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State of New York Public Employment Relations Board Decisions from December 8, 2000

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 8, 2000

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GREENBURGH NO. 11 FEDERATION OF TEACHERS,

Charging Party,

- and -

CASE NO. U-20725

GREENBURGH NO. 11 UNION FREE SCHOOL DISTRICT,

Respondent.

JEFFREY R. CASSIDY, for Charging Party

RAINS & POGREBIN, P.C. (TERENCE M. O'NEIL AND CRAIG L. OLIVO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Greenburgh No. 11 Union Free School District (District) to a decision by an Administrative Law Judge (ALJ) finding that the District violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it failed to respond to the requests of the Greenburgh No. 11 Federation of Teachers (Federation) for information necessary for the processing of three grievances at arbitration.

The District argued that the Federation's improper practice charge was untimely filed, that the Federation had failed to comply with the notice of claim requirements of

Education Law, §3813, and that the Act imposed no obligation upon a public employer to provide information for the processing of a grievance once the employee organization had filed a demand for arbitration. The ALJ found that the charge was timely, the notice of claim requirements had been satisfied by the filing of the improper practice charge, and the duty to provide information did not end at arbitration.

The District excepts to the ALJ's decision, making essentially the same arguments that it did before the ALJ. The Federation's response supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, including those made at oral argument, we affirm the decision of the ALJ.

FACTS

The Federation represents a unit of pedagogical employees of the District. In preparation for the arbitration of three grievances filed by the Federation claiming that the District had violated the class size provision of the parties' expired collective bargaining agreement, by letter dated October 8, 1998, the Federation requested that the District provide it with information regarding:

> class size(s) as of September 1, 1997, ...computer printouts for the class size(s) periodically during the 1997-98 school year..., the 1997-98 variance notification forms signed by the District and submitted to the State Education Department, and copies of any correspondence sent to parents of children of the classes for which variances were sought in 1997-98.

The arbitration hearings on the three grievances were scheduled for October 22, and November 9 and 12, 1998. Sometime between October 8 and 22, 1998, the three

arbitration hearings were adjourned. The November 9 arbitration was rescheduled to March 1, 1999, then rescheduled again to April 7, 1999. The November 12 arbitration hearing was rescheduled to May 6, 1999.[1]

Because the District had not responded to the Federation's October 8, 1998 request for information, the Federation made a second request for the class size information on February 12, 1999 and a third request on February 26.[2] The District did not respond to either of those requests. The instant charge was filed on March 10, 1999.

DISCUSSION

Before we reach the merits of the Federation's improper practice charge, we must first determine whether the improper practice charge was timely filed and if the notice of claim requirements of §3813 of the Education Law have been met. The timeliness question here presented raises issues that we have not heretofore been called upon to decide.

The ALJ found that each request for information necessary for the processing of grievances and the subsequent refusal or failure to provide the information requested

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[1]The record does not reflect the adjourned date for the October 22, 1998 arbitration hearing.

[2]The Federation informed the District in its February 26, 1999 request that, if the information sought was not provided within ten days, the Federation would file an improper practice charge.

constituted a separate violation of §§209-a.1(a) and (d) of the Act.[3] Based upon that determination, she found the charge to be timely as to the February 12 and 26, 1999 requests for information. She, therefore, did not reach the timeliness of the charge with respect to the Federation's October 8, 1998 request.

The District argues that the October 8, 1998 request renders the charge untimely because that request was made more than four months prior to the filing of the improper practice charge.[4] The District further argues that because the February 12 and 26, 1999, demands were identical to the October 8, 1998 request, the demands cannot be treated as separate demands.

The demands themselves are not in evidence but it is apparent that each request was for the same information, although apparently for different arbitrations, given the adjournment and subsequent rescheduling of all of the grievances.

We find that the charge was timely filed. The Federation made a request for information on October 8, 1998. If the District had refused that demand, the Federation's time to file the charge would run from the date of the District's refusal.

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[3]*Salmon River Cent. Sch. Dist.*, 20 PERB ¶4595 (1987), *aff'd* 21 PERB ¶3006 (1988). There, the request for information first took the form of a Freedom of Information Law request and was denied by the District. A subsequent demand was made simply for information necessary for the processing of a grievance. The ALJ found that the District violated the Act by refusing to provide the information requested in the second demand. We affirmed on the merits and did not decide the timeliness of the charge because timeliness was not raised.

[4]PERB's Rules of Procedure, §204.1(a), require that an improper practice charge be filed within four months of the occurrence of the act or acts alleged to be violative of the Act.

However, the District did nothing. It did not deny the request and it did not provide the information sought. Therefore, the Federation could have reasonably waited until the first arbitration hearing for the production of the information. The first arbitration was scheduled for October 22, 1998. Had the arbitration taken place as scheduled and had the District failed to provide the requested information at the arbitration, the Federation's time to file the improper practice charge would have run from that date. If the October 22 arbitration was the only one adjourned and the arbitration hearings scheduled for November 9 and 12, 1998 had taken place, and if the District failed to provide the requested information at those hearing dates, then the Federation's time to file would have run from those dates.

However, all of the arbitration hearings were adjourned sometime between October 8 and October 22, 1998. The first rescheduled date was March 1, 1999. The question is thus presented: when did the violation occur? As we have pointed out, if the District had responded to the Federation's request, there would be a fixed date from which to measure our four-month statute of limitations.[5] We have held that an improper practice charge must be filed within four months of when the charging party knew or should have known about the act or acts alleged to be violative of the Act.[6]

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[5]Rules of Procedure, §204.1(a).

[6]*See Great Neck Water Pollution Control Dist.*, 27 PERB ¶3057 (1994) (subsequent history omitted); *County of Onondaga*, 12 PERB ¶3035 (1979), *confirmed*, 77 AD2d 783, 13 PERB ¶7011 (4th Dep't 1980); *West Park Union Free Sch. Dist.*, 11 PERB ¶3016 (1978); *Board of Fire Comm'rs, Brighton Fire Dist.*, 10 PERB ¶3091 (1977); *Captain's Endowment Ass'n*, 10 PERB ¶3034 (1977).

In determining when a charging party knew or should have known that a violation occurred, when there is no act by a respondent with a specific date, we have employed the standard of reasonableness. For example, in charges alleging a failure to respond to a demand to bargain, we have found a charge timely filed where there was a two-month delay in responding to a demand to negotiate,[7] where the charging party had waited three months for a reply,[8] and where sixteen months had elapsed between the request that an agreement be executed and the date the improper practice charge was filed.[9]

The rationale applied in those cases is equally applicable here. When there is no response to a request for information necessary for the processing of a grievance, the party making the request may wait a reasonable time for a response before filing an improper practice charge alleging a failure to provide information. What constitutes a "reasonable" time must necessarily be determined on a case-by-case basis. We find, however, that in situations such as the one presented here, it is reasonable for a charging party to wait for the arbitration hearing to ascertain whether the information requested will be provided by the public employer. It was reasonable for the Federation to wait until the arbitration hearing to receive the information or the denial of its request from the District. As the arbitration hearings were adjourned and rescheduled, it was

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[7]*Faculty Ass'n of the Community College of the Finger Lakes*, 8 PERB ¶4510, at 4527, *aff'd*, 8 PERB ¶3044 (1975).

[8]*Sheriff and County of Oneida*, 23 PERB ¶3037 (1990).

[9]*City of Niagara Falls*, 23 PERB ¶3039 (1990).

reasonable for the Federation to wait until the first rescheduled date of the arbitration hearing, March 1, 1999, to determine whether the District was going to comply with its request for information. Using that date, the Federation's charge, filed on March 10, 1999, is timely.

Using the rationale applied by the ALJ, we would likewise find the charge to be timely filed. The ALJ held that each demand for information and the subsequent denial or failure to respond was a separate violation. We have not had to deal directly with this timeliness issue before. We note that, in *City of Rochester*,[10] the case relied upon the by ALJ, the subsequent demand for information was in a different form than the first request.

However, we long ago articulated the principle that each demand to negotiate and each refusal gives rise to a new charge until the matter has ultimately been decided by us or resolved to the mutual satisfaction of the parties.[11] In *Village of Malone*, we noted:

> The purpose of placing a four-month limitation on the period during which an improper practice charge can be filed is to prevent the prosecution of stale claims. Normally, a four-month period is an adequate period for a potential charging party to investigate and assess the acts of the potential respondent, to make a determination as to whether a charge should be filed and, in fact, to prepare and file the charge.[12]

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[10] 29 PERB ¶3070 (1996).

[11] *Village of Malone*, 8 PERB ¶3045 (1975).

[12] *Id.* at 3078.

Likewise, in agency shop fee cases, we have held that each bi-weekly deduction of the agency fee could be considered a separate violation of the Act, giving rise to a new cause of action with each deduction.[13]

Cases involving the right to negotiate and cases involving agency fee procedures deal with basic rights afforded to public employees under the Act: the right to be represented in the negotiation of terms and conditions of employment[14] and the right to participate in or to refrain from participating in an employee organization.[15] So, too, have we recognized that the right of public employees to be represented in grievances is one of the most important afforded them by the Act and that the withholding of relevant grievance information necessarily interferes with that right.[16]

We find that the same rationale should, therefore, apply to demands for information necessary for the processing of grievances. In cases involving a request for information necessary for the processing of grievances, contract administration or contract negotiations, each request for information and each subsequent refusal to provide information or failure to respond to the request gives rise to a separate violation of the Act. Therefore, the timeliness of a charge alleging a violation based upon the

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[13]*United Univ. Professions, Inc. (Iden)*, 13 PERB ¶3086 (1980). *Accord New York State Pub. Employees Fed'n*, 18 PERB ¶3059 (1985).

[14]Act, §203.

[15]Act, §202.

[16]*State of New York (Dep't of Health and Roswell Memorial Inst.)*, 26 PERB ¶3072 (1993).

refusal to provide such information may be measured from the date of the last, not first, refusal to provide information.[17]

Having determined that the date upon which the timeliness of the charge is based is March 1, 1999, we further determine that the Federation meets the notice of claim requirements of §3813 of the Education Law.[18] The improper practice charge was received by the District within ninety days of March 1, 1999, as it accompanied the notice of conference sent by PERB on March 18, 1999, and the District's answer to the charge was filed on March 31, 1999. This satisfies the notice of claim requirement applicable to §209-a.1(d) allegations under the Act.[19] Additionally, as we found in *Mahopac Central School District*,[20] the notice of claim provisions of Education Law §3813 are not applicable to cases alleging a violation of §209-a.1(a), as those cases involve the vindication of the public's interest in the rights of organization and representation.

We now turn to the merits of the charge. Neither of the parties disputes that the Act requires a public employer to provide the bargaining agent with requested

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[17]*See Incorporated Vill. of Lake Success*, 28 PERB ¶3073 (1995).

[18]Under our finding that each demand for information and each refusal constitutes a separate violation of the Act, the notice of claim requirements would likewise be met.

[19]*Deposit Cent. Sch. Dist. v. PERB*, 214 AD2d 288, 28 PERB ¶7013 (3d Dep't 1995). In its decision, the Court held that the District's receipt of a copy of an improper practice charge from PERB provided it with notice of the claim against it within the "90-day period" required by Education Law §3813.

[20]28 PERB ¶3045 (1995).

"information necessary for the administration of a contract including the investigation of grievances."[21] The obligation is "circumscribed by the rules of reasonableness, including the burden upon the employer to provide the information, the availability of the information elsewhere, the necessity therefor, [and] the relevancy thereof...."[22] Here, the District argues that the grievance process is over once a demand for arbitration has been made and that the obligation to provide information to an employee organization ceases when the information is no longer necessary for the investigation and processing of grievances. The District likens the information requested by the Federation to discovery, which is inappropriate at arbitration.

We have not previously decided this issue. However, the obligation of an employer to provide relevant and necessary information to an employee organization for the processing of grievances, even at arbitration, has been found to exist by the courts, the National Labor Relations Board (NLRB), and several of the states' public sector labor relations boards. The decisions of the NLRB and the other labor boards, while not binding, are nonetheless instructive in areas where PERB has yet to venture.

In *NLRB v. Acme Industrial Co.*,[23] the United States Supreme Court enforced a decision of the NLRB which held that an employer violated the duty to bargain by refusing to furnish requested information that would allow a union to decide whether or

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[21]*Board of Educ., City Sch. Dist. of the City of Albany*, 6 PERB ¶3012, at 3030 (1973).

[22]*Id.*

[23]385 US 432 (1967).

not to process a grievance to arbitration. Finding that the duty of an employer to furnish information relevant to the processing of a grievance does not terminate when the grievance is taken to arbitration, in *Timken Roller Bearing Co. v. NLRB*, [24] the court considered a union request for information concerning five grievances that awaited arbitration hearings. The Sixth Circuit enforced the NLRB's order, finding that the union had a statutory right to the information. Other circuit courts have found that the duty of an employer to furnish information relevant to the processing of a grievance does not terminate when the grievance is taken to arbitration.[25] In *Chesapeake and Potomac Telephone Co. v. NLRB*,[26] the Second Circuit Court of Appeals held:

> Sound reasons exist for not terminating a party's discovery rights merely because arbitration has been invoked. Reasonable discovery of material relevant to a grievance prior to an arbitration hearing enables a union to make an informed evaluation of the merits of its claim and to withdraw the arbitration demand or settle the grievance if the information indicates that the grievance is less meritorious than it had originally believed, thus eliminating delay and expense that might otherwise be incurred. [The employer's] argument that the failure to cut off discovery will delay the arbitration process because the parties will litigate before the Board the issue of whether evidence must be disclosed, misses the mark. Arbitration may to the same extent be delayed by requests for materials made before it is actually invoked. Moreover, failure to request relevant information until after arbitration is invoked may be attributed to the fact that union officials who handle grievance steps, unlike skilled lawyers who enter when arbitration is

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[24]325 F2d 746 (6th Cir. 1963), *cert. denied*, 376 US 971 (1964).

[25]*See Wilkes-Barre Pub. Co. v. Newspaper Guild of Wilkes-Barre*, 9559 F Supp 875, 113 LRRM 340 (D. Pa., 1982); *Cook Paint & Varnish Co. v. NLRB*, 648 F2d 712 (DC Cir. 1981); *NLRB v. Davol, Inc.*, 597 F2d 782 (1st Cir. 1979).

[26]687 F2d 633, at 636 (CA2, 1992).

> demanded, may not appreciate the necessity for uncovering and marshalling evidence bearing on the strengths and weaknesses of the union's case in order to decide how to proceed. Reasonable delay of arbitration for this purpose is therefore justifiable.

The NLRB also has consistently held that the duty to disclose does not cease when a union demands arbitration.[27] Likewise, several of the state labor relations boards have followed the NLRB's holdings in cases involving requests for information relevant to the processing of a grievance even when the parties are at arbitration.[28]

We find, therefore, that a public employer's duty, consistent with the policies and intent of the Act, is to provide relevant information necessary for the processing of a grievance through arbitration, even though the information may also be available through a subpoena issued by the arbitrator. We further find that the information requested by the Federation on October 8, 1998, and February 12 and 26, 1999, was necessary and relevant for the processing of the grievances originally scheduled for arbitration on October 22 and November 9 and 12, 1998. We find, therefore, that the

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[27]*See St. Joseph's Hosp. (Our Lady of Providence Unit)*, 97 LRRM 1212 (1997); *Fawcett Printing Corp.*, 82 LRRM 1661 (1973); *Fafnir Bearing Co.*, 56 LRRM 1108 (1964), *enforced*, 362 F2d 716 (2d Cir. 1966).

[28]*Delaware State Univ. v. Delaware State Univ. Chapter AAUP*, 165 LRRM 2084 (2000) (Delaware Board found it was an improper practice to fail to provide information for the processing of a grievance. At the time information was requested, the grievance was at arbitration); *State of NJ, OER v. CWA, AFL-CIO*, 13 NJPER 18284 (1987) (New Jersey PERC adopted NLRB standard and, while recognizing the right of a party to subpoena information may be more efficient when at arbitration rather than invoking PERC's jurisdiction, held that information may still be required pursuant to New Jersey's statute and decisions); *West Hartford Bd. of Educ. v. Conn. State Bd. of Labor Rel.*, 116 LRRM 2996 (1983) (Connecticut Board adopted NLRB standard).

District violated §§209-a.1(a) and (d) of the Act when it failed to respond to the Federation's requests for information

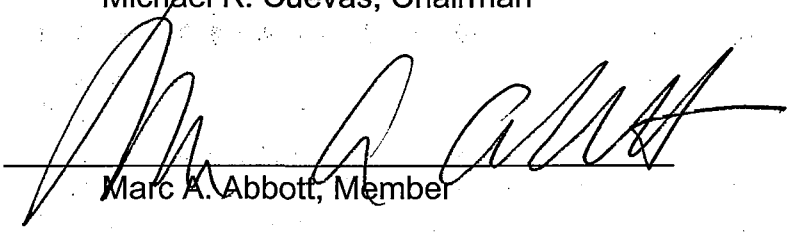
Based on the foregoing, we deny the exceptions filed by the District and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the District forthwith provide to the Federation the information requested by the Federation on October 8, 1998, and February 12 and 26, 1999.

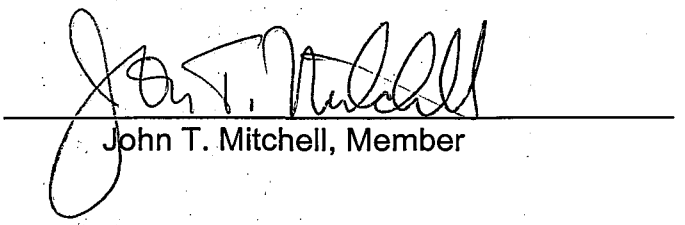
IT IS FURTHER ORDERED that the District sign and post notice in the form attached at all locations ordinarily used by it to post written communications to unit employees.

DATED: December 8, 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 No. 11 Union Free School District (District) in the bargaining unit represented by the Greenburgh No. 11 Federation of Teachers (Federation) that the District will forthwith provide to the Federation the information requested by the Federation on October 8, 1998 and February 12 and 26, 1999.

Dated . . . . . .

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

Greenburgh No. 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

HERBERT L. LEVY,

Charging Party,

- and -

CASE NO. U-21900

PUBLIC EMPLOYEES FEDERATION,

Respondent.

HERBERT L. LEVY, *pro se*

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Herbert L. Levy to a decision of the Director of Public Employment Practices and Representation (Director) dismissing an improper practice charge alleging that the Public Employees Federation (PEF) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by refusing to represent him in a proceeding to vacate an arbitrator's award pursuant to Article 75 of the New York State Civil Practice Law and Rules (CPLR).

FACTS

On August 17, 2000, Herbert L. Levy filed an improper practice charge against PEF. By letter dated August 23, 2000, the Assistant Director of Public Employment Practices and Representation (Assistant Director) advised Levy that his charge was

deficient because "[t]he 'facts' pled do not establish that PEF's refusal to commence a CPLR Article 78 proceeding was arbitrary, discriminatory or in bad faith."

By letter dated August 28, 2000, Levy replied and enclosed copies of the pleadings and memorandum of law which he submitted *pro se* to Supreme Court in an effort to vacate the arbitrator's award.

In response to Levy's letter of August 28, 2000, the Assistant Director advised him that his amendment was also deficient. He wrote:

> Neither the amendment nor the content of the attachment thereto is sworn and the letter is also undated and unsigned.
>
> As a charging party, it is your obligation, not PERB's, to allege facts which would establish that PEF's refusal to pursue your grievance to an Article 75 (not Article 78, as indicated in my August 23 letter) proceeding was arbitrary, discriminatory or in bad faith. The facts alleged would not do so.
>
> I note that the memorandum referred to in Ms. Greenberg's April 28, 2000 letter was not included with your filing and it does not appear that your memorandum of law was before PEF when it made its decision. Moreover, even if its decision arguably was in error, such error would not, in itself, be a violation of the Act.

Levy replied, by letter dated September 11, 2000, to the Assistant Director's letter and following this correspondence the Director dismissed the charge on September 22, 2000.

EXCEPTIONS

Levy excepted on the grounds that the Director's decision is arbitrary, discriminatory and/or made in bad faith.

DISCUSSION

Since we are loath to substitute our judgment for that of an employee organization, we have established a limited basis upon which a breach of the duty of fair representation may be shown. Absent evidence that an action taken is arbitrary, discriminatory or in bad faith, a violation of the representation duty will not be found.[1]

The Assistant Director advised Levy of the deficiencies contained within his original charge. The amendments which followed did not address those deficiencies. Instead, Levy submitted documents which failed to specify how PEF's conduct as it relates to the charge was arbitrary, discriminatory or in bad faith. On the contrary, Levy attached a letter from PEF to his charge which advised him that in PEF's opinion there were no grounds to vacate the arbitrator's decision. It is not our role to search through documents in an effort to discern and articulate the existence of a charge.[2]

Upon our review of the pleadings, we find that Levy has failed to make a *prima facie* showing of arbitrary, discriminatory or bad faith conduct on the part of PEF. While Levy alleges that PEF was careless, inept and ineffective in the manner in which it

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[1]*See CSEA, Local 1000, AFSCME (Heffelfinger)*, 32 PERB ¶3044 (1999); *Public Employees Fed'n, AFL-CIO, and State of New York (Dep't of Health)*, 29 PERB ¶3027 (1996); *CSEA v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

[2]*See State of New York (Workers' Compensation Bd.) and CSEA, Inc.*, 29 PERB ¶3054 (1996); *State of New York (Div. of Parole) and Security and Law Enforcement, Council 82, AFSCME*, 27 PERB ¶3016 (1994).

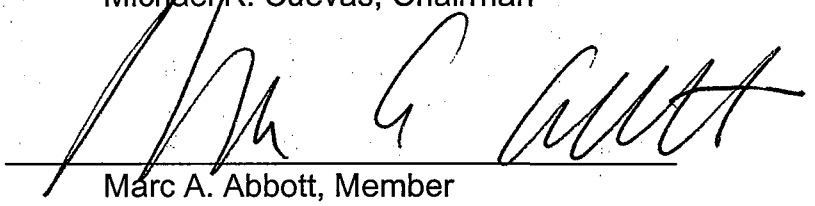
handled his complaints, we, as well as the courts, have held that such allegations do not evidence a breach of the duty of fair representation.[3]

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

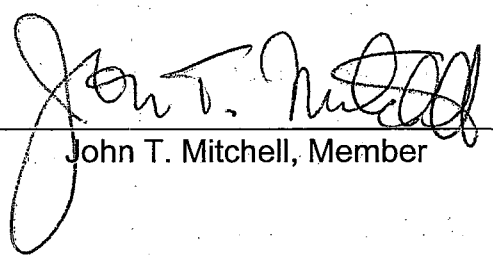
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: December 8, 2000
Albany, New York

Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

[3]*Supra* note 1.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARTIN FREEDMAN,

Charging Party,

- and -

CASE NO. U-21940

UNITED FEDERATION OF TEACHERS,

Respondent,

-and-

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

Employer.

MARTIN FREEDMAN, *pro se*

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Martin Freedman to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge. The charge, sworn to August 30, 2000, alleged, *inter alia*, that the United Federation of Teachers (UFT) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by not responding to his request to initiate a grievance addressing conduct by his employer, the Board of Education of the City

School District of the City of New York (District). The District is made a party to this proceeding pursuant to §209-a.3 of the Act.[1]

FACTS

On September 5, 2000, Freedman filed an improper practice charge alleging UFT failed to initiate a grievance against the District for an alleged act that occurred on May 22, 2000.

On September 6, 2000, the Assistant Director of Public Employment Practices and Representation (Assistant Director) informed Freedman that his charge was deficient because "[t]his charge was filed only two and one-half weeks after [his] request was mailed to UFT on August 14. A failure to respond within that time frame does not, in itself, establish arbitrary, discriminatory or bad faith conduct."

On September 12, 2000, Freedman responded to the Assistant Director's letter and informed him that in fact "two and a half weeks [is] more than enough time to respond, [because] it is imperative that action be taken within that time frame. Grievances are time sensitive and must be presented within 30 days of a contract violation."

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[1]Section 209-a.3 of the Act provides:

> [T]he public employer shall be made a party to any charge filed under [§209-a.2] which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

On October 4, 2000, the Director dismissed the charge as deficient after consideration of the facts which gave rise to the alleged improper practice. We agree.

DISCUSSION

Section 204.1(a)(1) of PERB's Rules of Procedure (Rules) mandates that improper practice charges be filed within four months of the date of the conduct which is the subject of the charge. Furthermore, the Rules do not provide for any extension of time to file an improper practice charge.[2] We have also determined that the filing period is not tolled while ancillary proceedings [grievance arbitration] are being pursued by or on behalf of a charging party, even when those proceedings have the potential to effectively moot the improper practice alleged.[3]

In order for Freedman to establish a claim for breach of duty of fair representation against UFT, he must show that the activity, or lack thereof, which formed the basis of the charges against UFT was deliberately invidious, arbitrary or founded in bad faith.[4]

Under certain circumstances, a union's failure to respond to requests to file a grievance may result in a violation of the Act.[5] However, in this case, the request was moot. Freedman acknowledged that the event which triggered the alleged contract

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[2]*See Public Employees Fed'n (Mankowski)*, 33 PERB ¶3032 (2000).

[3]*See Transport Workers Union, Local 100 (Hokai)*, 32 PERB ¶3019 (1999).

[4]*See CSEA v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024, at 7039 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

[5]*United Fed'n of Teachers (Grassel)*, 23 PERB ¶3042 (1990).

violation occurred on May 22, 2000. According to Freedman, a grievance must then be "presented within 30 days of a contract violation." By any calculation of time, workdays or calendar days, more than thirty days had elapsed when Freedman made his August 13, 2000 request. We cannot, therefore, conclude that, under the circumstances, UFT's failure to respond within a two and one-half week period was in bad faith, arbitrary or discriminatory.

Based on the foregoing, Freedman's exceptions are denied and the Director's decision is affirmed.

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

DATED: December 8, 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

MARVIN V. SANFORD,

Charging Party,

- and -

CASE NO. U-20907

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

RICHARD D. WOODS,

Charging Party,

- and -

CASE NO. U-20987

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

JOHNNIE A. FRITZ, JR.,

Charging Party,

- and - **CASE NO. U-21001**

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

TOMAR HUBBARD,

Charging Party,

- and - **CASE NO. U-21005**

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

BRADFORD PITTS,

Charging Party,

- and -

CASE NO. U-21006

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

ROBERT W. YEATES,

Charging Party,

- and -

CASE NO. U-21010

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

MARVIN SANFORD, TOMAR HUBBARD, BRADFORD PITTS, and ROBERT W. YEATES, *pro se*

CARY & RADJAVITCH (MICHAEL RADJAVITCH of counsel), for Charging Parties RICHARD D. WOODS and JOHNNIE A. FRITZ, Jr.

SCHWAN, SAMMARCO & SAMMARCO (W. JAMES SCHWAN of counsel), for Respondent

MICHAEL B. RISMAN, CORPORATION COUNSEL (KATHLEEN O'HARA, JENNIFER M. SCALISI, ROBERT PEARMAN, J. RICHARD BENITEZ, SUSAN SCHWING, and KEVIN J. KEANE of counsel), for Employer

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Buffalo Police Benevolent Association (PBA) to a decision of an Administrative Law Judge (ALJ) on six consolidated improper practice charges filed by Marvin V. Sanford (Case No. U-20907), Richard D. Woods (Case No. U-20987), Johnnie A. Fritz, Jr. (Case No. U-21001), Tomar Hubbard (Case No. U-21005), Bradford Pitts (Case No. U-21006) and Robert W. Yeates (Case No. U-21010) (collectively, charging parties), finding that the PBA had breached its duty of fair representation owed to the charging parties as employees in the unit represented by the PBA, in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act). The charging parties are police officers, formerly detectives, employed by the City of Buffalo (City).[1] Two of the charging parties, Woods and Fritz, at all times have been represented by counsel and have filed exceptions and cross-

[1]The City was made a statutory party to the proceedings pursuant to §209-a.3 of the Act.

exceptions to the ALJ's decision.[2] Sanford, Hubbard, Pitts and Yeates appeared *pro se* and have not responded to the exceptions. The City, likewise, has not responded to the PBA's exceptions.

BACKGROUND

In 1995, the New York Court of Appeals invalidated Civil Service Law (CSL) §58(4)(c), which conferred permanent status as detective on police officers who had been temporarily assigned to perform detective duties for a period of eighteen months or more.[3] The Court held that the statute violated the merit and fitness clause of the New York State Constitution because it compelled a municipality to appoint an officer as a detective. The decision held that if the position of detective was promotional, it was appropriate for a competitive Civil Service examination. Pursuant to legislation which was signed into law on June 25, 1997, CSL §58(4)(c) was repealed and a new §58(4)(c) and §59-a were enacted.[4] The new provisions of the CSL §58(4)(c) permit, but do not require, the placement of the position of detective into the classified Civil Service and provide that any person serving in the position of detective for at least

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[2]The cross-exceptions are actually a response to the PBA's exceptions.

[3]*Woods v. Irving*, 85 NY2d 238 (1995).

[4]At that time, CSL §58(4)(c) provided:

> Any person who has received permanent appointment as a police officer and who is temporarily assigned to perform the duties of a detective shall, whenever such assignment exceeds eighteen months in duration, be appointed as a detective and receive the compensation ordinarily paid to a detective performing such duties.

eighteen months on the date that position is classified shall receive a permanent appointment as a detective. Because of this legislation, the Buffalo Municipal Civil Service Commission (Commission) classified the positions of detective and detective sergeant[5] on December 3, 1997.[6]

Prior to December 3, 1997, detective and detective sergeant positions within the Buffalo Police Department (Department) were noncompetitive Civil Service positions. Appointment to the positions was at the sole discretion of the Police Commissioner. At all times relevant to these proceedings, Article 24 of the PBA-City collective bargaining agreement, which had expired on June 30, 1995, provided:

> Detectives, Detective Sergeants, Assistant Detective Chiefs and the Chief of Homicide, upon completion of eighteen months of service, shall not be removed from their respective positions except for cause.

Fritz had been appointed as a detective effective February 17, 1997; Sanford, Woods and Yeates were appointed effective June 2, 1997; Pitts was appointed effective January 13, 1998, and Hubbard was appointed as a detective effective August 17, 1998. Effective December 3, 1997, the provisional detectives were notified that if he had achieved eighteen months continuous service as a detective as of that date, they

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[5]The Commission's actions with respect to the position of detective-sergeant are not part of the instant improper practice charges and will only be discussed hereafter as relevant to this decision.

[6]In 1996 the Police Commissioner petitioned the Commission to classify the positions of detective and detective sergeant. Due to discussions with the PBA, which opposed the proposed oral component of the Civil Service examination and was concerned about the "grandfathering" of provisional detectives and detective sergeants, the action of the Commission was delayed until its December 3, 1997 classification.

would be grandfathered into the position; otherwise they would be required to take the competitive exam to retain their positions. By letters dated December 12, 1997, Fritz, Sanford, Woods and Yeates were advised that as they did not have the requisite eighteen months of service, they were required to take the exam. The PBA thereafter met with representatives of the City and the Commission in order to discuss the grandfathering of the detectives who did not have eighteen months of service as of December 3, 1997. In March 1998, the Commission decided to extend the grandfathering date from December 3, 1997, the date the position was classified, to June 20, 1998, the date of the written portion of the Civil Service examination.[7] Other than Hubbard, each of the charging parties had been a detective for a period of from five to sixteen months by the examination date.

FACTS

The facts are set forth in detail in the ALJ's decision. The facts, as relevant to the exceptions, are summarized here.

In response to the Commission's classification of the detective position, individual grievances were filed by Sanford, Woods and Fritz, and two class action grievances were filed by the PBA. The first class action grievance, GR98-14, was filed on January 15, 1998, alleging, *inter alia*, that Article 24 of the collective bargaining agreement had been violated. The grievance, in relevant part, states: "Detectives and Detective Sergeants have been advised that they are provisional and/or subject to

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[7]Five additional detectives were grandfathered as a result of the extension; however, none of the charging parties were included within that group.

competitive examination even though they are tenured under the parties' Collective Bargaining Agreement and cannot be removed except for cause." The grievance was heard at Step 3 and had been moved to arbitration as of the date of hearing in these matters.

The PBA filed an improper practice charge with PERB, Case No. U-19657, on January 20, 1998, alleging that the City had violated §§209-a.1(d) and (e) of the Act by unilaterally removing tenure and permanent status from the detectives and deeming them provisional notwithstanding the provisions of the parties' expired collective bargaining agreement. After a pre-hearing conference, the charge was administratively closed by the Director of Public Employment Practices and Representation (Director) on October 15, 1998, due to the PBA's failure to respond to a status letter from the assigned ALJ. While the PBA's attorney knew that the improper practice charge had been dismissed, the PBA officers and the charging parties first learned about the dismissal during the processing of the instant matters.

The second class action grievance, GR98-267, was filed by the PBA on September 2, 1998, alleging that the abolition of the detective position and its replacement with a competitive position, subject to oral examination, violated the collective bargaining agreement. That grievance was heard at Step 3 of the contractual grievance procedure and is awaiting arbitration.

Sanford filed the first individual grievance, GR98-307, on December 11, 1998. He had been advised by John Juszkiewicz, PBA first vice-president and grievance chairman, in December 1997, that he would be protected by the other grievances that

were then pending and that since he did not have eighteen months of service as a detective at that time, he should wait to file his grievance until he had completed eighteen months of service. Sanford's grievance was heard at Step 3 on January 6, 1999; at the hearing he was represented by the PBA. From December 1997 through January 1999, Sanford was reassured by Juszkiewicz that the PBA was working on the issue and that it would do everything it could to keep the detectives in their positions and eliminate the oral portion of the Civil Service examination.

Woods testified to similar conversations with Juszkiewicz during the same time frame as Sanford. Woods was advised to let Juszkiewicz know when he received his notice to take the oral portion of the examination because the PBA would then take action. Woods filed his grievance, GR98-301, in December 1998, after he learned that Sanford had filed his grievance. The Step 3 hearing on Woods' grievance was held on August 5, 1999. The PBA thereafter issued an "intent to arbitrate" notice, but with the notation that it was to be placed on hold pending the outcome of Case No. U-19657.[8] There has been no activity on the grievance since the Step 3 hearing.

Fritz testified that he received similar advice from Juszkiewicz when he spoke to him in February 1998: that there was no need for him to file an individual grievance since the PBA had already filed grievances that would cover him and that he did not yet have eighteen months in service as a detective. When Fritz attained eighteen months of service in August 1998, he was again advised by Juszkiewicz that he did not have to

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[8]By that time, Case No. U-19657 had already been administratively closed by the Director.

file an individual grievance because of the class action grievances. Upon learning, in January 1999, that other detectives had filed grievances, Fritz asked Juszkiewicz if he could file a grievance. Juszkiewicz approved and the grievance, GR99-2, was filed by Fritz on January 7, 1999 and was combined with Sanford's grievance.

The charging parties were formally notified by the Police Commissioner on January 14, 1999, that the Department was required to relieve them of their positions as detectives no later than March 25, 1999. Pursuant to the notification, the charging parties were removed from their positions as detectives and replaced by individuals from the competitive list.

Throughout 1998 and into 1999, the PBA continually assured its members, including the charging parties, that it was taking action on the issue of the detectives' classification and examination and that it "fully intends to pursue all avenues to address the numerous issues involved." In both bulletins to members and at monthly membership meetings, Robert T. Meegan, Jr., PBA president, informed members that the PBA had been instrumental in getting the Commission to change the tenure date for detectives from the date of the classification to the date of the examination, that the PBA still opposed the weight to be given to the oral component of the detective examination and that the PBA would work to eliminate that component, through the courts, if necessary, by seeking an injunction.

In addition to these assurances, the PBA posted throughout the police department a list of the PBA's pending grievances and other legal matters. The list is also distributed at the PBA monthly meetings. The list, at all times relevant to the

instant proceedings, included Case No. U-19657 as pending, as well as the class action and individual grievances discussed above.[9]

In December 1998, Sanford and some other detectives met with Juszkiewicz at the PBA office. The detectives had questions about the PBA's intentions regarding the issue of the detective exam. Juszkiewicz told them that the PBA was doing everything that could be done and that their questions should go to Meegan or the PBA attorney. In January 1999, Sanford and other detectives met with the PBA leadership. They requested that the PBA expedite the legal actions it had taken and that the PBA commence an Article 78 proceeding on their behalf. They were told that the PBA would not file an Article 78 petition because there were now bargaining unit members on the competitive list and the PBA "didn't want to get in the middle." Meegan told the detectives that there would be no further actions taken on the issue of the exam and the detectives' tenure.

The charging parties thereafter retained private counsel and commenced an Article 78 proceeding, seeking a preliminary injunction to revoke the Civil Service examination and enjoin the City from removing the detectives from their positions until the Article 78 and the underlying grievances had been decided. A preliminary injunction issued on March 11, 1999, along with an order to show cause which set the dates for appearance for March 23, 1999, before State Supreme Court Judge Joseph D. Mintz.

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[9]The list also referenced numerous other matters as pending, when they, too, had been settled and/or closed.

On March 19, 1999, the PBA filed a motion to intervene in the Article 78 proceeding. The affidavit in support of the motion and the accompanying answer to the petition contained arguments contrary to the assertions contained in the class action and individual grievances which, until that time, the PBA had supported and, indeed, had actively pursued on behalf of the detectives.

In the affidavit in support of its motion to intervene, the PBA argued that "there is no basis for continuing the Petitioners [the charging parties] in their respective positions."[10] The PBA asserted that the charging parties "apparent reliance upon Article [24] of the subject collective bargaining agreement is wholly misplaced."[11] The PBA further asserted that "the PBA has not filed an improper practice charge regarding the implementation of competitive testing for detectives and detective sergeants,"[12] and that while the [charging parties] claim that they have eighteen months of service, that eighteen months is only relevant "to the extent it predates December 3, 1997, the effective date that the detective position became subject to competitive testing."[13] Finally, the PBA in the affidavit asserts that the Commission erred when it allowed the June 1998 date (the date of the written portion of the Civil Service examination for

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[10]Charging party Exhibit #5: Affidavit in support of Motion to Intervene, ¶24.

[11]Charging party Exhibit #5: Affidavit in support of Motion to Intervene, ¶35.

[12]Charging party Exhibit #5: Affidavit in support of Motion to Intervene, ¶44.

[13]*Id.*

detective) to be used as the date from which to measure the eighteen months of service.

In its answer to the Article 78 petition, the PBA argues that the subject proceeding is untimely,[14] that to the extent the collective bargaining agreement is relied upon, the charging parties have failed to exhaust their administrative remedies,[15] and that the City and the Commission were only empowered to cover-in detectives that had eighteen months of service as of the date the detective position was classified and not the date of the Civil Service examination.[16] The answer specifically denied those portions of the petition that alleged that the PBA had filed a class action grievance alleging the same breach of contract as was asserted in Sanford's grievance and that the grievance was pending arbitration, and denied those portions of the petition that assert that the oral component of the examination rendered it "not competitive".[17]

At oral argument, the PBA further asserted that the proceeding was untimely because the charging parties' cause of action had accrued on December 3, 1997, when the detective position was declared competitive. At the close of the oral argument, Justice Mintz found the petition to be untimely and did not reach any of the other issues presented in the petition.

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[14]Charging party Exhibit #5: Answer to the petition, ¶13.

[15]Charging party Exhibit #5: Answer to the petition, ¶15.

[16]Charging party Exhibit #5: Answer to the petition, ¶18 and ¶19.

[17]Charging party Exhibit #5: Answer to the petition, ¶6.

Meegan testified that the PBA intervened in the Article 78 proceeding because it was felt that the new Police Commissioner was not in favor of competitive testing for the detective position and that, as a result, the City would not support the Commission's designation of the detective position as competitive. At the time of the Article 78 proceeding, there were unit employees who were filling detective positions pursuant to their placement on the competitive list.

Kathleen O'Hara, Assistant Corporation Counsel for the City, testified that the City had not expected the PBA to intervene in the Article 78 proceeding. She stated that, to the extent that the PBA's arguments in the Article 78 proceeding were contrary to the position it had taken in the grievances, she would use their arguments against them at arbitration.

ALJ'S DECISION

The ALJ found that the PBA breached its duty of fair representation and violated §209-a.2(c) of the Act by failing to provide true information to the members about matters which affect their employment by disseminating false or misleading information about the status of grievances and other legal actions undertaken on behalf of members. The ALJ also found a violation based upon the PBA's failure to act in good faith toward the charging parties by its conduct in the Article 78 proceeding.

The ALJ ordered the PBA to reimburse the charging parties for any legal fees and related expenses which they incurred in the Article 78 proceeding. She also ordered the PBA to move all the related grievances to arbitration, to hire outside

counsel to represent the charging parties in the grievances and to pay such attorneys, and to consider each charging party as an aggrieved party in each of the grievances.

EXCEPTIONS

The PBA has raised forty-eight exceptions to the ALJ's decision, including arguments with respect to timeliness, the charging parties' failure to meet the burden of proof and numerous factual errors made by the ALJ in her decision. Woods and Fritz argue that the ALJ should have awarded costs, including reasonable legal fees, incurred in the prosecution of their improper practice charges. They further argue that the PBA should be ordered to update monthly the list of pending grievances and legal actions. Otherwise, they support the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision in all but one respect.

PRELIMINARY AND PROCEDURAL MATTERS

We first address certain preliminary and procedural matters raised by the processing of these cases.

In its brief to the ALJ, the PBA asserted for the first time that the improper practice charges are untimely. Section 212.4(l) of PERB's Rules of Procedure provides that an objection to the timeliness of an improper practice charge, if not duly raised, is waived. As timeliness was not raised as an affirmative defense in any of the PBA's answers to any of the improper practice charges, it is waived unless the untimeliness of

the charge or charges first became apparent at the hearing.[18] The ALJ correctly found that timeliness was not raised at the hearing and did not first become apparent at the hearing. Therefore, the PBA's exception to the ALJ's decision on the timeliness of the charges is denied and the ALJ's decision in this respect is affirmed.

The matters were consolidated for hearing by the ALJ. The ALJ permitted the charging parties to be absent on some of the hearing dates, due to their duties as police officers, and because the underlying charges were virtually identical. All the charging parties, save one, Yeates, testified at the hearing. At the close of the charging parties' direct cases, the PBA made a motion to dismiss the charge as to Yeates, who had appeared at only the second day of hearing and who had not testified and had not introduced any evidence. The ALJ reserved decision on the PBA's motion.[19]

In the decision, the ALJ denied the PBA's motion to dismiss as to Yeates, for the reason that she had advised the charging parties that they did not need to attend all the hearing dates and did not all need to present evidence in that their claims were the same, as long as each was satisfied that the others would adequately represent his interests. We do not agree with the ALJ's holding in this regard, with respect to the finding that the PBA misrepresented to the charging parties that the improper practice and grievances filed would be processed and that the PBA would protect their interests. There is no evidence in the record that Yeates ever filed a grievance, requested that

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[18]*County of Nassau*, 23 PERB ¶3051 (1990).

[19]The PBA also moved that all the charges be dismissed for failure to sustain the burden of proof. The ALJ reserved decision on the motion and denied it in her decision.

the PBA file a grievance on his behalf or had any discussions with the PBA regarding his status as detective. The charge in Case No. U-21010 is, therefore, properly dismissed as to those allegations. With respect to the allegations relating to the PBA's actions in the charging parties' Article 78 proceeding, there is sufficient record evidence produced by the other charging parties to sustain Yeates' allegations. The motion to dismiss those allegations in Yeates' charge was properly denied by the ALJ in her decision.

DISCUSSION

It must first be said that we take no position as to the respective merits of the class action grievances, the individual grievances or the Article 78 proceeding brought by the charging parties. No determination is here made as to the likelihood of success on the merits of the grievances nor should one be construed.

In order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith.[20] We have found that an employee organization breaches the duty of fair representation with "conduct which is arbitrary, discriminatory or in bad faith".[21] We

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[20] *CSEA v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024, at 7039 (3d Dep't 1987), *affirmed on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

[21] *PEF, AFL-CIO*, 29 PERB ¶3027, at 3061 (1996).

have recognized that a wide latitude must be afforded to an employee organization regarding the investigation and processing of contract grievances.[22]

In defining the duty of fair representation, we have held that the duty is in the nature of a fiduciary obligation owed by the employee organization to the employees represented by it.[23] In this regard, we have been guided by decisions of the National Labor Relations Board (NLRB). The NLRB has found that as part of this fiduciary duty, a union has an obligation to provide employees with information regarding their terms and conditions of employment.[24] The union has a duty not to "purposely keep employees uninformed or misinformed concerning their grievances or matters affecting employment."[25]

Here, the ALJ found that the PBA breached its duty by providing the charging parties with information about the status of grievances and improper practice charges which was inaccurate and untrue. As affects these charging parties, the PBA distributed a list of pending matters which included Case No. U-19657, well after that matter had been administratively closed by the Director. The charging parties relied on that information as proof that the PBA was representing their interests and was upholding

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[22]*District Council 37, AFSCME (Gonzalez)*, 28 PERB ¶3062 (1995).

[23]*Westchester County Dep't of Corr. Superior Officers' Ass'n, Inc.*, 26 PERB ¶3077 (1993).

[24]*Union of Electronic, Electrical, Salaried Machine and Furniture Workers*, 143 LRRM 1235 (1993).

[25]*Teamsters, Local 282 (Transit-Mix Concrete)*, 114 LRRM 1148, at 1150 (1983).

Article 24 of the contract. Indeed, Woods' grievance is listed as "on hold" pending the outcome of U-19657. The charging parties also relied on the PBA's representations with respect to the status of the grievances and U-19657 in the Article 78 proceeding. That the PBA attorney may not have informed the PBA leadership that the improper practice charge had been closed does not relieve the PBA from liability. The PBA had given the attorney the authority to act on its behalf and is responsible for the acts of its agents, just as an employer is responsible for the acts of its agents.[26] The PBA officers also have a responsibility to ensure that the material they disseminate to the members is true and accurate. We find that the PBA violated §209-a.2(c) of the Act by furnishing unit employees with false and inaccurate information about the status of pending grievances and improper practice charges.

We further find that the PBA breached its duty of fair representation in its actions with respect to the Article 78 proceeding. It has long been recognized that a union must be and has always been afforded a wide range of reasonableness in making evidentiary and tactical decisions regarding the filing and prosecution of grievances.[27] Indeed, the United States Supreme Court has stated that "union discretion is essential to the proper functioning of the collective bargaining system."[28] Not wishing to substitute our judgment for that of the union's, we have found that with respect to the handling of

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[26] *See Town of Huntington*, 26 PERB ¶3073 (1993).

[27] *See Airline Pilots v. O'Neill*, 499 US 65, 136 LRRM 2721 (1991); *Ford Motor Co. v. Hoffman*, 345 US 330, 31 LRRM 2548 (1953).

[28] *IBES v. Foust*, 442 US 42, at 51, 101 LRRM 2365, at 2369 (1975).

grievances or representation in other proceedings, a union breaches the duty of fair representation by conduct which is arbitrary, discriminatory or in bad faith. Indeed, it has been held that allegations that a union has been careless, inept, ineffective or negligent in the investigation and presentation of a grievance do not evidence a breach of the union's duty of fair representation.[29] The same wide latitude afforded unions regarding the investigation and processing of contract grievances is applicable when a union elects to expand its services to unit employees to include legal representation.[30] In so finding, we have found that a union does not breach its duty of fair representation, under §§209-a.2(a) and (c), when it reasonably supports the position of one or a group of employees to the detriment of others.[31]

However, the PBA's actions here go beyond supporting one group's interests over another group's interests. Until filing the motion to intervene in the Article 78 proceeding, the PBA had assured the charging parties, as late as January 1999, that it was doing all it could to assist the detectives in retaining their positions and opposing the oral component of the examination. While Meegan told Sanford and some of the others at the January 1999 meeting that the PBA had had enough and would not take any further action on the detective examination, that was certainly no indication that the

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[29]*District Council 32, AFSCME (Gonzalez)*, *supra* note 22.

[30]*CSEA, Inc., Local 1000, AFSCME*, 32 PERB ¶3011 (1999).

[31]*See UFT, Local 2, AFT*, 18 PERB ¶3048 (1985); *South Huntington United Aides*, 17 PERB ¶3012 (1984); *State of New York and PEF, AFL-CIO*, 14 PERB ¶3043 (1981).

PBA had changed its position with respect to the grievances and the improper practice charge it was processing on their behalf. While an employee organization is not bound to assert only the position taken by a grievant and may consider the interests of the unit as a whole,[32] the actions of the PBA here went beyond merely asserting a contrary position in a court proceeding brought by individual unit employees. Here, the PBA, with no prior warning to the affected employees, intervened in the Article 78 proceeding to argue a position that was contrary to its earlier stated position and was not only detrimental to the charging parties' interests in that proceeding, but undermined the very basis for the grievances.

The reasons offered by the PBA for its actions in the Article 78 proceeding do not answer the question of why the PBA, if it was still pursuing the class action grievances and the grievances filed by the individual detectives, argued against the very basis of those grievances in court. Clearly, the PBA must have known or should have known that the City would use the PBA's arguments in court against it at arbitration on the grievances. The PBA argues that it was concerned that the integrity of the examination, which by then had resulted in other unit employees being appointed to detective positions, was being attacked in the Article 78 proceeding. The examination is the issue raised by the PBA in at least one of the class action grievances. As we have said before, a union may support a position of one employee or a group of employees over the interests of other employees, but it cannot, as the PBA did here, represent to

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[32] *See Local 1359, Dist. Council 37, AFSCME*, 29 PERB ¶3078 (1996).

both groups that it is representing their interests, when in fact the positions of the two groups are diametrically opposed and the arguments in support of one are mutually exclusive of the arguments in support of the other.

The PBA also argued against the Commission's decision to extend the date for grandfathering the detectives to the date of the examination, when the Commission's decision to do so was prompted, at least in part, by the PBA's arguments. Such an argument was unnecessary if the PBA was only interested in protecting the results of the examination. The PBA had previously announced the Commission's decision to use the later date to the membership as evidence of its efforts on behalf of the charging parties and others similarly situated.

The PBA argues in its exceptions that the ALJ made several errors in her characterization of the PBA's court papers and oral argument in the Article 78 proceeding. We find the record supports the ALJ's factual findings and analysis of this point. For example, the PBA did argue in its answer to the petition in the Article 78 proceeding that the proceeding was untimely, that the charging parties' action accrued on December 3, 1997, and that the charging parties had no cognizable claim under Article 24 of the contract. None of these arguments were required in support of the PBA's position that the results of the examination should not be overturned by the court. Further, the PBA's timeliness argument was directly contrary to the advice it had given to Sanford, Woods and Fritz about the time to file their grievances.

On the basis of the record before us, we find that the PBA's actions with respect to both the dissemination of information to the charging parties and its position in the

Article 78 proceeding were misleading and arbitrary. To find a violation of §209-a.2(c) of the Act, we need not reach a determination that the actions of the PBA were also taken in bad faith.[33]

The remedy ordered by the ALJ is confirmed, except as to the modification with respect to Yeates, which is discussed *infra*. The PBA is ordered to reimburse the charging parties for legal fees and related expenses incurred in the Article 78 proceeding.[34] The PBA and the City are ordered to move class action grievances GR98-14 and GR98-267, together with GR98-307 (Sanford), GR98-301(Woods) and GR99-2 (Fritz), to arbitration. Given that the PBA has taken a position in opposition to the charging parties' interests in these grievances, the PBA is also ordered to incur the costs of hiring outside counsel to represent the charging parties in these arbitrations.[35]

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[33]While there were some allegations that the PBA's actions were racially motivated, we need not decide whether the PBA's actions were also discriminatory as no exceptions were taken to the ALJ's determination that there was insufficient evidence of racial discrimination on the record before her and there is no evidence that the PBA's actions were otherwise discriminatory.

[34]*See State of New York and Local 418, CSEA (Diaz)*, 18 PERB ¶3047, at 3103, *rev'd on other grounds*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988), where we ordered CSEA to pay the charging party's reasonable legal fees and expenses to bring a lawsuit because we found that the union had inadequately represented the charging party in violation of its duty of fair representation. *See also Local 342, Long Island Public Serv. Employees*, 20 PERB ¶3045 (1987), *confirmed*, 146 AD2d 775, 22 PERB ¶7005 (2d Dep't 1989), *motions for leave to appeal denied*, 22 PERB ¶7020 (2d Dep't 1989), and 75 NY2d 701, 22 PERB ¶7038 (1989).

[35]We do not order, as did the ALJ, that each of the charging parties be considered to be a part to each of the other grievances. The class action grievances arguably cover all of the charging parties. We are not aware of any reason set forth in the ALJ's decision or present in this record to join each of the charging parties as parties in the individual grievances.

We will not, as sought by Woods and Fritz, order that the PBA reimburse them for their legal fees and related expenses in the prosecution of their improper practice charges.[36] The award of costs is extraordinary and is warranted only where the respondent's actions have been especially egregious.[37] While the PBA's actions violate the Act, they do not rise to that level.

IT IS, THEREFORE, ORDERED that:

1. The Buffalo PBA cease and desist from disseminating false and/or misleading information regarding pending grievances and improper practice charges to its membership.
2. The PBA reimburse Officers Sanford, Woods, Fritz, Hubbard, Pitts and Yeates for any and all reasonable legal costs and related expenses which they incurred in connection with the Article 78 proceedings brought in March 1999 against the City of Buffalo and the Buffalo Municipal Civil Service Commission.
3. The PBA and the City immediately move GR98-14, GR98-267, GR98-307, GR98-301, and GR99-2 to arbitration, and that the PBA incur the costs for the hiring of outside counsel to represent the charging parties in these proceedings.

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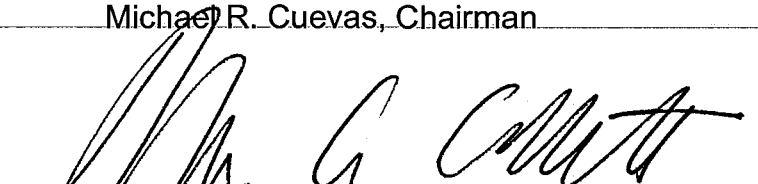
[36] *Local 342, Long Island Public Serv. Employees*, *supra* note 34.

[37] *See City of Troy*, 28 PERB ¶3027 (1995), and *United Fed'n of Teachers, Local 2, NYSUT*, 16 PERB ¶3052 (1983).

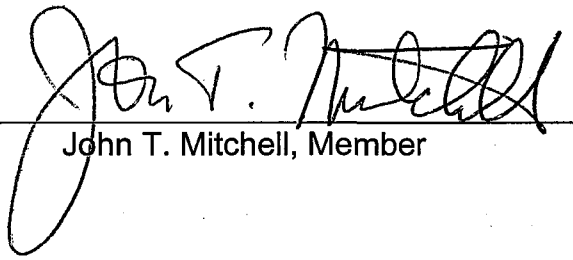
4. The PBA sign and post the attached notice in the form attached at all locations ordinarily used to post written communications to unit employees.

DATED: December 8, 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 City of Buffalo (City) in the unit represented by the Buffalo Police Benevolent Association (PBA) that the PBA will forthwith:

1. Not disseminate false and/or misleading information regarding pending grievances and improper practice charges to its membership.

2. Reimburse Officers Sanford, Woods, Fritz, Hubbard, Pitts and Yeates for any and all reasonable legal costs and related expenses which they incurred in connection with the Article 78 proceedings brought in March 1999 against the City of Buffalo and the Buffalo Municipal Civil Service Commission.

3. Together with the City, immediately move GR98-14, GR98-267, GR98-307, GR98-301, and GR99-2 to arbitration, and that the PBA incur the costs for the hiring of outside counsel to represent the charging parties in these proceedings.

Dated . . . . . .

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

BUFFALO POLICE BENEVOLENT ASSOCIATION

. . . . . .

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

CITY OF NIAGARA FALLS,

Charging Party,

-and-

CASE NO. U-21688

NIAGARA FALLS POLICE CAPTAINS AND LIEUTENANTS ASSOCIATION,

Respondent.

RONALD D. ANTON, CORPORATION COUNSEL (CHRISTOPHER M. MAZUR of counsel), for Charging Party

DeMARIE & SCHOENBORN, P.C. (ANTHONY J. DeMARIE of counsel), for Respondent

AMENDED BOARD DECISION AND ORDER[1]

This matter comes to us on exceptions filed by the Niagara Falls Police Captains and Lieutenants Association (Association) to a decision of the Administrative Law Judge (ALJ) which found that the Association submitted nonmandatory subjects of negotiation to compulsory interest arbitration in violation of §209-a.2(b) of the Public

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[1]On November 16, 2000, we issued the original decision in this case (unpublished). Our decision this date corrects only a mischaracterization of the negotiability of a demand for certain pension benefits pursuant to §443 (f-1) of the Retirement and Social Security Law (RSSL). The original decision contained the following sentence: "Since the legislative intent expressed in §443(f-1) is unequivocal, the Association's argument is specious and, consequently, bargaining over the subject is foreclosed by the language of the statute. Proposal #13 is, therefore, not a mandatory subject of negotiation." That sentence was corrected because, while the statute prohibits the subject matter of RSSL §443 (f-1) from consideration by an interest arbitration panel, it does not affect the subject's negotiability, as was found by the ALJ.

Employees' Fair Employment Act (Act) and directed the Association to withdraw its proposals #1 and #13 from consideration of compulsory interest arbitration.

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

FACTS

On May 4, 2000, the City of Niagara Falls (City) filed an improper practice charge alleging that the Association violated §209-a.2(b) of the Act by including in its petition for compulsory interest arbitration two proposals, to wit: proposal #1 and proposal #13, which are nonmandatory subjects of negotiation.

The Association, in its answer, argued that the at-issue proposals are mandatorily negotiable.

The matter was submitted to the ALJ upon the stipulated record described in the ALJ's letter dated June 12, 2000, consisting of the following:

1. The Improper Practice Charge filed by the City on May 4, 2000 and attachments thereto.

2. The Association's Answer.

3. The Parties' Collective Bargaining Agreement covering the period 1994-1996.

4. The 1998 Interest Arbitration Award in Case No. IA97-010; M96-457.

5. The following two (2) proposals included in the Association's Petition for Interest Arbitration which the City asserts are nonmandatory subjects of bargaining:

   (a) Proposal 1 - §4.04 - POSTINGS (NON-COMPETITIVE JOB CLASSIFICATION)

   The following to replace existing language:

(THE SECTION TO BE RETITLED "NON-COMPETITIVE JOB CLASSIFICATIONS".)

In the event the City decides to fill a vacancy in a non-competitive position, or it creates a new non-competitive position, assignment to such vacancy shall be made by the City from the three (3) most senior officers who requested assignment and who are qualified. The qualifications will be fixed by the City and may not be unreasonable.

By way of example and not by way of limitation, the following shall be considered as non-competitive positions:

Assistant Superintendent,
Detective Captain,
Detective Lieutenant,
NID Captain (formerly CIU Captain),
NID Lieutenant (formerly CIU Lieutenant),
Community Services Supervisor,
Youth Aid Bureau Captain (formerly JAB Captain),
Youth Aid Bureau Lieutenant (formerly JAB Lieutenant),
Traffic Supervisor.

Any position, which has been classified by the Public Employment Relations Board as "managerial or confidential" shall be excluded from the provisions of this section.

Notice of vacancy and of such reasonable qualifications shall be posted on Department Bulletin Boards and a copy shall be provided to the Association for at least thirty (30) days before the selection is made. The position shall be filled within ten (10) days thereafter.

In the event of a vacancy in a position, if no supervising officer indicates a desire to fill such vacancy it will be filled based upon inverse seniority.

For purposes of this section seniority shall be computed based upon the date of appointment to the officer's present rank.

(b) Proposal 13 - §12.06 - <u>ANTICIPATED LEGISLATION</u> - [NEW]

> In the event the New York State Legislature authorizes the elimination of any restrictions on Tier II employees, the City will eliminate such restrictions.

ALJ Decision

The ALJ determined that the Association's proposals #1 and #13 were nonmandatory and/or prohibited subjects of bargaining and ordered them withdrawn from compulsory interest arbitration.

Exceptions

The Association excepted to the ALJ's decision on the facts and law. The City responded with a brief in support of the ALJ's decision.

Discussion

Association Proposal #1

This proposal replaces existing language in §4.04 Postings, of the parties' collective bargaining agreement. The ALJ correctly found that qualifications for a position are a management prerogative and, thus, a nonmandatory subject of bargaining.[2] Proposal #1 also set forth a procedure in which an assignment to a vacant position was to be made from the three (3) most senior officers. We have held, and the ALJ correctly noted, that the procedures to be used to fill a position, e.g., seniority, are a mandatory subject of negotiation.[3]

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[2]*See City of Buffalo (Police Dep't)*, 29 PERB ¶3023 (1996); *Levitt v. The Bd. of Collective Bargaining of The City of New York, Office of Collective Bargaining)*, 21 PERB ¶7516 (Sup. Ct. New York County 1988); *West Irondequoit Bd. of Educ.,* 4 PERB ¶3070 (1971).

[3]*See Schenectady Patrolmen's Benevolent Ass'n,* 21 PERB ¶3022 (1988); *Dutchess County BOCES Faculty Ass'n, NEA/NY,* 17 PERB ¶3120 (1984), *confirmed* 122 AD2d 845,19 PERB ¶7018 (2d Dep't 1986); *White Plains Police Benevolent Ass'n,* 9 PERB ¶3007 (1976).

We turn to the Association's exceptions to the ALJ's findings based upon the stipulated record.

The Association believes the ALJ erroneously determined that proposal #1 would require the City to fill a vacant position and was, therefore, nonmandatory. The Association argues that the language of proposal #1 is discretionary in that the City makes the initial decision to fill the vacant position and as such is subject to the duty to bargain.[4] The problem, however, is that the language of proposal #1 incorporates mandatory subjects, e.g., procedure to fill a position, as well as nonmandatory subjects, e.g., qualifications, and filling the vacancy within a defined time (ten days). We have held that where a bargaining proposal contains two or more inseparable elements, i.e., a unitary demand, at least one of which is nonmandatory, the entire proposal is deemed nonmandatory.[5] Consequently, we do not agree with the Association's exception and it is denied.

The Association believes that the ALJ erred when she found that Association proposal #13 was nonmandatory. This proposal would add new §12.06 to the parties's collective bargaining agreement Article XII-Miscellaneous Provisions. The language of §12.06 is anticipatory and it refers to amendments to §§302(9)(d) and 443(f) and (f-1) of the New York State Retirement and Social Security Law (RSSL).

The language of §443(f-1) is clear that a demand in negotiations for the additional pension benefit provided by subdivision (f) of this section *shall not be* subject to compulsory interest arbitration. (emphasis added) Since the legislative intent

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[4]*See County of Westchester,* 33 PERB ¶3025 (2000) (citing cases).

[5]*See Police Benevolent Ass'n of the City of White Plains, Inc.*, 33 PERB ¶3051 (2000) (citing cases).

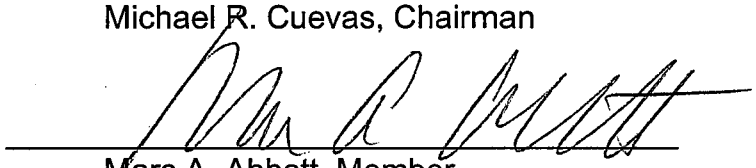
expressed in §443(f-1) is unequivocal, the Association's argument is specious and, consequently, submitting the subject to interest arbitration is foreclosed by the language of the statute. Proposal #13 is, therefore, not a proper subject to present to an interest arbitration panel. The Association's exception is denied.

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

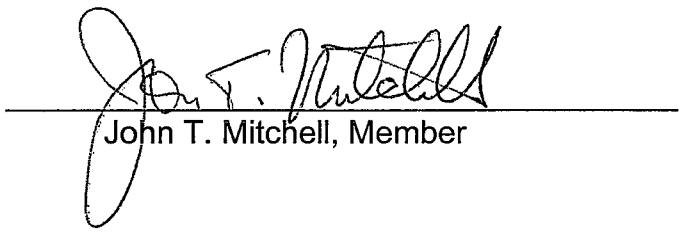
IT IS, HEREBY, ORDERED that the Association withdraw its proposals #1 and #13 from consideration at compulsory interest arbitration.

DATED: December 8, 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

SAANYS/ELMIRA HEIGHTS ADMINISTRATIVE COUNCIL,

Petitioner,

-and-

CASE NO. C-5023

ELMIRA HEIGHTS 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 SAANYS/Elmira Heights Administrative Council 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: High School Principal, Middle School Principal, Elementary School Principal and Director of Instructional Support.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the SAANYS/Elmira Heights Administrative Council. 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: December 8, 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

UAW LOCAL 1097,

Petitioner,

-and-

CASE NO. C-5026

MONROE 2-ORLEANS BOCES,

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 UAW Local 1097 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 regular full-time and part-time employees of the Elementary Science Program (ESP).

Excluded: All supervisory, managerial and office clerical employees of the ESP.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the UAW Local 1097. 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: December 8, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member