036 (1998); *Union-Endicott Cent. Sch. Dist.*, 29 PERB ¶3056 (1996), *annulled on other grounds sub nom. Bd. of Educ. of the Union-Endicott Cent. Sch. Dist. v. PERB*, 250 A.D.2d 82, 31 PERB ¶7016 (3d Dep't 1998), *motion for leave to appeal denied*, 93 N.Y.2d 805, 32 PERB ¶7006 (1999); *Village of Malverne*, 28 PERB ¶3042 (1995); *County of Onondaga*, 27 PERB ¶3048 (1994).

⁸See *County of Monroe*, 28 PERB ¶3025 (1995); *County of Onondaga*, *supra* note 7.

⁹27 PERB ¶3027 (1994).

¹⁰*City of Lackawanna*, 31 PERB ¶3040, at 3089 (1998).

Authority does not, under *State of New York (DMNA)*, compel a finding that the in-issue work has not been performed exclusively by unit employees.

The Authority further argues that pavement marking utilizing epoxy is not substantially the same as the pavement marking performed by unit employees and that the qualifications for performance of pavement marking have been changed, thereby relieving it of its obligation to bargain the transfer of unit work with the Teamsters. As we decided in *Niagara Frontier Transportation Authority*¹¹,

if the [at-issue] work had been performed by unit employees exclusively and... the reassigned tasks are substantially similar to those previously performed by unit employees... there has been a violation of §209-a.1(d) of the Act, unless the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation. If, however, there has been as significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other. (Footnote omitted)

The ALJ determined that the work of the bargaining unit was pavement marking and the work subcontracted by the Authority was pavement marking. We agree. The Authority relies on the use of different paint and different equipment to establish that the transferred work is not substantially similar to the work performed by those in the bargaining unit. We find that the use of epoxy paint and the equipment used for applying it to the roadways does not substantially alter the transferred work from the work of the unit. In the past, as technology has improved, the Authority has changed

¹¹18 PERB ¶3083, at 3182 (1985).

the material and equipment utilized by unit employees to mark pavement. On those occasions, the Authority has purchased the new equipment and material and had unit members trained in its use. The last purchase by the Authority of such equipment was the LDI in 1996. This resulted in a change in material and equipment utilized by the Authority to mark pavement and unit employees were trained to operate the LDI. While the use of epoxy for pavement marking would require the Authority to purchase new equipment at a substantial cost and to train unit employees in the use of that equipment, that is precisely what the Authority has done in the past. A simple difference in equipment or design does not "by itself effect a loss of exclusivity or establish a dissimilarity in tasks or qualifications sufficient to permit an employer to subcontract or otherwise transfer unit work."¹² Further, the fact that the Authority does not at present own equipment for marking pavement with epoxy does not warrant a contrary conclusion. The Authority points to *County of Clinton*¹³ as support for its argument that an employer may subcontract work that necessitates the use of equipment that the employer does not own. In *County of Clinton*, we found that the County did not violate the Act when it subcontracted part of a major construction project to a private contractor where it had done so in the past, where it did not own the necessary equipment, and unit employees were not trained in the use of the equipment. Here, the Authority subcontracted work in 1997 that has been exclusively performed by

¹²*Niagara Frontier Transit Metro Sys., Inc.*, 30 PERB ¶3068, at 3170 (1997).

¹³28 PERB ¶3041 (1995).

unit employees. Marking the pavement with epoxy was not part of a major roadway construction or rehabilitation project and here the Authority has a history of purchasing new pavement marking equipment and training employees in its use. That the Authority chose not to purchase equipment which utilized epoxy and instead bought equipment that used water-based paint does not obviate its duty to bargain. We have previously found that the fiscal or operational wisdom of a decision to subcontract unit work is immaterial to the negotiability of the subject.¹⁴

Finally, the Authority argues that the ALJ's decision and order have the effect of dictating the Authority's mode of operation and that the ALJ's order cannot be implemented. We disagree. The Authority is not directed to take any course of action by the ALJ's order beyond restoring unit work to the unit. The only restriction placed on the Authority is that required by the Act: the Authority may not unilaterally transfer exclusive bargaining unit work to nonunit employees in violation of §209-a.1(d). As to the remedy, the Authority is ordered to restore unit work to the unit and make whole unit members for the loss, if any, of wages or benefits. "[T]he purpose of our remedial orders is to make parties whole for the wrong sustained by placing them, as nearly as possible, in the position they would have been in had the improper practice not been committed."¹⁵

¹⁴*City of Niagara Falls*, 31 PERB ¶¶3085, at 3188 (1998). See also *City of Poughkeepsie*, 15 PERB ¶¶3045 (1982), *conf'd*, 95 A.D.2d 101, 16 PERB ¶¶7021 (3d Dep't 1983), *appeal dismissed*, 60 N.Y.2d 859, 16 PERB ¶¶7027 (1983); *motion for leave to appeal denied*, 62 N.Y.2d 602, 17 PERB ¶¶7009 (1984).

¹⁵*Burnt Hills-Ballston Lake Cent. Sch. Dist.*, 25 PERB ¶¶3066, at 3139 (1992).

The Authority and the Teamsters will determine whether and to what extent the unit members receive compensation as a result of the subcontract.

We, therefore, find that the Authority violated §209-a.1(d) of the Act by unilaterally subcontracting pavement marking to private contractors on August 14 and 28, 1997.

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

IT IS, THEREFORE, ORDERED that the Authority forthwith shall:

1. Restore the work of pavement marking to the unit represented by the Teamsters;
2. Make unit members whole for the loss of wages and benefits, if any, with interest at the maximum legal rate, which occurred as a result of the Authority's transfer of the unit work of pavement marking on August 14 and August 28, 1997;
3. Cease and desist from unilaterally subcontracting the unit work of pavement marking; and

4. Sign and post the attached notice in all locations ordinarily used to post notices of information to employees in the unit represented by the Teamsters.

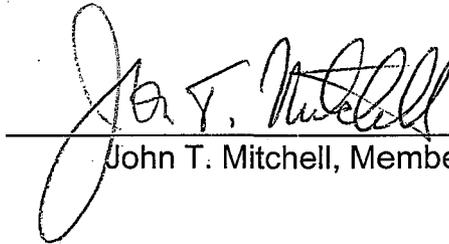
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, 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 New York State Thruway Authority in the unit represented by New York State Thruway Employees, Teamsters Local 72, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO that the New York State Thruway Authority will forthwith:

1. Restore the work of pavement marking to the unit represented by the Teamsters;
2. Make unit members whole for the loss of wages and benefits, if any, with interest at the maximum legal rate, which occurred as a result of the New York State Thruway Authority's transfer of the unit work of pavement marking on August 14 and August 28, 1997; and
3. Will refrain from unilaterally subcontracting the unit work of pavement marking.

Dated

By
(Representative) (Title)

New York State Thruway Authority
.....

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

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

In the Matter of

**MARCUS WHITMAN CUSTODIAL, MAINTENANCE
AND FOOD SERVICE EMPLOYEES ASSOCIATION,**

Petitioner,

- and -

CASE NO. CP-586

MARCUS WHITMAN CENTRAL SCHOOL DISTRICT,

Employer.

ROBERT SWAYZE, for Petitioner

BRENT D. COOLEY, for Employer

BOARD DECISION AND ORDER

The Marcus Whitman Central School District (District) excepts to a decision of an Administrative Law Judge (ALJ) in which the ALJ determined that two newly-created titles, building maintenance supervisor and custodial supervisor, are most appropriately placed into a mixed unit of rank-and-file and supervisory employees represented by the Marcus Whitman Custodial, Maintenance and Food Service Employees Association (Association). The District argues that the new titles have supervisory duties which establish a conflict between the Association's bargaining concerns and the District's operational needs. Therefore, according to the District, the titles should not have been

placed in the Association's unit over its objection. The Association argues that the ALJ was correct in her uniting determination. For the following reasons, we affirm.

FACTS

The District operates three school buildings. The Association represents a small bargaining unit of maintenance and custodial workers, including head custodians, custodians, cleaners, groundskeepers, building maintenance mechanics, maintenance workers, food service helpers and food service clerks. The building maintenance mechanic and maintenance worker are generally responsible for construction, electrical, plumbing, and other mechanical work, while the custodians, cleaners and groundskeepers clean and maintain the District's buildings and grounds.

The custodial work in each of the District's three school buildings is supervised by one of the three unit head custodians. The head custodians formally evaluate the employees whom they supervise, assign their daily tasks, assign overtime, and approve requests for time off. Although rarely imposed, the head custodians have the authority to discipline their subordinates. In addition to their supervisory duties, the head custodians work alongside those whom they supervise. Significantly, the record shows that the inclusion of these supervisory titles in the Association's bargaining unit has not interfered with their ability, or willingness, to perform their supervisory tasks.¹

Until September 1998, the head custodians reported directly to the director of buildings and grounds, who, in turn, reports to the director of finance, operations and

¹See also *Marcus Whitman Cent. Sch. Dist.*, 26 PERB ¶13018 (1993) (Board declined to fragment head custodians from the Association's bargaining unit).

personnel. In September 1998, the District divided its custodial and maintenance operations into two departments, custodial and building maintenance. At the same time, it created the two at-issue positions, custodial supervisor and building maintenance supervisor. Reporting to the director of buildings and grounds, the new positions oversee the custodial and maintenance work in all three of the District's school buildings. The relevant portions of their job descriptions, set forth in the ALJ's decision, establish that the new positions are front-line supervisors whose duties, like those of the head custodians, include the work of the rank-and-file employees. Indeed, contrary to the District's assertions to us, the job descriptions for the new titles are substantially similar to those of head custodians and unit maintenance mechanics.

Furnare, the new custodial supervisor, and Smith, the new building maintenance supervisor, testified that they plan and prioritize the work to be done in all of the District's buildings. As needed, they train the employees as to how to do the work efficiently, and, whenever necessary, they assist them in doing the work. Furnare and Smith are responsible for obtaining the necessary parts, equipment and supplies. While Smith now supervises the day-to-day work of the maintenance mechanic and maintenance worker, the head custodians continue to supervise the day-to-day work of the custodians, cleaners and groundskeepers within their buildings. Although Smith and Furnare have input into the budget developed by the director of buildings and grounds, the record does not indicate the nature or extent of their input. For example, the record does not establish that their input concerns personnel matters.

Despite the creation of the new supervisory titles, the record shows that the District did not diminish or alter the supervisory responsibilities of the head custodians in any material way. Indeed, although the record shows that Smith and Furnare function as team leaders, there is a paucity of evidence concerning the nature or degree of their supervisory authority. The record does not establish, for example, that either of the new supervisors has independent authority to impose disciplinary measures, to assign overtime, or to approve time off. These responsibilities continue to lie with the head custodians, who also continue to formally evaluate the custodians, cleaners and groundskeepers whom they supervise on a day-to-day basis. However, Smith testified that he formally evaluates the work of the maintenance mechanic and maintenance worker, apparently because they are no longer supervised by head custodians.

Much of Furnare's testimony focused on his efforts to improve communications and working relationships among and between the head custodians and the rank-and-file employees they supervise. To illustrate the point, Furnare testified that on two occasions he "wrote-up" head custodians for treating other employees in a demeaning manner. However, when asked what happened to the written statements, Furnare testified that he gave a copy to the head custodians, and that he put the other in his desk. He discussed a similar problem with the third head custodian, but did not memorialize the discussion in written form. On another occasion, Furnare told an employee that it was inappropriate for him to be playing basketball in a District building while on compensatory time off. According to Furnare, that behavior negatively

impacted on the morale of the others who are working. The employee acquiesced. Other than these low-level counselings and discussions, the record does not indicate what would happen if Furnare had determined that disciplinary measures were appropriate in any of those circumstances.

In a similar vein, Furnare testified that he assisted an employee who had difficulty prioritizing his work. The record does not indicate the nature of Furnare's authority to deal with the situation if it had not improved. Likewise, Smith testified that he is responsible for ensuring that building codes are met. The record does not indicate the nature of his authority to address deficiencies in the performance of the maintenance mechanic and maintenance worker if they fail to adhere to the codes.

Furnare testified that he interviews candidates for custodial positions and that he recommends action by the District. According to Furnare, his recommendations have been adopted by higher authorities. On one occasion, he did not rehire a substitute cleaner after discussing the matter with the director of buildings and grounds and the superintendent.²

DISCUSSION

We have consistently held that the mere fact that a title performs supervisory responsibilities over others in a proposed bargaining unit does not necessarily preclude

²In its response to the petition, the District alleged that per diem substitute cleaners are not in the Association's bargaining unit, although in its brief to us it argues that they are.

its placement in the same unit.³ However, as the ALJ correctly observed: "We will not include a supervisor in a unit with rank-and-file employees over the objection of a party in interest if the degree and nature of the supervisory responsibilities indicate a conflict of interest."⁴

Here, any presumption of a conflict between the representational interests of the unit and the supervisory duties of the new titles is overcome by the fact that unit head custodians for many years have performed, and still perform, significant, albeit low-level, supervisory duties without interference by the Association.⁵

Moreover, the record establishes that the two new titles share a significant community of interest, not only with the head custodians with whom they share oversight and some supervisory responsibilities, but with the rank-and-file employees with whom they share the work.⁶ A contrary conclusion is not warranted by the simple fact that the new titles have responsibility for three school buildings while the head custodians are responsible for only one. On this record, we find the difference to be insignificant. Moreover, to the extent the custodial supervisor has any supervisory responsibility over the head custodians, absent evidence that the role is significant, his placement in the same bargaining unit is not inappropriate.⁷ Simply stated, although

³See *Duchess County BOCES*, 25 PERB ¶3048 (1992).

⁴*Clinton Community College*, 31 PERB ¶3070, at 3155 (1998).

⁵See also *Marcus Whitman Cent. Sch. Dist.*, 26 PERB ¶3018 (1993).

⁶See *New York State Div. of State Police*, 1 PERB ¶399.32 (1967).

⁷See *Queensbury Union Free Sch. Dist.*, 27 PERB ¶3035 (1994).

both of the new titles function as team leaders, they are yet members of the same front-line team of supervisors and rank-and-file employees, and they belong in the same bargaining unit.

Finally, the ALJ was entirely correct in her determination that the employees' desire to be excluded from the unit is immaterial to the statutory uniting issue before us.⁸ Indeed, if the felt-interests of the employees were a factor, bargaining units would fluctuate depending on the personalities of those involved.

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

IT IS, THEREFORE, ORDERED that the unit placement petition filed by the Association is granted and the positions of custodial supervisor and building maintenance supervisor are properly placed in the unit represented by the Association.

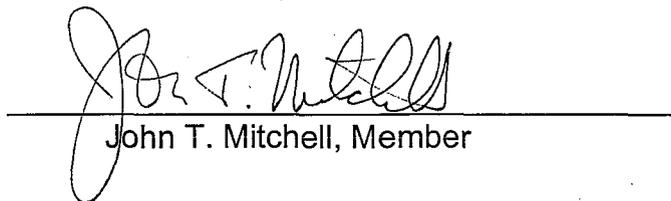
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁸State of New York - Unified Court Sys., 22 PERB ¶3023 (1989).

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

In the Matter of

GREENBURGH #11 FEDERATION OF TEACHERS,

Charging Party,

- and -

CASE NO. U-19896

GREENBURGH #11 UNION FREE SCHOOL DISTRICT,

Respondent.

JEFFREY CASSIDY, for Charging Party

**RAINS & POGREBIN, PC (TERENCE M. O'NEIL and HOWARD M. MILLER of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Greenburgh #11 Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Greenburgh #11 Federation of Teachers (Federation), finding that the District violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally moved the location of grievance hearings, required Federation members to pass through a metal detector to enter the grievance hearing location and stationed armed security personnel both at the grievance hearing site and in the grievance hearing room.

The ALJ determined that the District's utilization of metal detectors and armed security guards was inherently intimidating and coercive and constituted a *per se* violation of §209-a.1(a) of the Act.¹ The ALJ further held that the District unilaterally changed the grievance procedure, a mandatory subject of negotiations, by setting the location of the grievance hearings at the Capitol Theater, a location distant from the District, and by utilizing metal detectors and armed security personnel, in violation of §209-a.1(d) of the Act. He ordered the District to rescind the use of the Capitol Theater for grievance hearings and the use of metal detectors and armed security guards at grievance hearings.

The District thereafter filed exceptions to the ALJ's decision arguing that there was no evidence supporting the finding of a *per se* violation, that the District's measures were justified by the violence prevalent in schools today, that the aspects of the grievance procedure covered by the charge are nonmandatory subjects of negotiations, that the location of the grievance hearings was not alleged as a violation in the improper practice charge, that the ALJ's order is overly broad and that the ALJ's decision contains several factual errors. The District also excepts to the ALJ's characterization of the District's actions as "almost border[ing] on the paranoid" and to the ALJ's refusal to examine *in camera* several anonymous letters and memoranda. Attached to the District's exceptions are an affidavit from its counsel at hearing and an

¹The ALJ dismissed the alleged §209-a.1(c) violation for lack of evidence that the District acted in retaliation for the exercise of any protected right. No exceptions have been taken to that finding and we, therefore, do not reach it in this decision.

affidavit from its counsel on this appeal, explaining the nature of the anonymous letters and memoranda attached to both affidavits, the District's reasons for offering the letters and memoranda for *in camera* review at the hearing before the ALJ and the reasons the District now offers the anonymous letters and memoranda for our consideration.

The Federation thereafter filed a motion to strike parts of the exceptions, supporting affidavits and the anonymous letters and memoranda. The District responded to and argued against the motion. We deferred decision on the motion to strike and afforded the Federation the opportunity to file a response and/or cross-exceptions to the District exceptions.²

The Federation alleges in its response to the District's exceptions that the affidavits, anonymous letters and memoranda accompanying the District's exceptions should be stricken as there is no record evidence that the District ever offered the letters and memoranda for *in camera* review by the ALJ or into evidence at hearing. It further argues that the ALJ's characterization of the District's behavior is not improper as the record is devoid of any credible evidence that the District administrators had been threatened by Federation representatives or members in such a way as to justify the security measures instituted by the District at grievance hearings. The Federation also argues that the ALJ's finding that the District's actions were a *per se* violation of §209-a.1(a) of the Act is correct because no evidence of animus is required for such a finding. The Federation further argues that the ALJ's finding that the District's actions

²32 PERB ¶3068 (1999).

unilaterally changed the grievance procedure in violation of §209-a.1(d) of the Act is correct and that the ALJ correctly included the change of the location of the hearings in his findings. Finally, the Federation supports the ALJ's order as it is limited to the change in the grievance procedure, the issue before the ALJ.

The Federation included in its response several decisions of Judge Aldo Nastasi, Supreme Court, Westchester County, which it had included with its post-hearing brief to the ALJ, finding the District in violation of the United States Constitution and the New York State Open Meetings Law; for imposing security measures on the members of the public attending its Board of Education meetings.

The District then filed a response to the Federation's response, arguing that the Federation had raised factual and legal arguments not raised before the ALJ. Attached to the District's response to the Federation's response is a deposition by George N. Longworth, Chief of Police of Dobbs Ferry Police Department, taken in an unrelated Federal Court action. The deposition refers to events which took place in the District on June 24, 1994 and which are the subject of previous proceedings before us involving the Federation and the District.³ The Federation objects to the District's response to its response.

³See *Greenburgh No.11 Union Free Sch. Dist.*, 30 PERB ¶¶3052 (1997), *aff'd in pertinent part sub nom., Greenburgh Union Free Sch. Dist. No.11 v. Kinsella*, 253 AD2d 46, 32 PERB ¶¶7004 (3d Dep't 1999), *motion for leave to appeal denied*, 32 PERB ¶¶7014 (1999).

Procedural Matters

Initially, we dispose of several procedural matters raised by the parties to this proceeding. The District seeks to introduce into the record before us for our consideration numerous anonymous letters and memoranda detailing anonymous telephone calls allegedly received by the District at a time proximate to the incidents in the improper practice charge before us. The letters and memoranda were not made part of the record before the ALJ. Indeed, there is nothing in the hearing record to support the District's assertion that the letters were even offered for *in camera* review by the ALJ or that the documents were offered into evidence. In fact, the District's counsel at the hearing indicated on the record, after an off-the-record discussion between the ALJ and the representatives of the Federation and the District, that "[w]e're going to withdraw any reference to anonymous letters and we're not going to rely on anonymous letters in this case".

This Board will consider only the evidence accepted and made a part of the record before the ALJ, unless one of the exceptions before us is an alleged erroneous refusal by the ALJ to accept proffered material into evidence or unless some other extraordinary circumstance, such as newly discovered evidence, exists.⁴ While the District alleges that the ALJ erroneously refused its request that he conduct an *in camera* review of the anonymous letters and the memoranda, there is no record

⁴*United Univ. Professions, Inc.*, 21 PERB ¶3052 (1988).

evidence that such a request was ever made.⁵ Certainly, if such a request was made off the record and was refused by the ALJ, the District should have taken exception to the ruling once the parties were back on the record.⁶ Instead, the record evidences that the District withdrew any reference to the letters from the record. The District argues in its exceptions that it had a concern that the Federation might be able to ascertain the identity of the authors of the anonymous letters by viewing them and, therefore, decided not to introduce the documents into evidence at the hearing. However, the District's perceived need at the hearing for secrecy is not the type of extraordinary circumstance which would warrant this Board's acceptance of the documents into the record now for our consideration.⁷ We, therefore, grant the Federation's motion to strike and decline to accept the affidavits, anonymous letters and memoranda included in the District's exceptions in this case.

⁵Likewise, in its brief to the ALJ, the District did not address the ALJ's alleged refusal to review *in camera* the anonymous letters and memoranda.

⁶PERB's review of the ALJ's decision is limited to matters included in the original charge or developed at the formal hearing. Any exception to an ALJ's ruling not specifically raised is waived. (See *Margolin v. Newman*, 130 AD2d 312, 20 PERB ¶¶7018 (3d Dep't 1987), *appeal dismissed*, 71 NY2d 844, 21 PERB ¶¶7005 (1988); Rules, §212.4(h)). See also *City of Rye*, 13 PERB ¶¶3039, *conf'd sub nom. Banahan v. PERB*, 13 PERB ¶¶7012 (Sup. Ct. Albany County 1980).

⁷See *Law Enforcement Officers Union Council 82, AFSCME (Gardner)*, 31 PERB ¶¶3076 (1998); *United Fed'n of Teachers and Bd. of Educ. of the City Sch. Dist. of the City of New York (Grassel)*, 23 PERB ¶¶3042 (1990).

Likewise, we will not accept the District's response to the Federation's response to the District's exceptions or the Federation's response to the District's response.

Section 213.3 of our Rules of Procedure (Rules), provides:

No pleading other than exceptions, cross-exceptions or a response thereto will be accepted or considered by the board unless it is requested by the board or filed with the board's authorization. Such additional pleadings will not be requested or authorized by the board unless the preceding pleading properly raises issues which are material to the disposition of the matter for the first time.

The Federation's response does not raise any new matters that would lead us to request or authorize a response from the District.⁸ In fact, it is the District which seeks with its response to introduce evidence that was not before the ALJ in support of its argument that the District's actions were motivated by legitimate concerns for the safety of its administrators.

Finally, the District asserts that the ALJ erred in considering the location of the grievance hearings at the Capitol Theater as part of the Federation's improper practice charge because it was not one of the alleged violations. It is this Board's general practice to hold parties to normal standards of precision in the drafting of pleadings.⁹

The charge as filed by the Federation alleges that

⁸The decisions of Judge Nastasi that were included with the Federation's response were also included in the Federation's brief to the ALJ. Further, we may take administrative notice of court decisions. See *Local 1170 of the Communications Workers of America*, 23 PERB ¶3004 (1990).

⁹ *Nassau County Local 830, CSEA (Haugen)*, 19 PERB ¶3024 (1986).

8. The Capitol Theater was chosen by the District, a site previously objected to by the Federation.

9. On October 30, 1997 and December 4, 1997 Federation President John Goetschius corresponded with Superintendent Mallah objecting to her notice to the Federation that grievance hearings (for October 22 and December 8 and December 9) would be held at the Capitol Theater and that Federation officials would be required to pass through metal detectors. On both occasions grievance hearings were moved to another site and Federation officials were not required to pass through metal detector.

At the hearing, the Federation introduced evidence about the location of the grievance hearings and its objection to the District's choice of the Capitol Theater. The District introduced evidence in support of its use of the Capitol Theater. The Federation likewise briefed the issue in its memorandum of law to the ALJ. The District objected to the Federation's inclusion of the location of the grievance hearings in its post-hearing brief and urged the ALJ not to consider the allegation. In his decision, the ALJ, without addressing the District's argument, considered the location of the grievance hearings to be one of the violations of §209-a.1(d) of the Act included in the charge.

The Board will not find an improper practice which is not alleged in a charge or a timely amendment thereto.¹⁰ Here, however, the location of the grievance hearings at the Capitol Theater was specifically included in the details of the charge; that it was not

¹⁰See *Arlington Cent. Sch. Dist.*, 25 PERB ¶3001 (1992); *East Rockaway Union Free Sch. Dist.*, 18 PERB ¶3069 (1985); *United Fed'n of Teachers, Local 2 (Kauder)*, 18 PERB ¶3048 (1985); *East Moriches Teachers Ass'n, NYSUT (Upham)*, 14 PERB ¶3056 (1981).

specifically listed in the conclusory paragraph of the charge does not compel a finding that the allegation was not properly before the ALJ.

Facts

The record facts are largely undisputed. The Federation represents a unit of pedagogical employees of the District, a special act district which serves exclusively the residents of Children's Village, a private residential treatment facility. The last collective bargaining agreement between the District and the Federation expired in 1992. The relationship between the District and the Federation and their conduct of labor relations has been the subject of several improper practice charges before us.¹¹

As a result of picketing a District function in 1994, several teachers represented by the Federation were reassigned from the District's campus to various public libraries in neighboring communities to write curriculum.¹² The District thereafter proffered disciplinary charges against a number of the teachers who are assigned to the libraries, alleging attendance violations. It is the grievances on those charges that were scheduled by the District to be heard on March 25 and 30, 1998. The Federation had protested the use of the Capitol Theater as it is fifteen to twenty miles from the school. The Federation also objected to the use of metal detectors. When the District refused to

¹¹*Supra* note 3. See also *Greenburgh No.11 Union Free Sch. Dist.*, 32 PERB ¶3035 (1999).

¹²Several of the teachers were also involved in a gathering outside of the office of the Superintendent of Schools, Sandra Mallah, to protest disciplinary charges being levied for the picketing. See the decision cited in note 3, *supra*, for the details of those activities and our findings thereon.

relocate the grievance hearings or rescind the use of the metal detectors, the Federation acquiesced and agreed to the location and the detectors so that the hearings would not be further postponed.¹³ The District scheduled approximately eleven grievances to be heard individually at ten minute intervals on the first day of hearing and nine grievances for the second day of hearing.

When John Goetschius, the Federation president, and three other Federation members arrived for the first day of hearing, a metal detector, staffed by two technicians, was set up in the lobby of the Capitol Theater. Also present in the lobby were Frank Brabham, head of security for the District, and two armed off-duty police officers. Goetschius and the three Federation members were made to empty their pockets and pass through the metal detector before they could enter the theater.¹⁴ There was an armed police officer present in the theater during the grievance hearings, seated approximately fifteen to twenty feet from the table used by the District and Federation representatives. Brabham came and went during the hearings. Goetschius objected to no avail to the presence of the security guards in the hearing area. The District representatives entered the theater through a side door and did not pass

¹³The hearings were originally scheduled for October 22, 1997.

¹⁴Goetschius was also required to empty the bag he was carrying. One Federation member, Roy Polonio, could not pass successfully through the metal detector and was required to scan himself with a handheld scanner until he was cleared.

through the metal detectors.¹⁵ The same procedure was utilized on the second day of hearing, although only Goetschius and two Federation members were present for the Federation.

The District's stated reasons for the location of the grievance hearings and the implementation of the security measures were the 1994 demonstrations by Federation unit members and three other events involving Federation members. First, as a result of a background check conducted by Brabham shortly after his employment by the District in 1994, the District learned that two Federation members involved in the 1994 demonstrations had target pistol permits issued by the County of Westchester. Second, also in 1994, Brabham learned that a former District employee had been stopped for a minor traffic infraction on the Saw Mill Parkway. He was pulled over on a road that leads to the District. It was later discovered that there was a loaded pistol in his car. Third, at a District Board of Education meeting, where Brabham had also set up metal detectors, a Federation member was found to have a paint scraper containing a razor blade in his pocket.

The District proffered one other reason for the security measures surrounding the grievance hearings and that was the large number of individuals who would be attending each day of hearing. However, the record demonstrates that it was Mallah

¹⁵The District's Assistant Superintendent of Buildings and Grounds, Art Messenger, passed through the metal detectors. Brabham testified that three other people present also passed through the metal detectors but these individuals are not identified on the record. The owner of the theater may also have been required to pass through the metal detector.

who scheduled the hearings and no reasons were given as to why so many grievances were scheduled on each day. Thus, if the District was afraid that there might be an incident because so many of the Federation members would be gathered together at one time, the District provided no reasons why it did not reschedule the hearings on separate days for each individual.

Discussion

The ALJ determined that the District had established no justification for the implementation of the security measures at the March 25 and 30, 1998 grievance hearings. Finding that the utilization of metal detectors and armed security guards at a grievance hearing without justification was inherently intimidating and coercive, the ALJ determined that the District's actions were a *per se* violation of §209-a.1(a) of the Act.

We have recognized that the right of public employees to be represented in grievances is one of the most important afforded them by the Act.¹⁶ We have also held that the deprivation of fundamental employee rights, however erroneous or innocent, violates § 209-a.1(a).¹⁷ Such a violation involves conduct which has a chilling effect upon the organizational rights of unit employees and to which we may impute improper motivation because the action of the employer discourages unit employees from exercising the rights protected by the Act.¹⁸ In such a case, even if there is no

¹⁶*State of New York (Diaz)*, 18 PERB ¶3047 (1985), *rev'd on other grounds*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd*, 73 NY2d 796, 21 PERB ¶7017 (1988).

¹⁷*City of Newburgh*, 11 PERB ¶3108 (1978), *conf'd*, 70 AD2d 362, 12 PERB ¶7020 (3d Dep't 1979).

¹⁸*Plainedge Public Schools*, 13 PERB ¶3037 (1980). See also *State of New York*, 10 PERB ¶3108 (1977) (erroneous interpretation of the Act's contract bar rules causing an improper denial of representation access rights).

independent evidence of union animus or hostility toward the union or the union member involved, a *prima facie* case is established. The act of the employer itself, being so inimical to the exercise of rights protected by the Act, establishes the violation.¹⁹

The Act requires that an employer act "deliberately" "for the purpose of depriving [public employees] of such rights" in order for a violation of §209-a.1(a) to be found. We can, under the right circumstances, presume the employer's awareness of the logical consequences of its actions rather than hold the charging party to proving "actual" awareness. More difficult is imposing liability on a presumption of culpable motive where an innocent motive or justification is raised. In *State of New York*,²⁰ PERB first articulated a standard of proof to the effect that where an employer's conduct is so inherently destructive of a §202 right it must be "irrebuttably presumed" to have been engaged in "for the purpose of depriving them of such rights." This statement indicates that such an assumption is "conclusive" and when made, cannot be contradicted, modified or explained.²¹ This makes it a substantive, rather than a procedural, rule.²² Given the culpable motive element contained in our statute, we now hold that the irrebuttal presumption found in *State of New York* (and thus the *per se* violation) was improperly made. The effect of that "rule" would be a substantive change in the statute by eliminating the motive element from the proof necessary to sustain a charge. Only

¹⁹*State of New York (Dep't of Health and Roswell Park Memorial Institute)*, 26 PERB ¶3072 (1993).

²⁰10 PERB ¶3108 (1977).

²¹Fisch, *New York Evidence*, Presumptions ¶1121.

²²See *People v. Nemadi*, 140 Misc2d 712 (1988); *Heiner v. Greenwich Savings Bank*, 118 Misc. 326 (1922); *In Re Buchanan's Estate*, 184 AD 237 (1918).

the legislature would have the power to do so. Our charge is to interpret the law, not to re-write it. The better rule would be to hold that the facts make out a "permissive presumption", which is favored in New York law and which would shift the burden of proof to the responding party to destroy the presumption by sufficient proof to the contrary.

In the instant case, having alleged a violation consisting of conduct so inherently destructive of the employees' §202 rights, the Federation was entitled to a presumption that the District's actions were undertaken for the purpose of depriving such employees of such rights. Despite his finding of a *per se* violation, the ALJ considered the District's defense and found it insufficient justification for the District's actions. Although we are cognizant of the issue of violence in the workplace and in our schools and recognize that security measures are becoming a "fact of life" in our society,²³ we still find the District's proffered reasons for the implementation of the various security measures unpersuasive and insufficient to rebut the presumption that they were undertaken for

²³In its exceptions, the District alludes to the atmosphere of violence that exists in America's schools and in some workplaces as additionally justifying its implementation of the security measures at-issue in this case. These arguments were not made to the ALJ and are, therefore, not appropriately before us. Even were we to consider the District's arguments in this regard, we would reject them. This "general atmosphere of violence" provides no basis for the District's actions directed at only Federation members engaged in protected activity. Further, there is no record evidence of violence occurring at the school or at any District function in proximity to or contemporaneous with the grievance hearings. The events of June 24, 1994, the only record evidence of an incident between the Federation and District representatives, occurred almost four years before the grievance hearings at-issue here and the events of that day were found to be "not of the nature that would cause a reasonable person to react" with fear by this Board and the courts. See *Greenburgh No.11 Union Free Sch. Dist.*, 30 PERB ¶3052, at 3130 (1999), *aff'd in pertinent part sub nom. Greenburgh No.11 Union Free Sch. Dist. v. Kinsella*, 32 PERB ¶7004 (1999).

the purpose of depriving the employees of their statutory rights by chilling their exercise thereof and by erecting unnecessary obstacles in the path of the grievance process.

The right to have grievances filed and processed by an employee's bargaining representative must be viewed as one of the basic rights protected by §203 of the Act. The District's implementation of security measures in the circumstances of this case must be seen as striking at the very heart of this protected right. If the security measures imposed by the District continue, then employees know that if they file a grievance, they must pass through metal detectors and proceed in the presence of armed security guards. A Federation member who aspires to be a Federation representative knows that if called upon to process grievances on behalf of the membership, he or she will be subjected to metal detectors and armed security personnel. Such measures are contrary to the purpose of a grievance procedure as contemplated by the Act.²⁴ The Act affords public employees the right to be represented by an employee organization both in negotiations with the public employer in the determination of terms and conditions of employment as well as in the administration of grievances arising thereunder.²⁵ Employer conduct which has the effect of interfering with the rights of unit employees to be represented by their employee organization violates §209-a.1(a) of the Act.²⁶

²⁴Act, §200.

²⁵Act, §§203, 204.2 and 208.

²⁶See *County of Rockland and Rockland County Community College*, 13 PERB ¶3089 (1980), where the Board held that it was a violation of §209-a.1(a) of the Act to interfere with the rights of unit employees to be represented by their employee organization, and *Comsewogue Union Free Sch. Dist.*, 15 PERB ¶3018 (1982), where a union official was protected in providing advice to a unit employee regarding a contractual matter.

The District argues that there is no evidence in the record that the security measures actually interfered with the Federation's grievance prosecution. The standard is not whether a specific employee was actually "chilled" in the exercise of protected rights, but rather whether the employer's action has the necessary effect of chilling employees in the exercise of protected rights.²⁷ Based on the evidence adduced at the hearing, we find, therefore, that the District's utilization of metal detectors and armed security personnel at the grievance hearings on March 25 and March 30, 1998, violated §209-a.1(a) of the Act.

We turn now to the alleged violation of §209-a.1(d) of the Act occasioned by the District's unilateral alteration of the contractual grievance procedure by changing the location of the grievance hearings and implementing the use of metal detectors and armed security personnel at the grievance hearings. Grievance procedures are terms and conditions of employment and are, thus, mandatorily negotiable.²⁸ It follows, then, that unilateral changes in the grievance procedure violate §209-a.1(d) of the Act, unless, on balance, there is a determination that the employer's managerial concerns predominate.

The District argues that its safety concerns outweigh any real or perceived inconvenience to employees attending grievance hearings. A balance of interests must,

²⁷See *County of Monroe and Monroe County Sheriff v. Newman*, 125 AD2d 1002, 20 PERB ¶7001 (4th Dep't 1986); *Brunswick Cent. Sch. Dist.*, 19 PERB ¶3063 (1986).

²⁸See *Patrolmen's Benevolent Ass'n of Newburgh, New York, Inc.*, 18 PERB ¶3065 (1985), *aff'd sub nom. City of Newburgh v. Newman*, 19 PERB ¶7005 (Sup. Ct. Albany County).

therefore, be undertaken, directed to the nature of the subject matter in issue.²⁹

Balancing the intrusive nature of the security measures implemented by the District with the safety concerns articulated by the District in its case before the ALJ, we find, for the reasons set forth in our discussion of the §209-a.1(a) violation, that the employees' interests under the Act predominate because the facts here indicate a clear preponderance on one side: the employees' interest in utilization of the grievance procedure.³⁰ We, therefore, find that the District violated §209-a.1(d) of the Act when it unilaterally scheduled the grievance hearings at the Capitol Theater and implemented the use of metal detectors and armed security personnel at grievance hearings.

We turn finally to the District's exception dealing with the ALJ's characterization in his decision that the District's actions "almost border...on the paranoid." We find that the language used by the ALJ was inappropriate. The ALJ was in no position to make a clinical psychological diagnosis of the motivation of the District's administrators in implementing security measures at grievance hearings. If the language was intended only to illustrate the ALJ's opinion of the merit of the reasons articulated by the District for implementing the at-issue security measures, then less inflammatory, more judicious language could have, and should have, been used.³¹ We do not find, however, that the ALJ's characterization reflects a bias which would warrant disturbing his factual findings, which are fully supported by the record evidence, or his legal conclusions.

²⁹ See *State of New York (Dep't of Transp.)*, 27 PERB ¶13056 (1994).

³⁰ See *State of New York*, 18 PERB ¶13064 (1985); *County of Rensselaer*, 13 PERB ¶13080 (1980).

³¹ See *Manual for Hearing Officers in Administrative Adjudication*, New York State Civil Service Commission, Rev. Man. No.16 (1972).

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

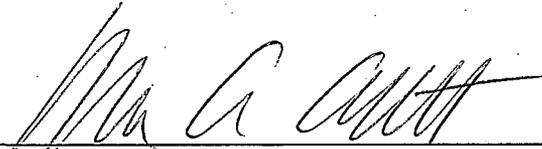
IT IS, THEREFORE, ORDERED that the District:

1. Rescind the utilization of the Capitol Theater for the conduct of grievance hearings involving employees in the unit represented by the Federation;
2. Rescind the utilization of electronic security devices, including but not limited to, metal detectors and wands for bodily and article searches as a condition precedent to entrance to grievance hearings involving employees in the unit represented by the Federation;
3. Rescind the use of security personnel, including armed security personnel, at the entrance of or within the hearing room utilized for grievance hearings involving employees in the unit represented by the Federation; and
4. Sign and post the attached notice in all locations normally used to post communications to unit employees.

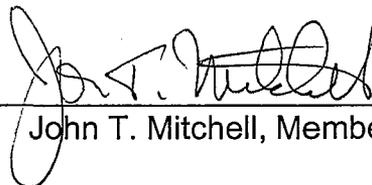
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, 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 Greenburgh #11 Union Free School District in the unit represented by Greenburgh #11 Federation of Teachers that the Greenburgh #11 Union Free School District will forthwith:

1. Rescind the utilization of the Capitol Theater for the conduct of grievance hearings involving employees in the unit represented by the Federation;
2. Rescind the utilization of electronic security devices, including but not limited to, metal detectors and wands for bodily and article searches as a condition precedent to entrance to grievance hearings involving employees in the unit represented by the Federation; and
3. Rescind the use of security personnel, including armed security personnel, at the entrance of or within the hearing room utilized for grievance hearings involving employees in the unit represented by the Federation.

Dated

By
(Representative) (Title)

Greenburgh #11 Union Free School District
.....

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**TEAMSTERS LOCAL 317, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-4859

VILLAGE OF BELMONT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that Teamsters Local 317, International Brotherhood of Teamsters, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All regular full-time and regular part-time Streets, Water and Sewer Department employees including Heavy Motor Equipment Operators, Motor Equipment Operators, Working Foremen and Chief of Operations and Laborers.

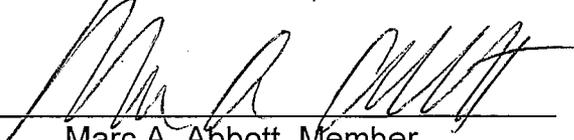
Excluded: Clerical, Elected Officials, Police and Firefighters.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 317, International Brotherhood of Teamsters, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

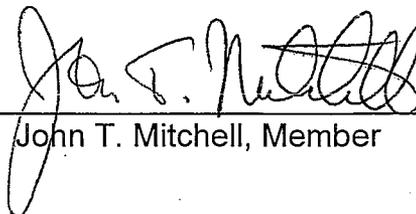
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

**SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 200B,**

Petitioner,

-and-

CASE NO. C-4966

CENTRAL SQUARE CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Service Employees International Union, Local 200B, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All substitute bus drivers who work a minimum of 150 hours per school year.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Service Employees International Union, Local 200B. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

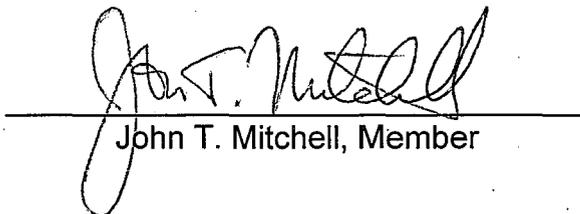
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PERU SUPPORT STAFF ASSOCIATION/NEA/NY,

Petitioner,

-and-

CASE NO. C-4945

PERU CENTRAL SCHOOL DISTRICT,

Employer,

-and-

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

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding^{1/} having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective

^{1/}The petition sought to decertify the intervenor and be certified as the negotiating representative.

negotiations and the settlement of grievances:

Included: All employees of the transportation staff, clerical staff, food service staff, teacher aide staff, monitor staff, maintenance staff and custodial staff.

Excluded: Substitute employees in any category listed above, District office personnel, head automotive mechanic, head bus driver, school lunch manager, federally funded teacher aides, teacher assistants, superintendent of buildings and grounds.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

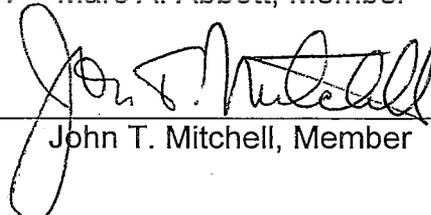
DATED: March 31, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member