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State of New York Public Employment Relations Board Decisions from October 11, 2001

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 11, 2001

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SARA-ANN P. FEARON,

Charging Party,

- and -

CASE NO. U-22492

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and UNITED FEDERATION OF TEACHERS,

Respondents.

SHELLMAN JOHNSON & ASSOCIATES FOR EQUAL EDUCATION (SHELLMAN JOHNSON, Chief Advocate), for Charging Party

BOARD DECISION AND ORDER

The charging party, Sara-Ann P. Fearon, through her representative, Shellman Johnson, has moved this Board to reconsider our Decision and Order previously issued August 16, 2001.[1] Respondents have not filed any papers in opposition.

Having reviewed the moving papers, we determine that there is neither newly discovered material nor overlooked propositions of law to justify reconsideration of our Decision and Order issued August 16, 2001.

The charging party argues that we have accepted a different standard of compliance for *pro se* parties appearing before us, citing *Marlboro Faculty Association*

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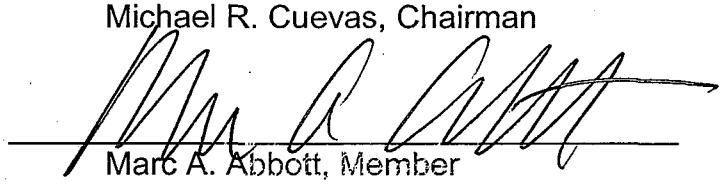
[1] 34 PERB ¶3031 (2001).

(Schanzenbach), 29 PERB ¶3007 (1996).[2] While we have been somewhat lenient in the content of pleadings received from *pro se* parties, as we held in *Marlboro, supra,* we have never sacrificed adherence to our Rules for the benefit of *pro se* parties.[3]

Accordingly, the motion for reconsideration is denied.[4]

DATED: October 11, 2001
Albany, New York

Michael R. Cuevas, Chairman



Marc A. Abbott, Member

John T. Mitchell, Member

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[2]We note that, although Mr. Johnson argues in his papers that Ms. Fearon is appearing *pro se*, Mr. Johnson appears on her behalf.

[3]*See CSEA, Inc., Local 1000*, 22 PERB ¶3020 (1989) (compliance with the Rules); *United Fed'n of Teachers and Bd. of Educ. of the City Sch. Dist. of the City of New York*, 19 PERB ¶3049 (1986) (timeliness).

[4]*United Fed'n of Teachers (Freedman)*, 34 PERB ¶3005 (2001) (citing cases).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARTIN FREEDMAN,

Charging Party,

- and -

CASE NO. U-22063

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

Respondent.

MARTIN FREEDMAN, *pro se*

DALE KUTZBACH, GENERAL COUNSEL (JERRY N. ROTHMAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Martin Freedman to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge he filed alleging that his employer, the Board of Education of the City School District of the City of New York (District), had violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) by retaliating against him for filing an earlier improper practice charge against the United Federation of Teachers (UFT), which named the District as a statutory party.[1] A hearing was held at which Freedman appeared *pro se* and the

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[1]The District was made a statutory party to that case, Case No. U-20764, pursuant to §209-a.3 of the Act.

District was represented by counsel. At the close of Freedman's case, which consisted of the introduction in evidence of certain documents and Freedman's narrative testimony, the District made a motion to dismiss. The ALJ closed the record and directed the parties to submit written argument on the motion. Thereafter, the ALJ issued a decision, dismissing the instant charge, finding that there was no evidence that those who had either made the decisions or taken the actions complained of by Freedman in the improper practice charge had any knowledge of his protected activities and that there was no evidence to establish any improper motive for the District's actions.

EXCEPTIONS

Freedman excepts to the ALJ's decision, arguing that District representatives knew about his protected activities and that the ALJ should have required the District to put in its case because his cross-examination of the District's witnesses would have assisted him in proving his case. The District has not responded to Freedman's exceptions.

Based upon our review of the record and consideration of the arguments offered by Freedman, we affirm the decision of the ALJ.

FACTS

Freedman has been employed as a teacher by the District since 1989. In June 1999, an improper practice charge filed by Freedman against UFT and in which the District was named as a statutory party, was settled. Freedman alleges that as a result of the settlement, the District assigned him to a teaching position in May 2000, that precluded him, under the terms of the District-UFT collective bargaining agreement,

from being eligible for a seniority transfer. He further alleges that he applied for a teaching assignment for the 2000 summer school session but that his application never received a response from the District. Even so, he did receive notification in September 2000 that he had received a summer school appointment but, because he had failed to report for duty, he was receiving an unsatisfactory rating and would be ineligible for appointment to a 2001 summer school position. Freedman filed a grievance regarding the summer school appointment for which he alleges he did not receive a response within the contractual time limits. He further alleges that he was not informed that a grievance hearing was adjourned. Finally, Freedman alleges that he did not receive a response from the District to a September 2000 health and welfare benefits inquiry or a September 2000 union disability benefit form until the end of October 2000.

DISCUSSION

As the ALJ correctly recognized, in deciding a motion to dismiss at the close of a charging party's case, we "must assume the truth of all the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."[2] Even giving Freedman every reasonable inference that can be drawn from the evidence he introduced at the hearing, he has failed to sustain a *prima facie* case of improper motivation.

It is well settled that in order to establish a violation of §209-a.1(a) of the Act, the charging party must prove that he or she was engaged in protected activities, that the respondent had knowledge of those activities and would not have taken the action

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[2]*County of Nassau (Police Dep't)*, 17 PERB ¶3013, at 3030 (1984).

complained of in the improper practice charge but for the charging party's exercise of protected rights.[3]

Only the first of these three elements is established on this record. Freedman filed an improper practice charge and the filing of an improper practice charge is an activity that is protected by the Act.[4] The record is, however, devoid of evidence as to who took the actions complained of in the charge and whether those individuals had any knowledge of Freedman's prior improper practice charge. Only one District representative was named by Freedman as taking one of the actions complained of and he introduced no evidence to establish either knowledge or motivation, improper or otherwise, on that individual's part. Evidence of improper motivation by any other District representative is also totally lacking on this record.

Finally, Freedman argues that the granting of the motion to dismiss deprived him of the opportunity to cross-examine witnesses to be called by the District and establish his *prima facie* case. As we have previously held, a charging party cannot rely upon cross-examination of the respondent's witnesses to establish a *prima facie* case.[5]

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

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[3]*Town of Independence*, 23 PERB ¶3020 (1990). *See also State of New York (Darcy)*, 33 PERB ¶3046 (2000); *Town of Ramapo*, 32 PERB ¶3077 (1999); *Plainedge Union Free Sch. Dist.*, 31 PERB ¶3063 (1998).

[4]*City of Lockport*, 22 PERB ¶3059 (1989); *Binghamton City Sch. Dist.*, 22 PERB ¶3034 (1989).

[5]*State of New York*, 33 PERB ¶3024 (2000); *Nanuet Union Free Sch. Dist. and Nanuet Teachers Ass'n*, 17 PERB ¶3005 (1984).

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

DATED: October 11, 2001
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

SUFFOLK COUNTY ASSOCIATION OF MUNICIPAL EMPLOYEES, INC.,

Charging Party,

-and-

CASE NO. U-21051

COUNTY OF SUFFOLK LEGISLATURE AND THE COUNTY OF SUFFOLK,

Respondents.

SOLOMON RICHMAN GREENBERG, P.C. (FREDRICK J. RICHMAN of counsel), for Charging Party

BERKMAN, HENOCH, PETERSON & PEDDY, P.C. (PETER SULLIVAN of counsel), for Respondents

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the County of Suffolk (County) to an Administrative Law Judge's (ALJ) decision which found a violation of §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when, on April 20, 1999, the County of Suffolk Legislature (Legislature) adopted a resolution waiving the one-year service eligibility for tuition reimbursement for an individual employee in the unit represented by the Suffolk County Association of Municipal Employees, Inc. (AME).

EXCEPTIONS

In its exceptions, the County of Suffolk argues, in substance, that the ALJ erred in applying the law to the facts.

FACTS

The facts are fully set forth in the ALJ's decision.[1] We will confine our review to the salient facts relevant to the exceptions filed by the County. The parties submitted a Stipulation of Agreed Facts, together with a Stipulated Record, to the ALJ in lieu of a hearing.

Exhibit L of the Stipulated Record contains §A6-2 of the County's Administrative Code, entitled "Tuition Reimbursement Program", which implements the tuition reimbursement provision of the parties' collective bargaining agreement. This section of the Code was adopted by the County in 1970 and amended in 1979. Subsection D establishes a service requirement of one year before a full-time employee is eligible for tuition reimbursement. However, subsection F, entitled "Limitations", and, in particular, subparagraphs 2 and 4, are also relevant to our inquiry. Subparagraph 2 sets the limit to the number of courses which may be approved at two. Subparagraph 4 provides that course approval must be granted prior to the commencement of the course or courses as a condition to tuition reimbursement and in accordance with provisions of subsection E, requiring, *inter alia*, that the course or courses taken must be relevant to the employee's present job and that the employee must receive a passing grade for each course.

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[1]34 PERB ¶4579 (2001).

On August 25, 1997, Daniel J. Dresch, Jr. submitted an application for approval of tuition reimbursement for four courses or twelve credit hours. The courses were to run from September 3, 1997 to December 1997.[2] On September 12, 1997, the County informed Mr. Dresch that it would not approve his application. The reason stated was that Mr. Dresch had not been employed for one year prior to the application. He was hired on August 25, 1997, and he would have completed his first year on August 25, 1998.[3]

Nevertheless, Mr. Dresch completed the Fall semester and, thereafter, submitted an application for tuition reimbursement for the Spring semester January 31, 1998 to May 1998.[4] Again, the County denied the application.[5] Dresch had enrolled in three courses during the Spring semester.

David S. Greene, Director of Labor Relations, in a memorandum dated December 17, 1997,[6] advised the County's Personnel Officer not to reverse the denial of Dresch's tuition reimbursement, pointing to the eligibility requirement. In addition, Greene pointed out that the Civil Service Department records the names of employees who request application forms for tuition reimbursement. Civil Service had no record of Dresch ever requesting such a form from their office. Greene could only speculate that

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[2]Exhibit 9, Stipulated Record.

[3]Exhibit 9, Stipulated Record.

[4]Exhibit 11, Stipulated Record.

[5]Exhibit 12, Stipulated Record.

[6]Exhibit 7, Stipulated Record.

Dresch was given an outdated form through his own department without first consulting with Civil Service about his eligibility for tuition reimbursement.

Dresch appealed the denials to the County Legislature. At the meeting of the Legislature's Personnel Committee, Greene advised the Committee that to reverse the denial would set a dangerous precedent. In addition, he pointed out that there is a contract between the employees and Suffolk County that contains a provision for tuition reimbursement. He cautioned that to bargain individually with every employee that comes aboard violates the Taylor Law.[7]

Notwithstanding Greene's admonition, the Legislature adopted a resolution granting tuition reimbursement to Dresch.[8] The County Executive thereafter vetoed the resolution, but the Legislature overrode his veto. AME then filed the instant charge. Dresch has not yet received the reimbursement.

DISCUSSION

The County argues in its exceptions that, since it has the authority to adopt rules, it has the corresponding right to modify or alter those same rules. This reasoning ignores the County's obligation under the Act. As a party to a collective bargaining agreement, the County is obligated to avoid conduct that would interfere with public employees in the exercise of their rights under §202 of the Act.[9] If we were to accept the County's argument, the County through its Legislature could unilaterally adopt

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[7]Exhibit D, Stipulated Record.

[8]Resolution No. 315-1999.

[9]Section 209-a.1(a) of the Act.

legislation for individual employees at will, thereby avoiding the collective bargaining process.

The focus of the County's exceptions is on its legislative authority to adopt rules and regulations. The stated purpose of the Dresch resolution belies this argument. The Administrative Code was adopted to provide an administrative procedure within which the collective bargaining agreement could be implemented. Specifically, paragraph 7 of the Stipulation of Agreed Facts illustrates the interplay between the Administrative Code and the collective bargaining agreement with respect to tuition reimbursement. The whole focus of the Administrative Code and the provisions of the collective bargaining agreement is a plan covering all unit employees equally and obviating the need to address tuition reimbursement requests on an individual basis.

We have long held that payment or reimbursement of the cost of education or training is an aspect of employee compensation.[10] "[T]he provision of benefits that are more than what is called for in a collective bargaining agreement is inherently destructive of a union's representation rights. It can be construed to give a message that the unit employees would do better if they abandoned their union."[11] While there is no showing of animus in this stipulated record, we have found, in a previous case involving this respondent, that no showing of animus is necessary where the action

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[10]*Town of Henrietta*, 20 PERB ¶3013 (1987); *Local 343, IAFF, AFL-CIO*, 17 PERB ¶3121 (1984); *Troy Uniformed Firefighters Ass'n, Local 2304, IAFF,* 10 PERB ¶3015 (1977); *New York State Professional Firefighters Ass'n, Inc., Local 461*, 9 PERB ¶3069 (1976); *Board of Educ. of Union Free Sch. Dist. No. 3 of the Town of Huntington*, 30 NY2d 122, 5 PERB ¶7507 (1972).

[11]*Connetquot Cent. Sch. Dist.*, 19 PERB ¶3045, at 3097 (1986).

involved is so destructive of the union's status that "the Legislature must be deemed to have actual or presumptive knowledge that its action would be coercive."[12]

Although it is usually the executive branch that is seen as the "employer" for Taylor Law purposes, we have recognized that legislative bodies often act in an executive capacity.[13] When so acting, legislative bodies are equally subject to the proscriptions of the Act against "bad faith" conduct[14] and other conduct, as here, that violates the Taylor Law.[15]

There is nothing in the language of the parties' collective bargaining agreement, nor the County's Administrative Code, authorizing the County to unilaterally modify the terms and conditions of tuition reimbursement. We, therefore, find that the County's unilateral adoption of the Dresch resolution violates §209-a.1(a) of the Act.

Based upon the foregoing, we deny the County's exceptions and we affirm the decision of the ALJ.

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[12]*County of Suffolk and Suffolk County Legislature*, 15 PERB ¶3021, at 3035 (1982), wherein we found a violation of §209-a.1(a) when the Legislature unilaterally granted step increases. There, as here, the union objected to the unilateral action.

[13]*Jefferson Co. Bd. of Supervisors*, 6 PERB ¶3031 (1973), *modified*, 44 AD2d 893, 7 PERB ¶7009 (4th Dep't 1974), *aff'd*, 36 NY2d 534, 8 PERB ¶7008 (1975).

[14]*Board of Educ., Cent. Sch. Dist. No. 1, Towns of Conklin, Binghamton, Kirkwood and Vestal*, 6 PERB ¶4526, *aff'd*, 6 PERB ¶3049 (1973).

[15]*County of Suffolk and Suffolk County Legislature*, *supra* note 12. *See also Board of Trustees, Vill. of Kenmore*, 12 PERB ¶4502 (1979).

IT IS, THEREFORE, ORDERED that the County:

1. Forthwith rescind Resolution No. 315-1999;

2. Cease and desist from adopting legislative resolutions unilaterally granting Dresch a waiver of eligibility requirements for participation in its tuition reimbursement program; and

3. Sign and post the attached notice at all locations normally used to communicate with employees in the AME negotiating unit.

DATED: October 11, 2001
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 County of Suffolk Legislature and the County of Suffolk (County) in the unit represented by the Suffolk County Association of Municipal Employees, Inc., that the County will forthwith:

1. Rescind Resolution No. 315-1999.
2. Not adopt legislative resolutions unilaterally granting Dresch a waiver of eligibility requirements for participation in its tuition reimbursement program.

Dated . . . . . .

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

COUNTY OF SUFFOLK LEGISLATURE & THE COUNTY OF SUFFOLK

. . . . . .

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

- and -

CASE NO. U-21987

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT OSWEGO),

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN 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 (State University of New York at Oswego) (State) to an Administrative Law Judge's (ALJ) determination that the State violated §§209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) by including a specification in two amended notices of discipline issued August 11, 2000, and September 5, 2000, respectively, which alleged that Richard Dowd, a member of the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), intended to contact his

bargaining agent regarding a dispute over the use of a certain room within one of the campus buildings.

EXCEPTIONS

The State excepted to the ALJ's decision on the law and the facts. Principally, the State argued that its motion to dismiss based on jurisdiction was denied, that the "but for" defense was ignored and the defense of mootness was rejected.

FACTS

We will confine our analysis to the salient facts relevant to our resolution of the exceptions. A detailed description of the facts is set forth in the ALJ's decision.

A hearing took place on February 28, 2001, at which time CSEA presented its direct case. At the hearing, CSEA limited its charge to ¶8 of the amended notices of discipline which it alleged plead a *per se* violation of §§209-a.1(a) and (c) of the Act by the State. The August 11, 2000, amended notice of discipline at ¶8 stated that "[y]ou [Dowd] threatened to go to the union (CSEA) when Rebecca Hotaling told you that you could not take over the downstairs hall council room. . . ." The September 5, 2000, amended notice of discipline at ¶8 stated that "Rebecca Hotaling was confused and felt threatened when you said you were 'going to go to the union' when she told you, you could not take over the downstairs hall council room on Onondaga for an employee break room." At the conclusion of CSEA's direct case, the State moved to dismiss the

improper practice charge on the ground that CSEA failed to prove a *prima facie* case. The ALJ denied the motion and the State went forward with its case.[1]

DISCUSSION

The ALJ denied the State's motion to dismiss based upon lack of subject matter jurisdiction. We agree. Section 204.1(a)(1) of the Rules permits the filing of a charge with the Director of Public Employment Practices of Representation (Director) alleging that a public employer or its agents . . . has engaged . . . in an improper practice . . . ." Furthermore, paragraph two of the Details of Charge identifies the State of New York as the public employer. This, coupled with the State's appearance, is sufficient to identify the proper parties to confer jurisdiction.[2]

The ALJ found that an employee has the right to seek the assistance of his or her union[3] and that the employee's statement of his or her intent to do so is likewise protected by the Act.[4] We agree. However, the ALJ concluded that the facts as pled and as presented at the hearing were tantamount to a *per se* violation of the Act. We

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[1]As the State did not raise the denial of its motion to dismiss for failure to prove a *prima facie* case in its exceptions, we are constrained by our Rules of Procedure (Rules) from reviewing this issue. *See Rules*, §213.6; *see also Chenengo Forks Cent. Sch. Dist.*, 29 PERB ¶3058 (1996); *City of Dunkirk*, 23 PERB ¶3025 (1990).

[2]*New York Practice*, Third Edition, David D. Siegel, West, p. 194.

[3]*See Cayuga-Onondaga Bd. of Cooperative Educ. Serv.*, 32 PERB ¶3079 (1999).

[4]*See Village of Scotia*, 29 PERB ¶3071 (1996), *conf'd in pertinent part*, 241 AD2d 29, 31 PERB ¶7008 (3rd Dep't 1998).

recently reevaluated the nature of a *per se* violation of §§209-a.1(a) and (c) in *Greenburgh #11 Union Free School District*.[5] In *Greenburgh*, we departed from our prior holdings and, in particular, *State of New York*.[6] In that case, we first articulated a standard of proof that an employer's conduct which was so inherently destructive of a §202 right, was "irrebuttably presumed" to have been done "for the purpose of depriving [employees] of such rights."[7] Such was the argument proffered by CSEA here in rebuttal to the State's motion to dismiss the charge.[8]

We reasoned in *Greenburgh* that the Act requires deliberate conduct on the employer's part "for the purpose of depriving [public employees] of such rights" in order for a violation of §209-a.1(a) to be found.[9] Thus, we said in *Greenburgh*, the concept of an irrebuttable presumption is no longer tenable because such an assumption is conclusive and can not be contradicted, modified or explained.[10]

Here, the ALJ determined that the language of ¶8 of both amended specifications amounted to a *per se* violation. This was error. It was not Dowd's

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[5]33 PERB ¶3018 (2000).

[6]10 PERB ¶3108 (1977).

[7]*Greenburgh*, *supra*, at 3048.

[8]Transcript, pp. 26-27.

[9]*Greenburgh*, *supra*, at 3048. *See also Town of Independence*, 23 PERB ¶3020, at 3038 (1990), for the standard of proof in §§209-a.1(a) and (c) violations.

[10]*Greenburgh*, *supra*, at 3048.

statement which prompted the issuance of the disciplinary notice. Dowd was disciplined for his numerous actions against Hotaling. The ALJ conceded in her decision that the State's conduct was not improperly motivated because ¶8 in both specifications had been included as one of many examples of Dowd's attempts to bully and intimidate Hotaling. Thus, by inference, the ALJ found that the State's proof rebutted the presumption and, consequently, CSEA failed to prove that the State acted deliberately to deprive Dowd of a protected right.

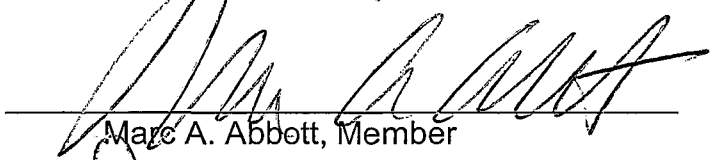
Since we have determined that the charge should have been dismissed for failure of proof, we need not reach the State's other exceptions.

For the reason set forth above, we grant the State's second exception and reverse the decision of the ALJ.

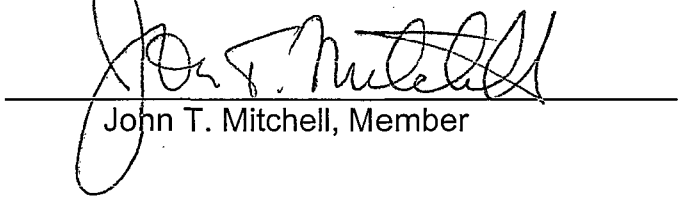
IT IS, THEREFORE, ORDERED that the charge be, and hereby is, dismissed.

DATED: October 11, 2001
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

ROCKLAND COUNTY BOARD OF COOPERATIVE EDUCATIONAL SERVICES

CASE NO. E-2220

Upon the Application for Designation of Persons as Managerial or Confidential

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RAINS & POGREBIN, P.C. (RICHARD G. KASS of counsel), for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL S . BAMBERGER of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Rockland County Board of Cooperative Educational Services (BOCES) to a decision of an Administrative Law Judge (ALJ) dismissing its application as to certain employees BOCES sought to be designated as confidential in accordance with the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act).[1]

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[1]Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, . . . persons . . . who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board. . . . Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

All the titles sought to be designated are in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

The ALJ designated as confidential Stephanie Sundheimer - Secretarial Assistant (personal secretary to the Assistant Superintendent for Human Resources); Carmela Bozzuti - Secretarial Assistant (personal secretary to the Assistant Superintendent for Educational Services); Mary Marino - Secretarial Assistant (personal secretary to the Assistant Superintendent for Business); and Laura Mastropolo-Marshag - Accountant.[2] The ALJ dismissed the application as to Judy Biase - Senior Clerk Typist; Joan Braun - Principal Clerk; and Eileen Harris - Clerk Typist.

EXCEPTIONS

The BOCES has filed exceptions to the ALJ's dismissal of the application as to Biase, Braun and Harris, arguing that the record supports their designation as confidential and that the ALJ should have relied on the employees' affidavits which were attached to the BOCES' application. CSEA has filed no exceptions and relies on its brief to the ALJ.

FACTS

CSEA called no witnesses at the hearing, effectively resting after the BOCES put in its case. BOCES called three witnesses, as here relevant: Assistant Superintendent for Human Resources, Paul Citarella, and Assistant Superintendent for Educational Services, James Ryan.

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[2]At the hearing, CSEA withdrew its objection to the designation of Mary Marino - Secretarial Assistant (personal secretary to the Assistant Superintendent for Business).

Biase and Braun work for Citarella in Human Resources. As his title suggests, Citarella is responsible for the BOCES' labor relations, grievance administration and collective bargaining, as well as recruitment, hiring and retention of staff within the BOCES' three bargaining units. Although Citarella has never been designated by PERB, the ALJ correctly found that he is a managerial employee within the meaning of §201.7(a)(ii) of the Act.

Biase is responsible for maintaining all personnel files related to certificated employees and Braun is responsible for the personnel files of the classified employees. Both work in close proximity to each other and Citarella and Sundheimer. Biase is additionally responsible for opening all the mail that comes into the Human Resources office, including Citarella's mail, which she places in a file for his perusal.[3] That mail includes correspondence from the BOCES Superintendent and other administrators, as well as the BOCES' outside labor counsel and includes information about contract negotiations, grievance and contract administration and on-going litigation.[4]

Citarella testified that at the time of the hearing he had been in his current position for a little over one year and that, while he consults with other administrators and cabinet members when he is determining how to administer the collective bargaining agreements, he also consults with Sundheimer, Biase and Braun.[5] As Citarella is new to his position, he has sought to familiarize himself not only with the

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[3]Transcript, p. 27.

[4]Transcript, p. 83.

[5]Transcript, p. 45.

terms of the various collective bargaining agreements but with past practices within the BOCES. To that end, Citarella has talked with Braun regarding personal days and leave time, hiring practices, seniority, and salary placement relating to classified personnel. Citarella testified that he has relied upon her input in formulating opinions and reaching decisions.[6] In the course of those discussions, Citarella has revealed to Braun what management's position would be with respect to at least one grievance. Braun has also given advice to Citarella about correspondence he has written, suggesting different language and a different, less direct approach, when dealing with the County Civil Service Commission.[7] Likewise, with Biase, Citarella has sought her out for similar discussions related to the certificated staff, including accumulation of additional college credits and sick leave issues involving doctors' notes.[8]

Harris is a Clerk Typist who works directly for Larry Pedersen, the BOCES District Superintendent, who is the chief executive officer of the BOCES and a managerial employee. Harris shares office space with the Superintendent's personal secretary and Clerk to the BOCES Board of Education, Mary Cramsie, who is unrepresented. Harris' desk is located in close proximity to Pedersen's office, Cramsie's desk, the BOCES Cabinet Room, Ryan's office, and Bozzuti's desk. Ryan testified that Harris performs essentially all of the tasks that are performed by Cramsie for the Superintendent, but that Cramsie is primarily responsible for typing Pedersen's

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[6]Transcript, p. 72.

[7]Transcript, p. 33.

[8]Transcript, p. 53.

correspondence. Harris opens mail, files and photocopies all materials, including the Superintendent's weekly packet to the BOCES Board of Education. The mail and the weekly packet contain material related to labor relations, litigation, organizational structure, and other matters to be discussed in executive session.[9] Ryan testified that because of the close proximity of the desks in this office and their location in relation to his office, Pedersen's office and the Cabinet Room, Harris, Cramsie and Bozzuti all have access to conversations taking place in the offices and Cabinet Room.

DISCUSSION

In *Town of Dewitt* (hereafter, *Dewitt*),[10] we held that:

> The definition of a confidential employee incorporates a two-part test for designation. The person to be designated must assist a §201.7(a)(ii) manager in the delivery of the duties described in that subdivision. (footnote omitted) Assistance alone, however, is not enough to support a designation. In addition, the person assisting the §201.7(a)(ii) manager must be one acting in a confidential capacity to that manager.

This record clearly supports the designation of Biase, Braun and Harris as confidential. The only testimony offered was that of the three BOCES Assistant Superintendents. Their testimony was not controverted.

Citarella credibly and clearly testified to the confidential duties performed by Biase and Braun. Biase is responsible for opening all the mail received in the Human Resources office, including that which deals with negotiations, grievances, arbitrations and litigation. Such exposure is sufficient, in and of itself, to conclude that Biase meets

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[9]Transcript, pp.167-169.

[10]32 PERB ¶3001, at 3002 (1999).

the first prong of the *Dewitt* test because she is exposed to material which is not appropriate for the eyes and ears of rank-and-file personnel.[11] Biase is also consulted by Citarella on contractual matters relating to the certificated personnel.

Braun has access to personnel files and works with them daily. In the course of her duties, Citarella testified that Braun sometimes prepares correspondence for him on matters related to the classified BOCES personnel and has advised him on the content of that correspondence. Braun obtains information for Citarella in the processing of grievances during which he has, on at least one occasion, revealed to her what BOCES' position would be on the merits of the grievance. Clearly, Braun also meets the first prong of the *Dewitt* test because she not only has access to all the files in the Human Resources office, but she works with them on a regular basis without restriction.[12]

Both Biase and Braun meet the second prong of the *Dewitt* test because of the confidential nature of Citarella's discussions with them. Both employees have been consulted by Citarella on questions of past practice and contract interpretation, as well as their general knowledge of the BOCES' operation and the staff. They serve in a "position of trust and confidence *vis-a-vis*" Citarella.[13] That there have only been a few instances referred to by Citarella does not, as found by the ALJ, warrant a different conclusion. At the time of the hearing, Citarella had only held his position for a little over

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[11] *Wappingers Cent. Sch. Dist.*, 19 PERB ¶3059 (1986).

[12] *Id.*

[13] *Supra*, note 9.

a year. The number of discussions he testified about and the nature of those discussions, given his short tenure in office, are sufficient to establish that Citarella confides in them on a regular basis.[14]

Harris performs confidential duties for Pedersen, the BOCES Superintendent. She opens his mail on a regular basis and is involved with Cramsie in the preparation of the weekly packet for the BOCES Board of Education. Included in the mail and in the packet are negotiation materials, litigation information and grievance materials. Regular exposure to such materials is not appropriate for the eyes and ears of rank-and-file employees.[15] Harris' duties clearly meet the first prong of the *Dewitt* test.

The record establishes that Harris performs essentially the same duties as Cramsie on a regular basis and, indeed, functions as an additional personal secretary to the Superintendent. Her relationship to Pedersen as one of his two secretaries, her close proximity to his office and the set-up of the Executive offices and Pedersen's assignment to Harris of the responsibility for sensitive, confidential materials on a regular basis support our finding that Harris functions in a confidential capacity with Pedersen. A confidential relationship is inherent in the nature of the two positions themselves and is evidenced by the nature of the duties assigned by Pedersen to Harris.[16]

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[14]*See North Rose-Wolcott Cent. Sch. Dist.*, 33 PERB ¶3002 (2000).

[15]*Supra*, note 11. *See also Kenmore-Town of Tonawanda Union Free Sch. Dist.*, 26 PERB ¶4021 (1993).

[16]*Supra*, note 10.

Based on the foregoing, we grant the BOCES' exceptions. We therefore, affirm the decision of the ALJ in part and reversein part the decision of the ALJ.[17]

Therefore, BOCES' application to designate the following titles as confidential is hereby granted as follows:

Stephanie Sundheimer	-	Secretarial Assistant (personal secretary to Assistant Superintendent for Human Resources)
Judy Biase	-	Senior Clerk Typist (Assistant Superintendent for Human Resources)
Joan Braun	-	Principal Clerk (Assistant Superintendent for Human Resources)
Carmela Bozzuti	-	Secretarial Assistant (Assistant Superintendent for Educational Services)
Mary Marino	-	Secretarial Assistant (Assistant Superintendent for Business)
Eileen Harris	-	Clerk Typist (BOCES Superintendent)
Laura Mastropolo-Marshag-		Accountant

DATED: October 11, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[17]Because of our finding herein, we need not address the BOCES' other exception.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioner,

- and -

CASE NO. M-201-146

CITY OF NEW YORK,

Employer.

GLEASON, DUNN, WALSH & O'SHEA (RONALD DUNN, of counsel), for Petitioner

ALAN SCHLESINGER, GENERAL COUNSEL, OFFICE OF LABOR RELATIONS, for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of New York (City) to rulings made by the Director of Conciliation (Director) in conjunction with impasse proceedings initiated by the Patrolmen's Benevolent Association of the City of New York, Inc., (PBA) under §§209.2, 209.3 and 209.4 of the Public Employees' Fair Employment Act (Act) and Part 205 of our Rules of Procedure (Rules). The City excepts to the Director's determination that an impasse exists in the negotiations for a successor collective bargaining agreement between the City and the PBA and to his appointment of a mediator.

The City alleges in its exceptions that the Director should have stayed his ruling on the PBA's declaration of impasse because of pending litigation before the Court of Appeals and that the parties had not negotiated to impasse and, therefore, the PBA's declaration of impasse was premature. The PBA responds that the Court of Appeals denied the City's application to enjoin all proceedings before PERB, including mediation. The PBA further argues that the parties have reached a genuine deadlock in negotiations and require the assistance of a mediator.

In reaching his determination to appoint a mediator, the Director reviewed the PBA's December 15, 2000 declaration of impasse and the City's response, as well as the ongoing litigation. The mediator was appointed on August 15, 2001.

The Act was amended in 1998 to remove the exclusion of police officers employed by the City from the coverage of the impasse resolution procedures available under §209.4.[1] On May 4, 2000, the PBA and the City commenced negotiations for a successor agreement to their 1995-2000 collective bargaining agreement. The Appellate Division's decision, from which the City has appealed, summarizes the procedural history of the parties' dispute:

> [During negotiations] the City filed a scope of bargaining petition with the...Board of Collective Bargaining of the City of New York (hereinafter BCB). In response, the PBA answered, claiming that...[the] Public Employment Relations Board (hereinafter PERB) had sole, exclusive jurisdiction over scope of bargaining issues and, thereafter, filed a declaration of impasse with PERB. In this declaratory judgment action, the PBA seeks a declaration that PERB has exclusive jurisdiction to resolve disputes between it and the City concerning the scope of bargaining and/or the

[1]1998 NY Laws ch. 641.

> existence of an impasse in negotiations and an order directing BCB to dismiss the petition of the City. Simultaneously, the City commenced an action against the PBA, PERB and BCB for judgment declaring that chapter 641 of the Laws of 1998 (Civil Service Law §212[3]) (hereinafter chapter 641) is unconstitutional and that BCB has exclusive jurisdiction over any impasse which may arise during the collective bargaining negotiations between it and the PBA and to determine scope of bargaining issues, whether within or without the context of an impasse. Additionally, the City sought a permanent injunction forbidding the enforcement of chapter 641.
>
> Following consolidation of the actions, the PBA moved for summary judgment declaring the constitutionality of the statute. In opposition, PERB cross-moved for dismissal of the complaint asserting that declaratory relief was unavailable, all administrative remedies had not been exhausted and the determinations of these administrative agencies regarding the breadth of their respective jurisdictions was entitled to judicial deference. The City cross-moved for summary judgment contending that chapter 641 was unconstitutional since it was enacted either in violation of the home rule provision of the State Constitution or was an improper delegation of legislative authority. In the alternative, the City sought denial of the PBA's motion so that necessary discovery could be concluded. Supreme Court, *inter alia*, granted the PBA's motion for summary judgment finding no violation of the State Constitution and further ruled that jurisdiction of scope of bargaining issues was properly placed with PERB. This appeal followed.[2]

The Appellate Division affirmed the decision of Supreme Court[3], finding that chapter 641 was constitutional and that PERB had exclusive jurisdiction over impasse and scope of negotiation issues between the City and the PBA. It was then that the

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[2]*Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. City of New York and NYS PERB*, 2001 N.Y. App. Div. LEXIS 7388, 34 PERB ¶7026, at 7044 (3d Dep't 2002).

[3]*Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. City of New York and NYS PERB*, 188 Misc2d 146, 34 PERB ¶7017 (Sup. Ct. Albany County 2001).

Director considered the PBA's declaration of impasse, filed eight months earlier. The Court of Appeals thereafter denied the City's motion for a stay pending disposition of its appeal to that court.[4]

The City argues that the Director should have, nonetheless, postponed his appointment of a mediator until the Court of Appeals decided the City's appeal of the Appellate Division's decision, because if the City prevailed on appeal, the impasse declaration would not be within PERB's jurisdiction. The City also argues that the Director should not have acted in order to give the parties an additional opportunity to negotiate because the City had recently settled contract negotiations with other unions representing uniformed personnel which might have changed the tenor of the negotiations between the PBA and the City.

The City further argues that the parties had met only nine times before the PBA declared impasse and that there had only been one negotiating session after the PBA had articulated the specifics of its proposed salary increase. This, the City argues, evidences the PBA's desire to proceed directly to arbitration. The PBA argues that PERB was free to proceed on the declaration of impasse once the Appellate Division's stay expired and that the parties had negotiated to a point of deadlock which required the assistance of a mediator in order to move forward.

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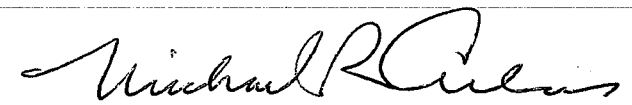
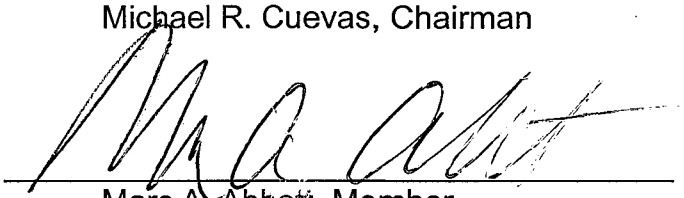
[4]*Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. City of New York and NYS PERB*, __ NY2d__, 34 PERB ¶7029 (September 20, 2001).

We clearly have the authority to review the Director's appointment of a mediator[5] and, having done so here, we determine, based upon the submissions made to the Director, that he properly appointed the mediator.[6] We, therefore, confirm the designation of a mediator by the Director in this matter. SO ORDERED.

DATED: October 11, 2001
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

John T. Mitchell, Member

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[5]*Board of Educ. of the City Sch. Dist. of the City of New York*, 34 PERB ¶3016 (2001) and cases cited therein.

[6]*City of Newburgh v. PERB*, 97 AD2d 258 (3d Dep't 1983), *aff'd* 63 NY2d 793 (1984).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CORTLAND COUNTY POLICE ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5093

COUNTY OF CORTLAND AND CORTLAND COUNTY SHERIFF,

Joint 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

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[1]The current representative, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, has disclaimed interest in further representing this unit of employees which has been fragmented from an overall unit of employees of the joint employer.

Employment Act,

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

Included: County Police Officer, County Police Corporal, County Police Sergeant, County Police Lieutenant, and County Police Captain.

Excluded: All other employees.

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

DATED: October 11, 2001
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

JAMESTOWN CITY ADMINISTRATIVE ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5065

CITY OF JAMESTOWN,

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 Jamestown City Administrative Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Account clerk typist/deputy registrar, account clerk typist/finance, administrative assistant to the assessor, assessor, assistant civil engineer, assistant recreation facility manager, building maintenance supervisor, computer programmer, deputy director of parks recreation & con., engineering technician, equipment manager, operations engineer, parks manager, principal account clerk/information services, programmer/analyst, real property appraiser, semi-skilled laborer/ice rink, senior account clerk typist/finance, senior typist/youth services, stenographic secretary/DPW, stenographic secretary/personnel, street & sewer supervisor, traffic engineering supervisor, and working crew chief.

Excluded: All other employees.

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

DATED: October 11, 2001
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 PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-5119

NEW HYDE PARK-GARDEN CITY PARK UNION FREE 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 United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time Teacher Aides.

Excluded: All other employees.

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

DATED: October 11, 2001
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-5113

BELLEVILLE HENDERSON CENTRAL SCHOOL DISTRICT,

Employer,

-and-

BELLEVILLE HENDERSON SUPPORT STAFF ASSOCIATION,

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.,

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[1]The former bargaining representative, the Belleville Henderson Support Staff Association, is defunct.

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 negotiations and the settlement of grievances.

Included: Teacher Aide, Registered Professional Nurse, Cleaner, Bus Driver, Food Service Helper, Monitor, CSE/Home School Coordinator, Cashier, Dental Hygienist, Teacher Assistant, Bus Driver/Cleaner, Monitor/Food Service Helper.

Excluded: All other employees.

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: October 11, 2001
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member