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## State of New York Public Employment Relations Board Decisions from December 6, 2001

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from December 6, 2001

### Keywords

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

### Comments

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

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In the Matter of

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

Petitioner,

- and -

**CASE NO. C-5045**

**STATE OF NEW YORK,**

Employer,

- and -

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

Intervenor.

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**CHRISTOPHER H. GARDNER, ESQ., for Petitioner**

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

**HINMAN STRAUB, P.C. (NANCY L. BURRITT AND JOHN SACCOGIO of  
counsel), for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the State of New York (State) to a decision of an Administrative Law Judge (ALJ) granting a petition filed by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82), seeking to represent certain employees of the State's Departments of

Environmental Conservation (En Con) and Parks, Recreation and Historic Preservation (Parks), currently represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA), in the Security Services Unit.

A hearing was held at which all parties were present and represented by counsel. At the hearing, the parties entered into a stipulation, as recited by the ALJ on the record, that provides, as here relevant, the following:

First, Council 82 withdraws any allegations in support of the fragmentation other than the law enforcement functions of the at-issue personnel and most specifically, Council 82 is withdrawing any allegations with respect to inadequate representation.

Second, if a bargaining unit is created in a final order of the board or under this proceeding, if a final -excuse me- if a separate bargaining unit is created by virtue of the law enforcement functions of the at-issue personnel, obviously subject to review by the board and the courts, but the parties agree that this unit is appropriate and; therefore, the next step would be the conduct of an election....<sup>1</sup>

Both the State and Council 82 filed briefs with the ALJ, NYSCOPBA did not. The ALJ thereafter determined that the petition should be granted and fragmented the petitioned-for titles - Traffic and Park Officer, Park Patrol Officer, Environmental Conservation Investigator I and II, Environmental Conservation Officer, Environmental Conservation Officer Trainee I and II, Supervising Environmental Conservation Officer and Forest Ranger I and II - from the Security Services Unit, leaving in the unit, as here relevant, employees in the corrections officers series and the University Police Officer I and II and University Police Investigator I and II titles. The ALJ relied upon our earlier

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<sup>1</sup>Transcript, pp. 12-13.

decision in *County of Erie and Sheriff of Erie County*, 29 PERB ¶13031 (1996) (hereafter, *Erie*), in which we fragmented deputy sheriffs with exclusively or primarily law enforcement duties from a unit of deputy sheriffs with custodial duties, finding that the titles at-issue in this case were primarily or exclusively involved in the enforcement of the laws of the State of New York or the detection and prevention of conduct that is criminalized by the laws administered by either En Con or Parks.

#### EXCEPTIONS

The State excepts to the ALJ's decision, arguing that the at-issue titles should not be fragmented from the existing unit because PERB has already decided that the Security Services Unit is the most appropriate unit for these employees and the State has been found to be different from other public employers with respect to uniting determinations, and because the stipulation entered into by the parties did not, as the ALJ found, preclude consideration of the State's administrative convenience and most appropriate unit arguments. Council 82 supports the ALJ's decision; NYSCOPBA has filed neither exceptions to the ALJ's decision nor a response to the State's exceptions.

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

#### PROCEDURAL MATTERS

Council 82 argues, and the ALJ so found, that the stipulation delineated by the ALJ on the record and entered into by the parties, defined the most appropriate unit and that the only issue before the ALJ was whether the at-issue titles should be fragmented from the Security Services Unit on the basis of our decision in *Erie*. At the hearing, NYSCOPBA sought to introduce evidence that the State University of New

York (SUNY) university police officer and university police investigator titles were police officers and that if employees with police duties and responsibilities were to be removed from its unit, the most appropriate unit was not the one sought by Council 82 but one including the at-issue titles and the university police officer and university police investigator titles.<sup>2</sup> The State supported NYSCOPBA's position insofar as stating that it would have introduced the same evidence if NYSCOPBA had not. On the basis of that evidence, the State argued that it would be inappropriate to fragment the at-issue titles from the Security Services Unit on the basis of their police duties and leave other police officers - the university police officer and university police investigator titles - in the unit with the corrections officers and others, who are not police officers. The State sought the dismissal of the petition on that ground, as well as upon the ground that the proceeding was an investigation and that it was incumbent upon PERB to have a complete record upon which to base its decision. The State also argued that the evidence relating to the university police officer and university police investigator titles would support its administrative convenience argument.<sup>3</sup> Council 82 reiterated that it had given up certain of its arguments - inadequate representation of the at-issue titles by NYSCOPBA - in return for the stipulation as to the appropriateness of the unit and that no evidence therefore should be admitted as to any other unit titles. While allowing NYSCOPBA's witness to testify about the job requirements and duties of the university police officer and university police investigator titles, the ALJ rejected the evidence

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<sup>2</sup>Transcript, p. 336.

<sup>3</sup>Transcript, p. 338.

when reaching his uniting determination. The ALJ sustained Council 82's objection and found that the stipulation evidenced an agreement that if the at-issue titles were fragmented from the Security Services Unit, the resulting unit would be the most appropriate unit.

We disagree with the ALJ's findings regarding the meaning and effect of the stipulation and we determine that we will consider the evidence and arguments made with respect to the university police officer and university police investigator titles in defining the most appropriate unit. We have long held that we are not bound by the parties' proposed uniting configurations.<sup>4</sup> As a representation case is an investigation conducted to enable us to ascertain that the unit petitioned for is the most appropriate unit,<sup>5</sup> we may inquire into the make-up of the petitioned-for unit and even whether titles not included in the petition are appropriately placed in the proposed unit.<sup>6</sup> Further, the stipulation itself provides that it is "subject to review by the board". We will, therefore, consider the placement of the university police officer and university police investigator titles in making our unit determination herein.

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<sup>4</sup>See *New York Convention Center Operating Corp.*, 27 PERB ¶3034 (1994). See also *Great Neck Bd. of Educ. Union Free Sch. Dist. No. 7, Town of North Hempstead*, 4 PERB ¶3017 (1971); *State of New York*, 1 PERB ¶399.85 (1968); *confirmed sub nom. CSEA v. Helsby*, 32 AD2d 131, 2 PERB ¶7007 (3d Dep't 1969), *aff'd* 25 NY2d 842, 2 PERB ¶7013 (1969).

<sup>5</sup>Jerome Lefkowitz, et al., *Public Sector Labor and Employment Law*, 365-66 (2d ed. 1998)

<sup>6</sup>See, *State of New York*, *supra* note 4.

FACTS

The facts are recited in detail in the ALJ's decision and are repeated here only as necessary for the issues on appeal.<sup>7</sup>

All the titles here in issue are currently in the Security Services Unit. The original unit determination was made in 1968, creating the unit, along with four other units, of State employees.<sup>8</sup> In 1969, the titles then in the unit were delineated and finalized.<sup>9</sup> The units created were neither the overall unit of State employees, excluding state police and professional employees of SUNY, sought by the State, nor the smaller units sought by numerous petitioning employee organizations. The Security Services Unit has been altered over the years to add seasonal lifeguards,<sup>10</sup> to remove parkway traffic and park officers,<sup>11</sup> and to remove supervisory personnel.<sup>12</sup>

The vast majority of the approximately 20,000 employees in the unit are in the corrections officers titles. The at-issue titles in En Con and Parks make up only 523 employees. There are also approximately 389 university police officers and 27 university police investigators in the Security Services Unit.

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<sup>7</sup>See, *State of New York*, 34 PERB ¶4013 (2001).

<sup>8</sup>*State of New York*, *supra*, note 4.

<sup>9</sup>*State of New York*, 2 PERB ¶3037 (1969).

<sup>10</sup>*State of New York*, 5 PERB ¶3022 (1972).

<sup>11</sup>Laws of 1979, Chapter 276. See also *State of New York (Office of Parks and Recreation)*, 13 PERB ¶3079 (1980), *confirmed sub nom. Russell v. PERB*, 14 PERB ¶7010 (Sup. Ct. Albany County 1981).

<sup>12</sup>See, e.g., *State of New York*, 21 PERB ¶3050 (1988).

The corrections officers are peace officers pursuant to §2.10(25) of the Criminal Procedure Law (CPL). Their responsibilities include the care, custody and security of inmates incarcerated in the State's correctional facilities and camps. They may be required to carry firearms, but usually do not. They are empowered to make arrests but do not do so as part of their job duties. Corrections officers undergo a seven-week training program at the Correctional Services Training Academy. They then receive four weeks of on-the-job training.

The traffic and police officers<sup>13</sup> and park police officers are police officers pursuant to CPL §1.20.34(e). Civil Service Law, §58(3) also identifies these employees as police officers as they are members of the regional state park police who are responsible for the prevention and detection of crime and the enforcement of the general criminal laws of the State. Pursuant to this authority, the traffic and safety officers and park police officers maintain order within the park facilities to preserve and protect the natural and historic resources of the State. They administer and enforce all laws, rules and regulations of the State to protect persons and property from injury or damage. They patrol the park facilities and conduct police inquiries and investigations. They execute warrants and make felony arrests within the State's parks. They are required to testify in court. They are uniformed officers, carry firearms, handcuffs and pepper spray and are assigned police vehicles with a full range of police equipment.

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<sup>13</sup>This title is being phased out through attrition and is being replaced by the park police officer title.

These employees must complete at least sixty semester credit hours of college, pass the civil service exam and complete a twenty-three week residential training course and on-the-job training to be employed as traffic and safety officers and park police officers.

The environmental conservation officers and investigators are police officers pursuant to CPL §1.20.34(j). They attend a residential training academy and in-service training (traineeship) for at least 536 hours, which exceeds the minimum required by the Municipal Police Training Council. On a daily basis, the officers enforce all of the laws of the State of New York. While their primary responsibility is to investigate violations of the Environmental Conservation Law, in the course of those duties, they regularly are called upon to enforce all other State laws, including the Penal Law and the Vehicle and Traffic Law. When not involved in an investigation, the officers patrol the region to which they are assigned. They may issue tickets and arrest violators. The environmental conservation officers wear full police uniforms, carry weapons and pepper spray. They drive fully-equipped police vehicles.

The environmental conservation investigator I and II are "situated in special centralized task forces to conduct investigations of criminal violations of the hazardous and toxic waste provisions of the Environmental Conservation Law."<sup>14</sup> The investigators also supervise all other personnel involved in such investigations. They train the environmental conservation officers in the principles and procedures of investigating

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<sup>14</sup>Civil Service Standard for Environmental Conservation Investigators. *State of New York*, 34 PERB ¶4013, at 4038 (2001).

hazardous waste violations because the officers primarily conduct investigations of pollution which is not of a criminal nature and which does not involve hazardous waste. The investigators draft warrants, execute search and seizure warrants, testify in court and perform undercover work as necessary. The investigators may also be involved in other criminal investigations, from homicides to theft of equipment to disorderly conduct. Investigators must have been a fully qualified environmental conservation officer to be considered for the investigator position.

Forest rangers are peace officers pursuant to CPL §2.10.33. They must have completed sixty semester credit hours of college, including or supplemented by fifteen hours in environmental/life science and two years of technical work in related fields, or a bachelor's degree, including thirty hours of environmental/life science. They complete a twenty-six week training program at the Office of Public Protection Academy, which meets training and mandatory certifications necessary for law enforcement officers. The training includes instruction in wildland fire suppression, search and rescue, use of helicopters and emergency management. Forest rangers also complete a one-week training program for operation of emergency vehicles. In order to respond to emergencies in wilderness areas, they are on call and available for duty twenty-four hours a day.

The forest rangers carry handguns, collapsible batons and pepper spray while on duty. They patrol both day and night by foot, motor vehicle, ATV, snowmobile or boat to provide law enforcement and emergency response to remote and inaccessible regions of the State. They enforce the Environmental Conservation Law, Parks and Recreation

Law, Vehicle and Traffic Law, Penal Law and Alcohol and Beverage Control Law and provide assistance to other law enforcement agencies. Forest rangers may obtain warrants, issue appearance tickets and make custodial arrests. Approximately 50% of their duties are related to law enforcement. Twenty per cent of the forest rangers' job duties involve search and rescue efforts. Pursuant to the Search and Rescue Law, ECL §9-0105, the forest rangers are authorized to organize, direct and execute search and rescue operations for lost persons or civilian aircraft, including the organizing and directing of all responding personnel and resources; for example, State police, deputy sheriffs, firefighters, search dogs and search teams. Their training and expertise is also utilized in support of criminal investigations involving searches for fugitives and evidence. The forest rangers also have significant responsibilities in the areas of fire fighting and stewardship of the State's natural resources.

The university police officer I and II and university police investigator I and II titles are designated as police officers in CPL §1.20.34(s). They are required to have completed sixty college semester credit hours and a sixteen week police training course at the State Police Academy. In addition, they receive two additional weeks of field training and subsequent specialized training, in the use of a Breathalyzer or radar, as warranted. They have Statewide jurisdiction and may carry guns, handcuffs, mace, a radio and pepper spray, as they patrol SUNY campuses on foot, bicycle or in a fully-equipped police car. They investigate complaints, respond to requests for assistance and may be involved on a daily basis with drug and alcohol offenses, harassment, assault, rape and traffic incidents. They make arrests or issue appearance tickets, as

the case may warrant. The investigator I and II titles are promotional titles and have the same training and authority as the university police officers. They work in conjunction with local police agencies in the investigation of criminal activity and supervise the university police officers.

#### DISCUSSION

The State argues that the ALJ erred in applying *Erie* to a uniting case involving the State. The basis for its argument is that PERB has already decided the most appropriate unit for these employees and also that the State has been found by this Board to be different from local jurisdictions with respect to uniting determinations.

The first argument may be summarily dismissed. We have on many occasions altered the State bargaining units, adding or removing titles, or creating new units entirely.<sup>15</sup> The Security Services Unit has itself been the subject of several decisions, adding titles and removing titles.<sup>16</sup> Indeed, the Laws of 1979, Chapter 276, §10, which removed the parkway patrol function from the traffic and park officers and transferred it to the State Police and returned the traffic and park officer title to the security services unit, specifically notes that “[s]uch restoration shall not be construed to limit the public employment relations board from subsequently including these titles in a collective bargaining unit, other than the security service unit....”

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<sup>15</sup>See, e.g., *State of New York*, *supra* note 4.

<sup>16</sup>See, e.g., notes 10 and 12, *supra*.

The second aspect of the State's argument, that it is or should be treated differently than other public employers in the resolution of uniting questions because of its unique status, is likewise without merit. The State relies upon the decision of the Acting Director of Public Employment Practices and Representation (Acting Director) in *State of New York*, 9 PERB ¶4016, at 4023 (1976). In addressing a fragmentation petition seeking to carve out one group of six printers from the Operating Services Unit which contained 300 other employees in the same job title, the Acting Director noted that the Board had already determined that there should be five units of State employees, "because of the circumstances which distinguish the State as an employer from all others...." Decisions of the Acting Director are not binding on the Board. We also find that the Acting Director's dicta, opining on the Board's rationale behind the initial uniting cases, lacks precedential value.

The State here also relies on *County of Rockland*, 10 PERB ¶3014 (1977). There, in discussing the initial uniting case [*State of New York*, 1 PERB ¶399.85 (1968)], the Board noted that "[g]iven the many different professions and other occupations found in State service and the potential for a myriad of units, that case may be distinguished from cases involving local government."<sup>17</sup> The State here points to that statement as a recognition by the Board that the State occupies a unique position and that uniting decisions applicable to local governments are not applicable to the State. The State misapprehends the meaning of that statement. The uniting criteria utilized by

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<sup>17</sup>10 PERB ¶3014, at 3030, n.4 (1977).

PERB are the same regardless of the identity of the public employer involved. The distinction lies in the factual differences present in each case, whether it is the State, county, city, town or village, or some other public employer.

The State further argues that the ALJ misapplied *Erie* to the facts of this case.<sup>18</sup> In *Erie*, we fragmented deputy sheriffs-criminal from a unit of deputy sheriffs-officers because, like police officers employed by local government, they, in the words of *City of Amsterdam*,<sup>19</sup> were concerned with "the broad spectrum of human rights, public order and the protection of life and property." We found in *Erie*<sup>20</sup> that deputy sheriffs who "are or can be regularly exposed to that type of law enforcement by virtue of their status, qualifications and required training" are not properly included in a unit of other deputy sheriffs whose primary function is the supervision and custody of inmates.

We defined the class of employee we would consider to be involved in law enforcement to the extent that fragmentation from a unit of other deputy sheriffs would be appropriate. We determined that such an employee must be responsible for the prevention and detection of crime and the enforcement of the general criminal laws of the State and that such duties are the exclusive or primary characteristic of that employee. In *Erie*, we recognized the basic differences between employees who have as the primary attribute of their employment criminal law enforcement and those who do

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<sup>18</sup>The State argues in its exceptions that the ALJ misapplied *Erie* only as to his determination on the status of the forest ranger titles and the En Con titles.

<sup>19</sup>10 PERB ¶3031 (1977).

<sup>20</sup>29 PERB ¶3031, at 3069.

not. As in *Erie*, here the En Con employees are qualified, and are expected by the State, to perform the full range of law enforcement work which employees in the correction officers titles are not.<sup>21</sup> The State argues that none of the petitioned for En Con employees meet these criteria and that the petition must be dismissed as to them. We disagree.

The environmental conservation officer, environmental conservation officer trainee I and II, supervising environmental conservation officer titles and environmental conservation investigator I and II, are all police officers within the meaning of the Criminal Procedure Law. They are all responsible for the detection and prevention of crime and the enforcement of the criminal laws of the State of New York, as well as a variety of other laws, including the Environmental Conservation Law. Such duties are their exclusive and primary responsibility. The State argues that because they are primarily involved in the enforcement of the Environmental Conservation Law, they do not meet the criteria articulated in *Erie* for fragmentation.

As we noted in *Erie*, with respect to the various deputy sheriff-criminal titles,

the degree of involvement with criminal law enforcement activities will vary by individual according to their area of assignment at any given time. That circumstance is equally true, however, among the police officer members of municipal police departments. The uniting standard articulated in this case produces a unit which we consider to be entirely in keeping with our prevailing practice regarding all other police officers. The unit we fashion consists of those in the police services division of the sheriff's department and includes road patrol officers, detectives, supervisory personnel, and others providing ancillary services (emphasis added) which are directly and predominantly related to criminal law enforcement.

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<sup>21</sup>*Supra*, note 19, at 3070.

Here, the En Con officers are all qualified, trained, equipped and expected to perform as police officers. That they are engaged in specialized law enforcement simply evidences the degree to which they are involved in criminal law enforcement as well as their involvement with "ancillary services". The expectation is that they are, or can be, exposed to criminal law enforcement in the course of performing their duties.

The same is true of the forest ranger titles. Although not police officers within the meaning of the Criminal Procedure Law, the forest rangers meet the criteria set forth in *Erie* in their qualifications, training and job duties. The record establishes that they are involved in law enforcement as 30% to 50% of their duties, in addition to being involved in search and rescue or fugitive and evidence searches for another 20% of their assigned duties. As such, they are clearly providing ancillary services which are directly and predominantly related to criminal law enforcement. As we noted in *Erie*, classification as a police officer alone is an insufficient basis for determining unit placement. The corollary is, likewise, true. Classification as a peace officer is insufficient by itself for determining the most appropriate unit placement. There the deputy sheriffs-officer were police officers but were not "responsible for the prevention and detection of crime and the enforcement of the general criminal laws of the state." Here, the forest rangers are not police officers within the meaning of the Criminal Procedure Law, but have the other characteristics which we found crucial to support fragmentation in *Erie*. Given these considerations, we find that the forest ranger titles are more appropriately grouped with the other En Con employees and the Park employees in the petitioned for unit, than with the correction officer titles and other titles remaining in the Security Services Unit.

We reach finally the question of the university police officer and investigator titles. These employees are police officers within the meaning of the Criminal Procedure Law. They are qualified, trained and equipped in the same manner as municipal police officers and the petitioned for titles. Their duties are similar to those of the traffic and park officer and park patrol officer, although performed at the State's universities and colleges as opposed to the State's parks. Just as it is no longer appropriate under *Erie* to include the titles sought to be fragmented by Council 82 in the Security Services Unit, it would be inappropriate to leave the university police officer and investigator titles in that unit. For these reasons, we find that they are appropriately grouped with the petitioned-for titles. As we noted earlier, we are not bound by the units proposed by the parties. Our obligation is to create the most appropriate unit, especially when additional titles have already been put in issue by one or more of the parties, as was done here both by the State and NYSCOPBA.<sup>22</sup>

Finally, the State argues that its administrative convenience is not served by the creation of an additional bargaining unit which will result in additional administrative responsibilities for the State. We reject this argument. Once again citing to *Erie*,

[t]he mere possibility, even likelihood, that there will be some labor relations or personnel issues created as a result of the fragmentation of the deputy sheriffs--criminal is not a reason to deny them what is otherwise clearly the most appropriate unit in view of the 'strong prevailing practice of having separate units for policemen.'<sup>23</sup>

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<sup>22</sup>We do not consider the placement of these titles in the State Police Unit because of the difference in dispute resolution procedures available to these employees and those in the State Police Unit. See, Act, §209.2; *City of Lockport*, 30 PERB ¶3049 (1997).

<sup>23</sup>29 PERB ¶3031, at 3070 (1996), citing *City of Amsterdam*, 10 PERB ¶3031, at 3062 (1977).

While we are not unmindful of the State's financial concerns, the possibility that the State will incur additional administrative or personnel costs in negotiating and administering the contract for another bargaining unit is not a sufficient basis for dismissing Council 82's petition.

IT IS, THEREFORE, ORDERED that there will be a negotiating unit established as follows:

Included: Traffic and Park Officer, Park Patrol Officer, Environmental Conservation Investigator I and II, Environmental Conservation Officer, Environmental Conservation Officer Trainee I and II, Supervising Environmental Conservation Officer, University Police Officer I and II, University Police Investigator I and II, and Forest Ranger I and II.

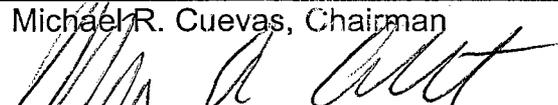
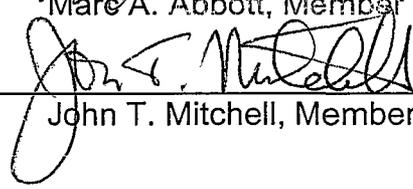
Excluded: All other employees.

IT IS FURTHER ORDERED that the matter is remanded to the Director of Public Employment Practices and Representation (Director) for further proceedings not inconsistent with this decision.<sup>24</sup>

DATED: December 6, 2001  
Albany, New York



Michael R. Cuevas, Chairman

  
Marc A. Abbott, Member  
John T. Mitchell, Member

<sup>24</sup>The unit we find to be most appropriate is significantly larger than the unit originally described in Council 82's petition. The Director, therefore, upon review of Council 82's showing of interest for the original unit, may determine that it is not sufficient for participation in the election for the larger unit. The Director may permit Council 82 sufficient time in which to file a showing of interest for that unit. See *Public Sector Labor and Employment Law*, 418-19, *supra* note 5 ; *Levittown Union Free Sch. Dist.*, 15 PERB ¶3095 (1982).

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

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION,  
INC., LOCAL 1000, AFSCME, AFL-CIO,  
DUTCHESS COUNTY LOCAL 814, TOWN OF  
POUGHKEEPSIE UNIT,**

Charging Party,

- and -

**CASE NO. U-22231**

**TOWN OF POUGHKEEPSIE,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (MARILYN S. DYMOND of  
counsel), for Charging Party**

**PACER & BUTTRIDGE (PAUL G. HANSON of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the Town of Poughkeepsie (Town) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) which found that the Town violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Dutchess County Local 814, Town of Poughkeepsie Unit (CSEA) when it terminated John Scheib's employment because of his efforts to organize a CSEA bargaining unit in the Town's highway department.

### EXCEPTIONS

The Town excepts to the Assistant Director's decision on the law and the facts. The Town argues that Scheib was not engaged in a protected activity at the time he was disciplined for handing out union literature. CSEA has filed a response in which it generally disputes the contents of the Town's exceptions.

### FACTS

We will confine our review to the salient facts relevant to the Town's exceptions.

The improper practice charge was filed on December 20, 2000, alleging, *inter alia*, that John Scheib, a laborer working in the Town's highway department, was actively involved in CSEA's effort to organize the highway department. CSEA represents other Town employees and the typist in the highway department.

Scheib had been employed by the Town as a laborer from October 1995 to September 29, 2000, the date of his official employment termination. Scheib testified that, during the spring of 2000, he had contacted the local CSEA president, Patrick Brown, regarding the steps to take in order to organize the Town's highway department. Brown instructed Scheib to contact CSEA's Albany representative, Phoebe Mackey. After contacting Mackey, Scheib commenced his efforts to organize the highway department. Mackey had instructed Scheib to confine his organizational activity to non-work times of the day, such as lunch time, break time and before or after work.

The dispute over Scheib's efforts to organize the highway department arose just before quitting time on September 19, 2000, while Scheib was conversing with a small group of highway department employees. The work day for the highway department was 6:30 a.m. to 4:30 p.m. The undisputed testimony of the Town's witness revealed

that the highway department had no rule or policy that prohibited employees from distributing union literature on company time or on company premises.<sup>1</sup>

On September 19, 2000, at about 4:20 p.m., Scheib was talking to a group of employees who were smoking when Wayne Metrando, a highway department employee who happened to walk past this group, asked Scheib for a union card.

Scheib retrieved a card from his truck, put it on the stairs nearby and pointed the card out to Metrando. Metrando picked up the card and walked directly into the office of highway superintendent, Jack Still. A few minutes later, deputy highway superintendent, Jack Harris, exited from Still's office and confronted Scheib with the union card.

While there is some dispute over the language used by Harris when he confronted Scheib with the union material, the record is clear that he advised Scheib that he could not hand out union material on Town time and Town property.<sup>2</sup> Scheib denied any wrongdoing and, since it was the end of the work day, Scheib exited the highway department.

On September 20, 2000, when Scheib arrived at work, Harris directed him to see Still. Scheib obeyed Harris and, during his conversation with Still, Scheib again denied any involvement with the union material.<sup>3</sup> At that point, Still directed Scheib to leave the department and have his "lawyers contact our lawyers."<sup>4</sup>

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<sup>1</sup>Transcript, pp. 151-152.

<sup>2</sup>Transcript, p. 146.

<sup>3</sup>Transcript, p. 45.

<sup>4</sup>*Id.*

Scheib was never authorized to return to work. On October 19, 2000, Still submitted a form to the Town personnel office that indicated Scheib's employment had been terminated effective September 29, 2000, for "conduct detrimental to highway department".<sup>5</sup>

#### DISCUSSION

Based upon our review of the record as it relates to the Town's exceptions, and our consideration of the parties' arguments, we affirm the decision of the Assistant Director.

The right of public employees to form, join and participate in, or to refrain from forming, joining, or participating in any employee organization of their own choosing is guaranteed by the Act.<sup>6</sup> Furthermore, the Act gives a public employee the right to be represented by an employee organization, to negotiate collectively with the public employer over the terms and conditions of employment, as well as the administration of grievances arising out of the employment relationship.<sup>7</sup>

The limits of these rights have been tested since the enactment of the Act. We have consistently held that interference and/or discrimination arising out of an employee's participation in organizational activity invokes the protections of the Act.<sup>8</sup>

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<sup>5</sup>Transcript pp. 10-11, 84.

<sup>6</sup>Act, §202.

<sup>7</sup>Act, §203.

<sup>8</sup>Act, §§209-a.1(a) and(c). See *Rosen v. PERB*, 72 NY2d 42, 21 PERB ¶7014 (1988); *Town of Gates*, 15 PERB ¶13079 (1982).

As the Assistant Director correctly pointed out in his decision, the essential elements necessary to establish a *prima facie* case of a violation of §§209-a.1(a) and (c) were set forth in the *Town of Independence*.<sup>9</sup> The burden of persuasion lies with the charging party to demonstrate by a preponderance of the evidence that the public employer acted with improper motivation.<sup>10</sup>

The record establishes that the first and second elements of the charge had been satisfied. Scheib was engaged in a protected activity because of his participation in organizational activities and his supervisors were aware of his activities. The Town, however, argues in its exceptions that Scheib's activity was not protected because he distributed CSEA membership cards during work hours and on the employer's property. The ALJ found this argument to be pretextual and we agree. CSEA urges us to consider the NLRB decision in *Sweet Street Desserts, Inc.*, 319 NLRB 307, 312; 152 LRRM 1102 (1995) (hereafter, *Sweet*), for support that, in the absence of a pre-existing policy regarding the distribution of union material, a violation may be found on the theory that not all parts of the employer's premises nor all hours of the work day constitute workplace or work time. Even though we are not constrained to follow federal law applicable to private employment under our statute,<sup>11</sup> we find instructive the NLRB's decisions in *Sweet* and also *Filene's Basement Store*,<sup>12</sup> where the NLRB

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<sup>9</sup>23 PERB ¶3020 (1990).

<sup>10</sup>See *State of New York (SUNY-Oswego)*, 34 PERB ¶3035 (2001).

<sup>11</sup>Civil Service Law §209-a(6); *City Sch. Dist. of the City of New Rochelle*, 4 PERB ¶3060 (1971).

<sup>12</sup>299 NLRB 183 (1990).

determined that the employer's prohibition of solicitation on break time was overly broad and discriminatory, even though the work breaks were paid time.

Here, the record is devoid of any evidence that the Town had promulgated a rule or policy which limited the employees' access to other employees or to the employer's property for the purpose of distributing union material. Scheib handed a designation card to a fellow employee, upon his request, at the end of the day, when the day's work had been completed, and the employees were permitted to engage in personal activities, such as smoking and cleaning up prior to punching out for the day. While the record is unclear as to the extent or duration of the employer's knowledge of Scheib's union activities, it is clear that, on September 19, 2000, Harris confronted Scheib with the union material and directed Scheib not to hand out union material on Town time and/or property. Harris further directed Scheib to see Still in the morning following this incident.

It is evident, upon this record, that "but for" Scheib's organizational activity, Still would not have taken any disciplinary action against Scheib. This inference can be drawn from the fact that Still sent Scheib home without any explanation, never admonishing him for his "alleged" breach of any Town rule or policy. Instead, Still directed Scheib to have his attorney contact the Town's attorney before he could return. The record demonstrates that, while the attorneys were attempting to communicate with each other, Still submitted a form to the personnel office indicating Scheib's employment was terminated on September 29, 2000.

The Town argued in its defense that it had a legitimate business reason to terminate Scheib's employment. We disagree. The Town's two witnesses, Harris and Metrando, testified about Scheib's poor work performance, citing examples of past disciplinary problems. However, Harris, who was in a supervisory position, testified that Scheib had never been disciplined for his alleged poor work performance.<sup>13</sup> The Town offers no other justification for its termination of Scheib during an organizational campaign, apart from these past instances. We find and conclude, therefore, that the Town has failed to establish a legitimate business reason defense.<sup>14</sup>

We find that the record supports the Assistant Director's conclusions and the decision is affirmed.

IT IS, THEREFORE, ORDERED that the Town:

1. Offer reinstatement to John Scheib to his former position as laborer in its highway department with full pay and benefits retroactive to September 20, 2000, until the offer of reinstatement, less earnings from other employment, with interest at the maximum current legal rate;
2. Cease and desist from interfering with, restraining, coercing or discriminating against employees for the exercise of rights protected under the Act;

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<sup>13</sup>One earlier incident resulted in Scheib's dismissal but he was later returned to work.

<sup>14</sup>See *Town of Independence*, supra, note 9. Compare *New York City Transit Auth. (Fredericson)*, 34 PERB ¶3025 (2001); *Holbrook Fire Dist.*, 33 PERB ¶3050 (2000); *Rockville Centre Union Free Sch. Dist.*, 32 PERB ¶3050 (1999).

3. Sign and conspicuously post the attached notice at all work locations normally used to communicate with employees of the highway department.

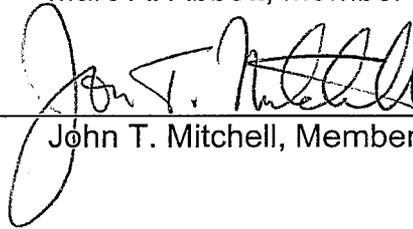
DATED: December 6, 2001  
Albany, New York



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 Town of Poughkeepsie in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Dutchess County Local 814, Town of Poughkeepsie Unit, that the Town shall:

1. Offer reinstatement to John Scheib to his former position as laborer in its highway department with full pay and benefits retroactive to September 20, 2000, until the offer of reinstatement, less earnings from other employment, with interest at the maximum current legal rate.
2. Not interfere with, restrain, coerce or discriminate against employees for the exercise of rights protected under the Act.

Dated .....

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

TOWN OF POUGHKEEPSIE  
.....

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

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

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In the Matter of

**PUBLIC EMPLOYEES FEDERATION, AFL-CIO,**

Charging Party,

- and -

**CASE NO. U-21827**

**ROSWELL PARK CANCER INSTITUTE,**

Respondent.

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**FREDERICK M. BECKER, for Charging Party**

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

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Public Employees Federation, AFL-CIO (PEF) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Roswell Park Cancer Institute (RPCI) violated §§209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally promulgated an Administrative Policy and Procedure Manual (Manual).

The improper practice charge initially referred to eight different sections of the Manual with which PEF took issue. After the pre-hearing conference, PEF withdrew the charge as to all but two of the sections of the Manual: Policy No. 213.1 - Performance Evaluation and Policy No. 300.D.21 - Security Surveillance Procedure. RPCI thereafter made a motion to dismiss the charge. PEF filed an offer of proof as to its remaining

allegations, but argued that a hearing was necessary. On the basis of the motion and the offer, the conferencing ALJ determined that there were no facts in dispute and a hearing was not required for disposition of the charge. The matter was then decided based on the parties' submissions and briefs, as well as correspondence confirming the parties' agreements and the ALJ's directions as to the processing of the case.

The ALJ dismissed the §209-a.1(d) allegation, finding that, as to Policy No. 213.1 - Performance Evaluation, there had been no unilateral change in the performance evaluation procedures.<sup>1</sup> The allegations that §§209-a.1(a) and (c) were violated were dismissed for lack of proof.

#### EXCEPTIONS

PEF excepts to the ALJ's decision, arguing that it was in error to decide this matter without a hearing and arguing, as to Policy No. 213.1, that the ALJ erred in dismissing the charge. RPCI supports the ALJ's decision.

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

#### FACTS

RPCI is a public benefit corporation. PEF represents the at-issue employees and their terms and conditions of employment are set forth in the collective bargaining agreement between the State of New York (State) and PEF covering the Professional, Scientific and Technical Unit (PS&T).

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<sup>1</sup>No exceptions have been taken as to the ALJ's dismissal of the improper practice charge allegations related to Policy No. 300.D.21 - Security Surveillance Procedure. We, therefore, do not make any determinations as to that part of the ALJ's decision which is not before us.

The parties' 1995-1999 and 1999-2003 collective bargaining agreements contain a memorandum of understanding (memorandum) covering performance evaluation. The memorandum provides that "the State has full and complete authority to exercise its prerogative to evaluate its employees so long as it does so in a manner not inconsistent with any of the provisions of paragraphs IIIA through D below."<sup>2</sup> The memorandum sets the evaluation periods for unit employees. The memorandum further provides that:

Any questions or disputes arising from the interpretation or implementation of this Memorandum, or any other questions or disputes arising from the administration of the PS&T Unit Performance Evaluation System, shall be subject to labor/management discussion at the Agency level and/or the State level as appropriate as their sole and exclusive means of resolution.<sup>3</sup>

PEF alleges that on May 5, 2000, RPCI issued the Manual which, as relevant to the charge, contains Policy No. 213.1 - Performance Evaluation. PEF alleges that the policy changes the performance evaluation procedure in effect since 1986 and was done for the purpose of interfering with union activity and depriving unit members of representation. The basis of this allegation is that just prior to the distribution of the Manual, RPCI changed a unit employee's evaluation from "unsatisfactory" to "satisfactory" based upon an appeal of the rating by PEF to the Statewide Performance Evaluation Appeals Board.

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<sup>2</sup>ALJ Exhibit 5.

<sup>3</sup>*Id.*

As to the alleged changes in the procedure, PEF produced prior performance evaluation appeals which it alleged were handled in accordance with the State's 1986 Employee Performance Evaluation Manual (1986 Manual). These, PEF alleges, establish that RPCI has changed certain aspects of the performance evaluation procedure by Policy No. 213.1.<sup>4</sup> PEF alleges that the policy refers to documents that will be used for evaluation purposes without identifying those documents. There is no reference to "documents" in Policy No. 213.1. PEF also refers to the language which allows the RPCI Department of Human Resources Management to set the due date for the evaluations and gives departments sixty days to complete the evaluation form. PEF argues that the 1986 Manual required evaluations to be done on the employee's anniversary date in title and gave a six week time frame for the completion of evaluation forms.<sup>5</sup> The 1986 Manual does set the date for evaluations by the anniversary date, as does the memorandum of understanding. However, the 1986 Manual does not require that evaluations be completed within six weeks; that recommendation is found in a August 29, 1983 memorandum to agency employee relations officers from the Governor's Office of Employee Relations.

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<sup>4</sup>We do not consider the evaluation appeals referenced for the first time by PEF in its brief. See *Lackawanna City Sch. Dist.*, 28 PERB ¶3023 (1995); *County of Suffolk*, 26 PERB ¶3076 (1993); *Oswego City Sch. Dist.*, 25 PERB ¶3052 (1992).

<sup>5</sup>Apparently, PEF has been successful in overturning some "unsatisfactory" ratings given to unit employees by arguing, *inter alia*, that the evaluations were not completed in a timely fashion.

DISCUSSION

It is well-settled that an ALJ has the discretion while processing an improper practice charge, either at a pre-hearing conference, after the conference, during the hearing or at any other appropriate juncture, to require a party to submit an offer of proof in support of the allegations being processed.<sup>6</sup> Here, the ALJ properly required PEF to submit an offer of proof in response to RPCI's motion to dismiss because the charge contained no facts upon which a finding of a violation of §§209-a.1(a) and (c) of the Act could be based.

We have held, in deciding a motion to dismiss, that an ALJ is to assume the truth of all of the charging party's evidence and to give the charging party the benefit of all reasonable inferences that may be drawn from that evidence.<sup>7</sup> It is well-settled that the elements necessary to prove a case of interference or discrimination, in violation of §§209-a.1(a) and (c) of the Act, are that the affected individual was engaged in protected activity, that such activity was known to the person(s) making the adverse employment decision, and that the action would not have taken place but for the protected activity.<sup>8</sup> Here, the only evidence provided by PEF in its offer of proof in

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<sup>6</sup>*Amalgamated Transit Union, Div. 580, AFL-CIO and Central New York Regional Transp. Auth.*, 32 PERB ¶3053 (1999); *New York State Security and Law Enforcement Employees Council 82, AFSCME*, 29 PERB ¶3015 (1996); *Nanuet Union Free Sch. Dist.*, 17 PERB ¶3005 (1984); *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 16 PERB ¶3067 (1983); *Village of Spring Valley Policemen's Benevolent Ass'n*, 14 PERB ¶3010 (1981).

<sup>7</sup>*See State of New York (Dep't of Correctional Servs.)*, 29 PERB ¶3015 (1996); *County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).

<sup>8</sup>*See Plainedge Union Free Sch. Dist.*, 31 PERB ¶3063 (1998); *Town of Independence*, 23 PERB ¶3020 (1990).

support of the alleged violations of (a) and (c) is the timing of the issuance of the Manual shortly after RPCI changed a unit employee's evaluation rating because PEF had appealed the rating. While the timing of that event could raise a suspicion, a suspicion is not evidence and timing alone is insufficient to establish the "but for" element of a §§209.a.1 (a) or (c) violation.<sup>9</sup> The ALJ properly dismissed these allegations.

As to the alleged violation of §209-a.1(d), the ALJ found that PEF had failed to establish that Policy No. 213.1 of the Manual had changed the procedure used for the evaluation of unit employees. PEF makes conclusory allegations that Policy No. 213.1 changes the 1986 Manual but offers no proof that would sustain its allegations. Further, PEF offered no evidence which establishes that the 1986 Manual is still in effect given the language of the subsequent memorandum of understanding which contains provisions for employee evaluations of unit employees. That memorandum also contains language authorizing the evaluation of employees in a manner chosen by management as long as it is not inconsistent with the language of the memorandum, as well as setting the specific evaluation periods, and providing that any questions or disputes related to the interpretation or implementation of the evaluation procedure are subject to labor/management discussion. Even given every reasonable inference which may be drawn from PEF's offer of proof, PEF has failed to establish that Policy No. 213.1 in any way varies the terms of the procedure set forth in either the 1986 Manual or the memorandum of understanding.

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<sup>9</sup>See *Town of North Hempstead*, 32 PERB ¶3006 (1999); *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 14 PERB ¶3005 (1981)

For the reasons set forth above, we deny PEF's exceptions and we affirm the decision of the ALJ.

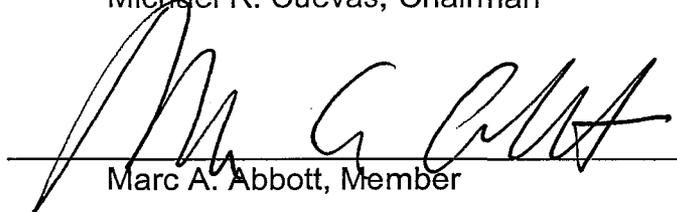
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: December 6, 2001  
Albany, New York



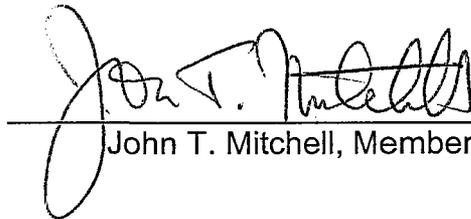
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Michael R. Cuevas, Chairman



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Marc A. Abbott, Member



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John T. Mitchell, Member

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

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, LOCAL 861,  
UNIT 9250, WYOMING COUNTY EMPLOYEES,**

Charging Party,

- and -

**CASE NO. U-22099**

**COUNTY OF WYOMING,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of  
counsel), for Charging Party**

**ERIC T. DADD, COUNTY ATTORNEY, for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Local 861, Unit 9250, Wyoming County Employees (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the County of Wyoming (County) violated §§209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when it terminated a unit member's employment because of protected union activity. The County's answer generally denied the allegations.

### EXCEPTIONS

CSEA has filed twenty-eight exceptions to the ALJ's decision. We will address the principal exceptions that allege the ALJ erred in her analysis of the facts as they applied to the Act.

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

### FACTS

CSEA filed a charge alleging that, on July 28, 2000, one of its members, Rita Kabalan, a provisional employee of the Wyoming County Department of Social Services (Department), filed a grievance which sought reinstatement of compensatory time that had been removed from her leave accruals.

Kabalan had been employed by the Department on March 6, 2000, as a case worker. On March 10, 2000, Kabalan received a copy of the Wyoming County Vehicle Use Policy. As a part of her work, Kabalan was required to conduct interviews with family members at their homes during non-business hours. On those occasions, and whenever case workers were required to work overtime, Kabalan was required to submit a form to her supervisor for approval.

On April 4, 2000, the Department issued a memorandum to staff outlining the use of compensatory time. Kabalan filed her grievance in July 2000 upon being advised by her supervisor that she would not be able to use thirteen and three-quarter hours of compensatory time that she had accrued in May 2000.

During her first five months of employment in the Department, Kabalan was assigned to the Home Finding Unit supervised by Case Supervisor Terrie Brown and

Senior Case Worker, Dennis Huff, who had specialized core supervisory training. Huff testified that during the time he was supervising Kabalan, he did not recall any concerns regarding her work. In fact, Huff related a conversation he had with Brown concerning Kabalan's notetaking. Brown commented that she had occasion to access Kabalan's case records and found that she kept current and clear records.<sup>1</sup> During the last month of employment, Kabalan was assigned to another unit, Child Welfare, under the supervision of Janet Sternberg.

Sternberg testified that all new employees are given a set of job standards that the agency expects them to meet or exceed. At some point during the probationary period, at about three months, the employees are supposed to have a review and then at the end of six months, Sternberg testified, the supervisor was asked to do a review again.<sup>2</sup> Sternberg was never asked by the Director of Social Services, Sheila Weaver, to perform an evaluation for Kabalan.<sup>3</sup> Weaver testified that she did not speak with Kabalan about her job performance prior to the decision to terminate her employment with the County.<sup>4</sup> A performance plan was never completed for Kabalan.<sup>5</sup>

As a new employee in the Department, Kabalan was required to attend training in Buffalo, New York, that was scheduled over a ten-week period. Kabalan resided in

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<sup>1</sup>Transcript, p. 62.

<sup>2</sup>Transcript, p. 93.

<sup>3</sup>*Id.*

<sup>4</sup>Transcript, p. 209, 228.

<sup>5</sup>Transcript, pp. 211-213.

Gainesville, New York, at the time she was hired by the County. She later moved to Warsaw, where the County offices were located. The distance between Gainesville and Warsaw is about nine miles.<sup>6</sup>

On those occasions when Kabalan was required to attend training classes in Buffalo, the County would provide a County car to her in order to avoid the trip into Warsaw and she would leave her vehicle parked in the County lot overnight.<sup>7</sup> On at least two occasions when Kabalan was required to drive to Buffalo for training, she dropped off her son at school, which was on the way, and then proceeded to Buffalo.<sup>8</sup>

On June 9, 2000, Weaver sent an e-mail message to Brown and Huff stating that she had observed Kabalan transporting a child in a County car. Weaver indicated that her concerns were two-fold: 1) Kabalan's training commenced at 9 a.m.; and 2) Kabalan had signed the County car policy, which stated that no one should be transported in the County car unless it is work-related. Weaver's suspicion was that Kabalan was transporting her child to school. Weaver requested that Brown and Huff review the car policy with Kabalan and let her know the results.<sup>9</sup>

Huff responded to Weaver's e-mail on June 14, 2000. He advised Weaver that he had addressed the car issue with Kabalan on June 14, 2000, and that she stated that she had transported her son with the County car as his bus transportation fell

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<sup>6</sup>Transcript, p. 110.

<sup>7</sup>Transcript, pp. 112-113, 136.

<sup>8</sup>Transcript, p. 66.

<sup>9</sup>Charging Party Exhibit 2.

through and she would have been late for training if she had switched cars. Huff and Kabalan discussed options regarding how it could have been handled, and Kabalan was apologetic and agreed that it would never happen again. Kabalan also advised that she was not late for training.<sup>10</sup> Huff verified with the trainer that Kabalan was not late. The record indicates that Weaver took no further action regarding this incident.

Weaver also testified that she was not aware that Kabalan was keeping a County vehicle overnight. She first learned of this on August 25, 2000, when she was reviewing Kabalan's time records in preparation for the grievance hearing.<sup>11</sup> Based upon Weaver's review of Kabalan's time records in August 2000, in which she felt there were certain discrepancies, and the transportation of her child in a County car, Weaver recommended to the Social Services Commissioner, Jeannette Wallace, that Kabalan's employment with the County be terminated. Kabalan's employment with Wyoming County was terminated without explanation on September 6, 2000.<sup>12</sup> Less than two weeks prior to the termination, Kabalan's grievance was returned by the County Administrator, Kevin DeFebbo, to Commissioner Wallace, because it had come to him without a Step 2 hearing. Wallace was directed to set a date for the hearing, which was scheduled for September 7, 2000. Kabalan advised Wallace's office that she was unavailable on that date and suggested that either her representative could attend or the hearing could be rescheduled.

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<sup>10</sup>*Id.*

<sup>11</sup>Transcript, p. 157, 168.

<sup>12</sup>Charging Party Exhibit 8.

DISCUSSION

In order to sustain a finding of a violation of §§209-a.1 (a) and (c), it must be shown that the affected individual was engaged in protected activity, that such activity was known to the person or persons making the adverse decision and that the action would not have been taken "but for" the protected activity.<sup>13</sup> The ALJ correctly concluded that, upon this record, there was sufficient circumstantial evidence of improper motivation to defeat the County's motion to dismiss at the close of CSEA's case. Upon such a finding, the obligation necessarily shifted to the County to demonstrate by a preponderance of the evidence that, regardless of Kabalan's protected activity, it had a legitimate business reason to terminate her employment.<sup>14</sup>

The ALJ concluded that the County based its decision to terminate Kabalan's employment on her improper use of a County vehicle and the alleged discrepancies in her overtime reports. The ALJ reached this conclusion based upon the entire record. The ALJ found no direct evidence of animus on the part of either Weaver or Wallace. The ALJ thus concluded that the coincident time between the filing and processing of Kabalan's grievance and her termination of employment was insufficient to establish improper motivation.

It is axiomatic that our jurisdiction is limited to violations of the Act. The termination of a probationary employee's public employment must, therefore, implicate the protections afforded by the Act to trigger PERB's jurisdiction. It is in this area of

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<sup>13</sup>See, e.g., *City of Salamanca*, 18 PERB ¶3012 (1985).

<sup>14</sup>*State of New York (SUNY Oswego)*, 34 PERB ¶3017.

discipline and/or termination of probationary employment that questions about the Act's coverage have arisen.

As a probationary employee, Kabalan's employment was subject to termination at any time after the minimum period of probation.<sup>15</sup> The conditions under which a probationary employee may be removed are governed by the Civil Service Law<sup>16</sup> and the cases decided thereunder.<sup>17</sup> The guiding principle in those cases is that the termination of employment must be done in good faith. Consequently, the burden is on the terminated probationary employee to demonstrate that the termination was done in bad faith. This principle is analogous to our interpretation of the Act. When alleging a discriminatory discharge, the burden of persuasion lies with the charging party to demonstrate by a preponderance of the evidence that the public employer acted with improper motivation.

We have found that:

...it is possible for an employee's discharge to violate §§209-a.1 (a) or (c) of the Act even if the actors responsible for the discharge bear no union animus, either generally or specifically. An animus finding is essentially evidentiary. A finding of animus helps to establish the necessary causation. On the other hand, the absence of animus can help to negate an inference or finding that an action was motivated improperly by the employee's exercise of statutorily protected rights.<sup>18</sup>

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<sup>15</sup>Civil Service Law, §63.

<sup>16</sup>*Id.*

<sup>17</sup>See *Williams v. Commissioner of Office of Mental Health of State of New York*, 259 AD2d 623 (2<sup>nd</sup> Dep't 1999); *Gulemi v. Bradley*, 267 AD2d 386 (2<sup>nd</sup> Dep't 1999).

<sup>18</sup>*State of New York (Dep't of Corr. Serv.)*, 25 PERB ¶13050, at 3106 (1992).

While timing alone is insufficient to support a finding of a violation of §§209-a.1(a) and (c),<sup>19</sup> a close proximity in time between a protected activity and an adverse action may be sufficient to raise a suspicion of a causal relationship.<sup>20</sup> Proof of such a causal relationship may be found in circumstantial evidence.<sup>21</sup>

It is undisputed that Kabalan, as a new employee, was entitled to performance evaluations during her probationary term based upon certain criteria established by the department. The record is clear that during Kabalan's probationary period none of her supervisors, as well as Director Weaver, evaluated her performance. Notwithstanding, Kabalan's supervisors testified that they commended her on her work performance. The only issue that Weaver addressed was Kabalan's use of the County vehicle. However, Weaver took no steps to discipline Kabalan for the alleged misuse of the County vehicle while transporting her son to school. The ALJ discredited Weaver's testimony regarding Kabalan's permission to keep the County car overnight. Furthermore, there was conflicting testimony over the language of the policy and its application.<sup>22</sup> Weaver's testimony was also suspect with regard to Kabalan's overtime

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<sup>19</sup>*County of Monroe and Monroe County Sheriff*, 33 PERB ¶3044 (2000); *Town of North Hempstead*, 32 PERB ¶3006 (1999).

<sup>20</sup>*Mahopac Cent. Sch. Dist.*, 28 PERB ¶3045 (1995); *State of New York (Dep't of Social Services)*, 26 PERB ¶3026 (1993); *County of Orleans*, 25 PERB ¶3010 (1992); *Oyster Bay-East Norwich Cent. Sch. Dist.*, 23 PERB ¶3031 (1990).

<sup>21</sup>*Town of Independence*, 23 PERB ¶3020 (1990).

<sup>22</sup>Transcript, p. 222.

approval forms which framed the basis of Kabalan's compensatory time grievance. Weaver approved Kabalan's overtime and she maintained a calendar on her desk to track an employees' overtime against their caseload. While Weaver may not have had the vehicle logs contemporaneous with the overtime requests, she tracked Kabalan's overtime against her caseload and received the vehicle logs at the end of the month following usage. Consequently, we find that Weaver's memo to the Personnel Office dated August 29, 2000, indicating that Kabalan's employment had been terminated because she violated the County Vehicle Use Policy and because she accumulated compensatory time while handling only five cases, is disingenuous and must be regarded as pretextual.

Based upon the foregoing, we grant CSEA's exceptions and reverse the ALJ's decision. Since the penalty of termination was imposed as a result of the County's violation of the Act, reinstatement with back pay is the appropriate remedy. This is especially so in view of the fact that the record does not reveal, nor has the County asserted, any facts evidencing Kabalan's poor work performance which might render reinstatement an inappropriate remedy.<sup>23</sup>

IT IS, THEREFORE, ORDERED that the County:

1. Forthwith offer Rita Kabalan reinstatement to her former position;

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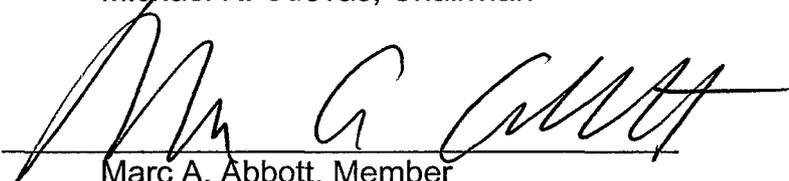
<sup>23</sup>*County of Westchester*, 34 PERB ¶3013 (2001).

2. Make Kabalan whole for any loss of pay and benefits suffered by reason of her employment termination from the date thereof to the effective date of the offer of reinstatement, less any earnings derived from employment in the interim, with interest at the maximum current legal rate;
3. Cease and desist from terminating Kabalan from employment because she filed a grievance on July 27, 2000.
4. Sign and post a notice in the form attached at all locations ordinarily used to post informational notices to unit employees.

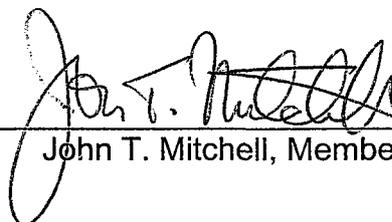
DATED: December 6, 2001  
Albany, New York



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 Wyoming (County) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 861, Unit 9250, Wyoming County Employees (CSEA) that the County will forthwith:

1. Offer Rita Kabalan reinstatement to her former position.
2. Make Kabalan whole for any loss of pay and benefits suffered by reason of her employment termination from the date thereof to the effective date of the offer of reinstatement, less any earnings derived from other employment, with interest at the maximum current legal rate.
3. Not terminate Kabalan from employment because she filed a grievance on July 27, 2000.

Dated .....

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

COUNTY OF WYOMING  
.....

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**PATRICK HAUGHEY,**

Charging Party,

- and -

**CASE NO. U-22096**

**NEW YORK STATE COURT CLERKS  
ASSOCIATION,**

Respondent,

- and -

**STATE OF NEW YORK - UNIFIED COURT  
SYSTEM,**

Employer.

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**PATRICK HAUGHEY, *pro se***

**DUANE, MORRIS & HECKSCHER LLP (EVE I. KLEIN of counsel), for  
Respondent**

**LAUREN P. DESOLE, CHIEF OF EMPLOYEE RELATIONS (RICHARD W.  
MCDOWELL of counsel), for Employer**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by Patrick Haughey, *pro se*, to a decision of an Administrative Law Judge (ALJ) dismissing Haughey's improper practice charge filed against the New York State Court Clerks Association (Association) alleging, *inter alia*, that the Association violated §209-a.2(c) of the Public Employees' Fair

Employment Act (Act) when it failed to file a grievance on his behalf. Haughey's employer, State of New York - Unified Court System (UCS), is made a statutory party pursuant to §209-a.3 of the Act. The ALJ dismissed the charge as being untimely and as being moot.

### EXCEPTIONS

Haughey excepts to the ALJ's decision dismissing the charge as moot. The Association and UCS support the ALJ's decision.

### 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.

On November 1, 2000, Haughey filed an improper practice charge alleging that the Association breached its duty of fair representation when it failed to respond to a request on October 17, 2000, to represent him in a grievance that he had filed on November 29, 1999.

The Association and USC each filed an answer in which they raised the affirmative defense of timeliness.<sup>1</sup> The hearing was conducted on February 2, 2001, at which all parties were present. During the hiatus before the next hearing scheduled for May 1, 2001, the Association moved, on April 6, 2001, to dismiss the charge as moot because Haughey had resigned from the UCS on April 4, 2001. UCS joined the motion; Haughey opposed the motion.

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<sup>1</sup>Rules of Procedure (Rules), §204.3(c)(2).

DISCUSSION

In deciding the Association's motion to dismiss, the ALJ correctly applied the standard we enunciated in *County of Nassau (Police Department)*,<sup>2</sup> that the ALJ "must assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."

Upon our review of the record, we find that Haughey failed to establish that the alleged violation had occurred within the four months prior to the filing of the charge. As the ALJ noted in her decision, "Haughey testified that, on November 19, 1999, he asked a representative of the Association to file a grievance on his behalf . . . but that the representative refused."<sup>3</sup> He then filed the grievance on his own on November 29, 1999. Although Haughey alleges in his charge that the Association refused to respond to his letter of October 17, 2000, requesting representation, under our Rules and case law, it was November 29, 1999, when Haughey filed his own grievance after the Association refused his original request for representation that commenced the time to file his charge with PERB.<sup>4</sup>

We have previously held that a union is not required to agree with a unit employee's interpretation of the contract.<sup>5</sup> Furthermore, we will not substitute our

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<sup>2</sup>17 PERB ¶3013, at 3030 (1984).

<sup>3</sup>34 PERB ¶4581, at 4768.

<sup>4</sup>Section 204.1(a)(1) of PERB's Rules mandates that improper practice charges be filed within four months of the date of the conduct which is the subject of the charge.

<sup>5</sup>See *Amalgamated Transit Union, Div. 580 and Central New York Regional Transp. Auth.*, 32 PERB ¶3053 (1999).

judgment for that of a union's regarding the filing and prosecution of grievances.<sup>6</sup> More importantly, the filing period for an improper practice charge is not tolled while ancillary proceedings [grievance prosecution] are being pursued by or on behalf of a charging party.<sup>7</sup>

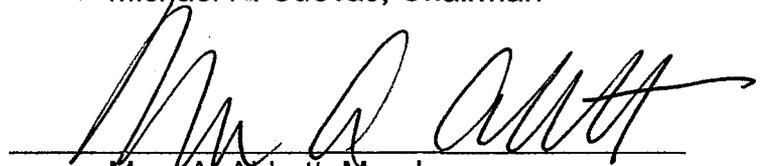
Since the predicate for Haughey's improper practice charge is the Association's failure to represent him in the grievance, and Haughey was aware of the Association's position prior to November 29, 1999, we affirm the ALJ's finding that the improper practice charge filed on November 1, 2000, almost one year later, must be dismissed as untimely. Based upon our determination, we need not reach the issue of mootness.

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

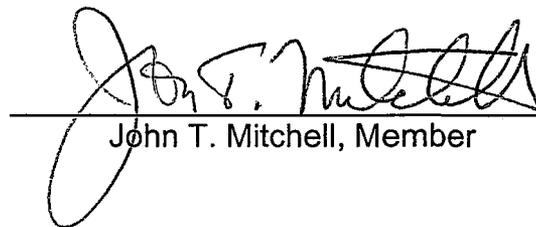
DATED: December 6, 2001  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>6</sup>See *Dist. Council 37, AFSCME (Gonzalez)*, 28 PERB ¶13062 (1995).

<sup>7</sup>See *Orange County Corr. Off. Benv. Ass'n*, 28 PERB ¶13081 (1995).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**BEAVER RIVER CENTRAL SCHOOL DISTRICT  
NON-INSTRUCTIONAL EMPLOYEES  
ASSOCIATION/NYSUT/AFT/AFL-CIO,**

Petitioner,

- and -

**CASE NO. C-5140**

**BEAVER RIVER CENTRAL SCHOOL DISTRICT,**

Employer.

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**SHEILA F. PATTERSON, for Petitioner**

**TRACY R. SCHOLZ, for Employer**

**BOARD DECISION AND ORDER**

On November 7, 2001, the Director of Public Employment Practices and Representation (Director) determined that the Beaver River Central School District Non-Instructional Employees Association/NYSUT/AFT/AFL-CIO (Association) met the requirements of §201.9(g)(1) of our Rules of Procedure (Rules) for certification of the Association without an election as the representative of the bargaining unit agreed to by the parties. The Director forwarded the record of the proceeding to the Board for issuance of a certification order.

Since we have not yet issued a certification order and we have received information which may indicate that the Association no longer meets the requirements

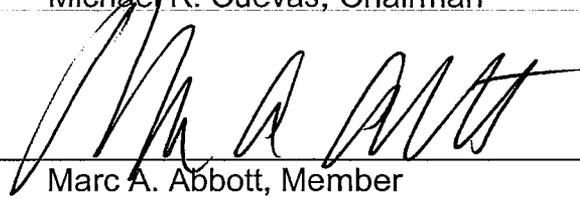
of §201.9(g)(1) of the Rules, the matter is remanded to the Director to ascertain the employees' choice by conducting an investigation.<sup>1</sup>

DATED: December 6, 2001  
Albany, New York



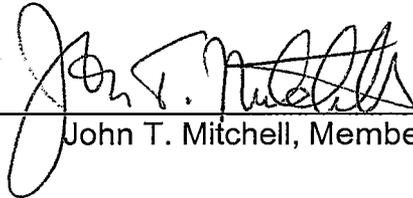
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Michael R. Cuevas, Chairman



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Marc A. Abbott, Member



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John T. Mitchell, Member

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<sup>1</sup>*Town of Campbell*, 17 PERB ¶3071 (1984). See also *Town of New Haven*, 20 PERB ¶3015 (1987); *Mohawk Valley Gen'l Hospital*, 19 PERB ¶3020 (1986).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**SACHEM SCHOOL DISTRICT EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5079**

**SACHEM CENTRAL SCHOOL DISTRICT,**

Employer,

-and-

**LOCAL 74, SEIU, AFL-CIO,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the Sachem School District 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 permanent full-time and part-time employees in the following job categories: custodial worker, groundsmen, head custodian, head groundsmen, automobile mechanic, maintenance mechanic, chief custodian, athletic groundskeeper, driver-messenger, console operator, roving guard, bus driver, cook, supervisory cook, food service worker, and bus monitor.

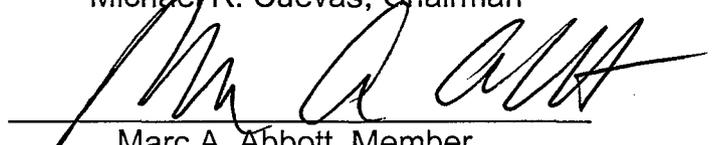
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Sachem School District 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.

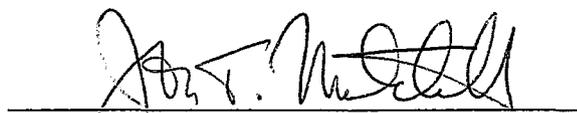
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Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**LIBERTY TEACHING ASSISTANTS, MONITORS AND  
AIDES, NYSUT, AFL-CIO,**

Petitioner,

-and-

**CASE NO. C-5137**

**LIBERTY CENTRAL SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the Liberty Teaching Assistants, Monitors and Aides, NYSUT, 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: All full-time and part-time employees in the titles of teaching assistant, teacher aide and monitors including cafeteria monitors, hall monitors, study hall monitors, T1 supervisor, study hall aide, teacher aide/monitor, assistant, aide, teaching aide/assistant, aide/monitor and family worker NYS pre-K.

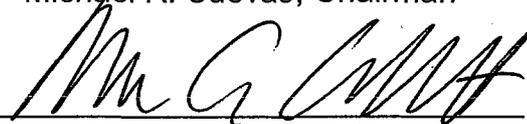
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Liberty Teaching Assistants, Monitors and Aides, NYSUT, 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.

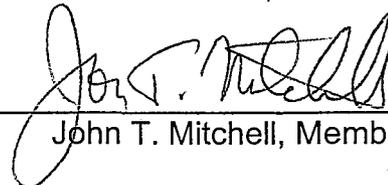
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Michael R. Cuevas, Chairman



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