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State of New York Public Employment Relations Board Decisions from April 25, 2002

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 25, 2002

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
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MICHAEL R. CUEVAS
CHAIRMAN

MARC A. ABBOTT
MEMBER

JOHN T. MITCHELL
MEMBER

MINUTES OF THE BOARD MEETING

April 25, 2002
Albany, New York
9:30 A.M.

PRESENT: MICHAEL R. CUEVAS, Chairman
MARC A. ABBOTT, Member
JOHN T. MITCHELL, Member

Staff: Robert DePaula, Deputy Chairman & Counsel
Deborah A. Sabin, Assistant Counsel to the Board
Christine White, Acting Secretary to the Board

1. Minutes of the Board Meeting on March 26, 2002 approved.

2. Board Decision and Orders

   A. CP-757 & CP-758 - District Council 37, AFSCME, AFL-CIO and Professional Staff Congress of the City University of New York and Research Foundation of the City University of New York and the City University of New York and United Automobile, Aerospace and Agricultural Implement Workers, AFL-CIO, Local 2110

   B. U-22120 - Peekskill Police Association and City of Peekskill and Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO

   C. U-22716 - Town of Yorktown and Town of Yorktown Police Benevolent Association, Inc.

   D. U-21928 - John Zito and United Federation of Teachers, Local 2, AFT, NYSUT, AFL-CIO and Board of Education of the City School District of the City of New York

   E. U-20907, U-20987, U-21001, U-21005, U-21006 & U-21010 – Buffalo Police Benevolent Association & City of Buffalo

3. Board Certifications

   A. C-5161 - Teamsters Local #264 and Holland Central School District and Holland Support Staff Association, NEA/NY

   B. C-5188 - Teamsters Local 294, International Brotherhood of Teamsters, AFL-CIO and Town of Cairo

The next meeting of the Board will be held on June 12, 2002 in New York City.

Respectfully submitted,
Christine White
Christine White
Acting Secretary to the Board

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

- and -

CASE NO. CP-757

RESEARCH FOUNDATION OF THE CITY UNIVERSITY OF NEW YORK and THE CITY UNIVERSITY OF NEW YORK,

Employers,

-and-

UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, LOCAL 2110,

Intervenor.

In the Matter of

PROFESSIONAL STAFF CONGRESS OF THE CITY UNIVERSITY OF NEW YORK,

Petitioner,

- and -

CASE NO. CP-758

RESEARCH FOUNDATION OF THE CITY UNIVERSITY OF NEW YORK and THE CITY UNIVERSITY OF NEW YORK,

Employers,

-and-

UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, LOCAL 2110,

Intervenor.

JOEL GILLER, ESQ. (MARY J. O'CONNELL of counsel), for District Council 37, AFSCME, AFL-CIO

MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (IRWIN BLUESTEIN of counsel), for Professional Staff Congress of the City University of New York

LITTLER MENDELSON, P.C. (DAVID R. MARSHALL and DANIEL A. GRITTI of counsel), for Research Foundation of The City University of New York

FREDERICK P. SCHAFFER, GENERAL COUNSEL (KATHERINE RAYMOND of counsel), for The City University of New York

LEVY, RATNER & BEHROOZI, P.C. (PAMELA JEFFREY of counsel), for Intervenor

INTERIM BOARD DECISION AND ORDER

District Council 37, AFSCME, AFL-CIO (DC-37) and the Professional Staff Congress of the City University of New York (PSC) have filed exceptions, in their respective matters above referenced, to a decision of an Administrative Law Judge (ALJ) adjourning *sine die* the processing of their petitions for unit clarification/ placement. The United Automobile, Aerospace and Agricultural Implement Workers, AFL-CIO, Local 2110 (UAW) has intervened in these petitions.

EXCEPTIONS

DC-37 has excepted to the ALJ's interim decision on legal and factual grounds, including that the ALJ's decision was contrary to the New York State Administrative Procedure Act (SAPA), §301 and the decision prejudices the affected employees.

PSC has excepted to the ALJ's interim decision on legal and factual grounds and, specifically, that the ALJ exceeded his authority.

The UAW, the City University of New York (CUNY) and the Research Foundation of the City University of New York (RF) have submitted responses to the exceptions, supporting the ALJ's ruling.

FACTS

On June 18, 2001, DC-37 filed a unit clarification/placement petition (CP-757), which seeks a determination that certain full-time and part-time, non-instructional employees of RF are in titles either presently represented by DC-37 and, therefore, encompassed in its existing white-collar bargaining unit of employees at CUNY, or are in unrepresented titles which could be appropriately placed in that unit. DC-37 named both RF and CUNY as the employer. UAW was named in the petition as an employee organization that might be affected by the petition.

RF, CUNY and UAW filed separate responses and, among the defenses raised, was PERB's lack of jurisdiction.

Also, on June 18, 2001, PSC filed a similar petition (CP-758), which seeks a determination that certain instructional employees of RF are either in titles represented by PSC and, therefore, encompassed in its existing bargaining unit of employees at CUNY, or are in unrepresented titles which could be appropriately placed in that unit. PSC also named both RF and CUNY as the employer. The UAW and DC-37 were named in the petition as employee organizations that might be affected by the petition.

RF, CUNY and UAW filed separate responses and raised the same defenses as in CP-757.

The ALJ was apprised of a representation petition that involves RF and UAW before the National Labor Relations Board (NLRB). On September 1, 2000, the

Regional Director of the NLRB issued a decision, concluding that "RF is exempt from NLRB jurisdiction by virtue of being a political subdivision upon Section 2 (2) of the Act."[1] The ALJ noted that the Regional Director's decision is presently on appeal to the NLRB. The ALJ also noted that PSC alleged in its papers that the NLRB had granted review on March 22, 2001.[2]

At the conference held on December 10, 2001, DC-37 and PSC urged the ALJ to process the instant CP petitions. Conversely, UAW, RF and CUNY urged the ALJ to adjourn the proceedings until the NLRB issued its final determination on jurisdiction. After reviewing the parties' written briefs, the ALJ decided to place the instant petitions on hold pending the final determination of the NLRB on the representation petition. PSC and DC-37 have taken exceptions to the ALJ's decision.

DISCUSSION

The ALJ adjourned the processing of the unit clarification/placement petitions until the NLRB decides the jurisdictional issue. We agree.

> As a general rule, this Board will not review the interlocutory determinations of the Director or an Administrative Law Judge

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[1]NLRB Case No. 26-RC-8187, p. 14.

[2]PERB takes official notice of the improper practice charge, U-22025, filed by UAW on October 12, 2000 against RF in which the UAW alleges that "While the Union filed its representation petition before the National Labor Relations Board, as opposed to PERB, the RF's employees are protected from retaliation for their activities in attempting to form a Union under the Public Employees' Fair Employment Act as well as the National Labor Relations Act." The parties in that proceeding have agreed to place that charge on hold until a decision of the NLRB regarding jurisdiction is received.

> until such time as all proceedings below have been concluded, and review may be had of the entire matter.[3]
>
> * * *
>
> The purpose of that policy is to prevent the delay inherent in the piecemeal review of proceedings, and to prevent the prejudice and inefficient use of administrative resource that can result from such piecemeal review.[4]
>
> * * *
>
> It is only when extraordinary circumstances are present and/or in which severe prejudice would otherwise result if interlocutory review were denied that we will entertain a request for such review.[5]

DC-37 and PSC have offered no evidence of any irreparable harm which they might suffer if these cases were put on hold and a final determination made by an ALJ only after the NLRB has decided the appeal of the Regional Director's decision on jurisdiction.

DC-37 argues in its brief that "[T]he workers of RF/CUNY will be prejudiced because they will be deprived of the fundamental, constitutionally guaranteed right to organize and bargain collectively." While the ALJ's decision to put these cases on hold will result in the matters not being further processed for some span of time, the ALJ's decision avoids the possibility of inconsistent determinations and the possibility of further litigation over the jurisdictional issue. It is the lack of finality that would delay

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[3]*County of Nassau*, 22 PERB ¶3027, at 3066 (1989).

[4]*United Federation of Teachers, Local 2 and New York State United Teachers*, 32 PERB ¶3071 at 3167 (1999).

[5]*County of Nassau, supra* note 3; *see also Mt. Morris Cent. Sch. Dist.*, 26 PERB ¶3085 (1993).

and, perhaps, deprive these employees of their right to organize and bargain collectively, and not any particular forum.

PSC argues in its brief that the NLRB Regional Director found "that RF/CUNY was a public employer." Consequently, "the employees at issue cannot obtain representational rights through the processes of the NLRB." This argument also lacks merit because it assumes that the status of RF and CUNY as either public or private entities is not being reviewed on appeal to the NLRB. It is only after the NLRB appeal process has been exhausted, that the at-issue employees may look to PERB to adjudicate their representational rights if the NLRB has determined that it does not have jurisdiction. Any other approach would frustrate the policies of the Act and result in an inefficient use of administrative resources of two agencies.

Balancing the possible prejudice and inefficiencies associated with each course of action available to us, we choose, in our discretion, not to entertain this interlocutory appeal.

Based upon the foregoing, DC-37's and PSC's interlocutory exceptions are dismissed without prejudice to their right to appeal the ALJ's decision to adjourn the instant petitions for unit clarification/placement upon exceptions, if any, to the ALJ's final determination. SO ORDERED.

DATED: April 25, 2002
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

PEEKSKILL POLICE ASSOCIATION,

Charging Party,

- and -

CASE NO. U-22120

CITY OF PEEKSKILL,

Respondent,

-and-

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Intervenor.

JOHN K. GRANT, ESQ., for Charging Party

GROTTA, GLASSMAN & HOFFMAN, P.A. (DAVID M. WIRTZ of counsel), for Respondent

BRIAN M. LUCYK, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ), finding a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act), on an improper practice charge filed by the Peekskill Police Association (Association) alleging that the City of Peekskill (City) violated the Act when it unilaterally altered the noncontractual practice of offering dispatching duties to police

officers on an overtime basis. The City's answer generally denied the allegations and affirmatively alleged, *inter alia*, that it had no duty to negotiate over the alleged unilateral change in practice because dispatching duties were not exclusive to the Association. Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters), the representative of the employees who perform the at-issue work in the civilian title of police dispatcher, intervened.

Exceptions

The City's exceptions relate generally to the ALJ's decision on the law and the facts and, more specifically, address the ALJ's finding that the City unilaterally changed the order in which dispatchers were assigned to work overtime.

The Teamsters except to the ALJ's decision on the law and the facts and, more specifically, to the ALJ's findings that cases with respect to the employer's right to transfer nonexclusive unit work to nonunit personnel were not relevant and that the manner in which the overtime work was "doled out" is a term and condition of employment and, therefore, mandatorily negotiable, rather than a management prerogative.

The Association argued in its response to the exceptions that the ALJ was correct in his findings and conclusions of law. The Association, however, filed cross-exceptions alleging that the ALJ erred in finding that it did not have exclusivity over the dispatching duties, that the City's obligation to bargain existed only as long as the City elected to have police officers do dispatch work, and that there is no support in the record for the City's stated reason for changing the procedure.

The City argued in its response to the Association's cross-exceptions that the ALJ was correct in finding no exclusivity and the record amply demonstrates the need for the change.

The Teamsters argued in response to the Association's cross-exceptions that the ALJ was correct in finding nonexclusivity, and that there is support in the record for the change.

FACTS

The Association is the certified bargaining representative for police officers and sergeants employed by the City. The Teamsters represent a civilian unit containing, among other titles, police dispatchers, community service workers and park rangers.

The Association called only one witness, Sergeant Joseph Gomez, who testified that he has been employed in the department for seventeen and one-half years. He was promoted to patrol sergeant in 1994. During his tenure in the department, he has been employed as a police dispatcher, patrolman and patrol sergeant. His testimony reveals that the City has, during that time, assigned overtime dispatching duties to employees in the units represented by the Association and the Teamsters. The order of the assignment to the employees in the two units has changed at least twice during his tenure and before the at-issue change in order of assignment of overtime dispatching. The record is unclear, however, as to the manner in which the assignments were made during the last several years since the City's last change in 1995 in the order of assignment. Gomez testified to several different permutations in the manner of assigning dispatching overtime, including, *inter alia*, the length of the shift assigned, the

use of on-duty personnel in both units as opposed to off-duty personnel, and the significance of seniority in making the assignment of Association unit employees.

The City's only witness, James Madaffari, City Manager and Commissioner of Public Safety, testified that there was a change in the manner of assignment sometime in 1995 or 1996 when the on-duty police dispatcher was given the right of first refusal to overtime dispatch work, and that changed the system in place at that time whereby overtime dispatch work was first offered to police officers. Madaffari also testified that, as of October 2000, more dispatching work was offered to the Teamsters' unit members than had been previously offered.

Our review of the record testimony reveals that, for the past ten to twelve years referred to by the parties, the procedures for overtime dispatching have been inconsistent and have been altered by the City as its staffing needs have changed. The practice by which the City determines the employees to whom the overtime assignments will be offered, as well as the order in which the assignment of overtime dispatching is made available to City employees, is not clearly set forth either in the witnesses' testimony or the charge.[1]

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[1]Paragraph 5E of the details of charge states the following:

> For many years, any overtime the City authorized or required of a dispatcher was first offered to the dispatcher on duty. If the dispatcher did not want the overtime assignment, the City offered the overtime to police officers in the Association's unit on a reverse seniority basis (most senior first). The City would then offer the overtime to non-unit employees only if all police officers refused the overtime.

DISCUSSION

The City argues in its exceptions that the ALJ erred in finding that the City violated §209-a.1(d) of the Act. We agree. We do not find on this record that the Association has met its burden of establishing an unequivocal past practice with respect to the order of assignment of police officers to dispatching overtime. We have established precedents defining the charging party's burden of proof in a charge alleging a unilateral change in a past practice. In such a case it must be established, by a preponderance of the evidence, that there has been a past practice regarding a mandatory subject of negotiations and then established that a unilateral change in the past practice has occurred.[2] It is well settled that, in order to demonstrate the existence of a past practice, a charging party must prove that the practice "was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances [footnote omitted] to create a reasonable expectation among the affected employees that the [practice] would continue."[3]

The procedures for the assignment of overtime work affect hours and compensation, which are mandatory subjects of negotiations.[4] We, therefore, must test whether the charging party has demonstrated an unequivocal practice with respect

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[2]*See State of New York (PEF)*, 33 PERB ¶3024 (2000); *Farmingdale Union Free Sch. Dist.*, 7 PERB ¶3056 (1974).

[3]*County of Westchester*, 33 PERB ¶3025, at 3068 (2000); *County of Nassau*, 24 PERB ¶3029 (1991).

[4]*See Village of Mamaronack Police Benevolent Ass'n*, 22 PERB ¶3029 (1989); *City of Schenectady*, 22 PERB ¶3018 (1989), *aff'g*, 21 PERB ¶4605 (1988).

to this mandatory subject that continued uninterrupted for a significant period of time, such that the employees could reasonably expect the practice to continue unchanged.[5]

At best, Gomez's testimony presented a conflicting interpretation of the alleged practice as set forth in paragraph 5E of the Association's charge. The record reflects at least two changes in the order of assignment of dispatching overtime in the City's procedure. Further, within the changes in the order of assignment, there existed several inconsistent variations in the manner in which this overtime was assigned, each dependent on the City's needs and the available personnel at any given time. We do not find, on this record, that the Association established an unequivocal practice by a preponderance of the evidence.

Given the inconsistencies in the procedure used by the City to make overtime dispatching assignments, we further find that the Association did not establish that there was a reasonable expectation that the practice would continue unchanged. Thus, the Association must be considered to have failed in meeting its burden of proof and the charge must, therefore, be dismissed.[6]

Based on the foregoing, we grant the City's exceptions, deny the exceptions filed by the Teamsters, deny the cross-exceptions filed by the Association, and reverse the decision of the ALJ.

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[5]*Bellmore Union Free Sch. Dist.*, 34 PERB ¶3009 (2001); *County of Nassau, supra* note12.

[6]*See Bellmore, supra* note 15; *Schalmont Cent. Sch. Dist.*, 29 PERB ¶3036 (1996).

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

DATED: April 25, 2002
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

TOWN OF YORKTOWN,

Charging Party,

- and -

CASE NO. U-22716

TOWN OF YORKTOWN POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

WINSTON & STRAWN (DEBORAH S. K. JAGODA of counsel), for Charging Party

BUNYAN & BAUMGARTNER (RICHARD P. BUNYAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Yorktown (Town) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge filed by the Town alleging that the Town of Yorktown Police Benevolent Association, Inc. (Association) had violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by including nonmandatory subjects of bargaining in its petition for interest arbitration.

The charge involves three of the demands submitted by the Association in its petition for interest arbitration. The ALJ decided the case on the language of the

demands, denying the Town's request for a hearing as to the Association's intent and the Town's objection to one demand.

EXCEPTIONS

The Town excepts to the ALJ's characterization of the record as a "stipulation of facts" in light of the ALJ's denial of its request for a limited hearing and the ALJ's determination that the charge would be decided on the pleadings and the stipulation of facts submitted by the parties. The Town further excepts to the ALJ's determination that the three at-issue demands are mandatory subjects of negotiation. The Association supports the ALJ's decision, except that the Association has no objection to the correction of the characterization of the charge as being submitted for decision on a stipulation of facts.

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

PROCEDURAL MATTERS

The case was decided by the ALJ on a stipulated record prepared by the parties. However, we here clarify the ALJ's decision to the extent that it does not reflect that the Town requested a hearing on one of the demands and the ALJ determined that no hearing was necessary because the charge could be decided on the language of the demand. There was no issue of fact raised by the Town which required a hearing.[1] Indeed, the Town does not except to the ALJ's determination that no hearing was

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[1]*See Schenectady Patrolmen's Benevolent Ass'n*, 21 PERB ¶3022 (1988).

necessary, only that the ALJ's decision did not reflect that the Town sought a hearing on the intent of one of the demands.

FACTS

The language of each demand is set forth below, in the discussion on the mandatory or nonmandatory nature of the demand.

DISCUSSION

The Association proposed that a new section, numbered 7, be added to Article III, *Compensation*, of the parties' agreement.[2] The proposal is:

> All members of the bargaining unit assigned to patrol shall work a 4-day on 2-day off schedule which consists of steady shifts. The steady shifts shall consist of steady day tour, 8:00 a.m. to 4:00 p.m.; steady evening tour, 4:00 p.m. to 12 midnight and steady midnight tour 12:00 a.m. to 8:00 a.m. No member of the bargaining unit assigned to patrol shall work more than 242 days per year. In addition, those members of the bargaining unit assigned to SPO or Relief Squad shall work no more than 236 days per year.

The ALJ found that the demand involves hours of work in its several components, rejecting the Town's argument that, even if some of the components were mandatory subjects of negotiation, in combination, the demand becomes nonmandatory. The Town argues in its exceptions that the demand is a unitary proposal which must be found to be nonmandatory because it interferes with the Town's managerial prerogatives to determine the level of services it will provide and to set staffing levels.

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[2]The parties' last negotiations concluded with the issuance of an interest arbitration award for two years, commencing January 1, 1999.

In *Village of Mamaroneck Police Benevolent Association*,[3] we held, relying upon our decision in *Town of Blooming Grove*,[4] that, while

> the right of the Town to establish its manpower needs by establishing levels of coverage for each day of the week constitutes a management prerogative about which the Town was not obligated to bargain [footnote omitted],"an employer is obligated to negotiate the method by which its manpower needs will be met in terms of tours of duty. (*See also City of White Plains*, 5 PERB ¶3008 (1982); *City of Buffalo*, 14 PERB ¶3053 (1981). The length of the employees' work year and tours of duty are mandatory subjects of bargaining."

Here, as in *Mamaroneck*, *supra*, the demand seeks to set the number of days worked per year, as well as the hours of the shifts. We have consistently held that management prerogatives are the determination of levels, days, and hours of coverage to be required, while the manner in which employees will be assigned to provide that coverage is mandatorily negotiable, if alternative ways of providing coverage exist. That this demand has several components, all of which are mandatory, [5] does not compel a contrary conclusion.

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[3]22 PERB ¶3029, at 3072 (1989).

[4]21 PERB ¶3032, at 3069 (1988).

[5]Hours of work are a mandatory subject of bargaining. Act, §§201 and 204.3. Tours of duty and shift assignments are components of hours of work and are, therefore, mandatorily negotiable. *City of White Plains*, 5 PERB ¶3008 (1972); *City of Schenectady*, 21 PERB ¶4605 (1988), *aff'd*, 22 PERB ¶3018 (1989). Also mandatory are the number of days worked per year, *Addison Cent. Sch. Dist.*, 17 PERB ¶4566, *aff'd*, 17 PERB ¶3076 (1984); the specific days worked per week, *Starpoint Cent. Sch. Dist.*, 23 PERB ¶3012 (1990); the number of days worked per tour, *Local 294, IBT*, 10 PERB ¶3007 (1977); and the hours or type of tours, *City of Buffalo*, 14 PERB ¶3053 (1981). The starting and ending time of shifts as well as the number of shifts is mandatorily negotiable, *County of Rockland and Rockland County Sheriff*, 27 PERB ¶3019 (1994).

The second Association proposal seeks to amend Article XV, Section 1, *Miscellaneous*, to add the following language to which the Town objects:

> The Town shall notify the Association at least three (3) months in advance of any change in working methods or working conditions, except where such change is required because of an emergency or major disaster over which the Town has no control. Nothing in this Section shall be construed as a waiver by the Association of its right to negotiate such changes....[6]

The change in this proposal from the language in the parties' agreement is the increase in the time for notification from seven days, as the agreement currently provides, to three months and the addition of the second sentence.[7] The Town articulates the theory that the contract provision is mandatory because the contractual notice period of seven days is reasonable. The Town argues, however, that the expanded notification period proposed by the Association in its demand is unreasonable and, therefore, nonmandatory. The ALJ found that the contract provision itself is nonmandatory because it is too restrictive in that it only permits the Town to change working conditions and methods without advance notification in those emergency circumstances over which the Town has no control. Having found that the contract provision is nonmandatory, the ALJ applied the "conversion theory of negotiations"

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[6]The concluding language of the proposal, "or the impact of such changes", is not at-issue.

[7]The ALJ found the second sentence to be nonmandatory as it could be read as imposing a negotiations duty regarding nonmandatory subjects of bargaining. Neither party has excepted to the ALJ's decision on this point.

articulated in *City of Cohoes* (hereafter, *Cohoes*),[8] which renders the contract provision mandatory as between these parties. Finding that the Association's proposal seeks to modify the contract provision, the ALJ rejected the Town's interpretation of the decision in *City of White Plains*.[9] There, the ALJ determined that the conversion theory applies to nonmandatory matters already in the contract, but it does not convert nonmandatory demands into mandatory topics merely because they are to be added to a mandatory subject matter in a contract. We affirmed the ALJ on different grounds.

Here, the ALJ correctly determined that the contract provision sought to be modified was an otherwise nonmandatory subject of negotiation, rendered mandatory by *Cohoes*. As the Association's proposal is specifically related to the contract provision, it, too, is mandatory.[10] *Cohoes* was intended to give parties an avenue to address contractual provisions which deal with nonmandatory subjects of negotiations. Not only does it provide parties with the means to argue at interest arbitration that a contract provision dealing with a nonmandatory subject should be removed, it is also a tool to modify nonmandatory contract provisions, as long as the proposed modification is reasonably related to specific language of the nonmandatory contract provision. As the ALJ noted, "the focus of a *Cohoes*-based analysis should be on the specificity of relationship between the proposal and the contract provision and not on a difference

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[8]31 PERB ¶3020 (1998), *conf'd*, 32 PERB ¶7026 (Sup.Ct. Albany County), *aff'd*, 276 AD2d 184, 33 PERB ¶7019 (3d Dep't 2000), *motion for leave to appeal denied*, 96 NY2d 711, 34 PERB ¶7018 (2001).

[9]33 PERB ¶4588, *aff'd*, 33 PERB ¶3051 (2000).

[10]*Cohoes*, *supra* note 7, at 3038.

between their independent status as negotiable items."[11] That is the reasonable interpretation of *Cohoes* and effectuates the fundamental policies of the Act.

The final proposal objected to by the Town is the Association's demand that a new article, *Minimum Manpower*, be added to the parties' collective bargaining agreement, as follows:

> In the event the composition of this bargaining unit is diminished all members of the bargaining unit shall receive a stipend of one-thousand ($1,000) dollars per member.

The Town argues that the demand amounts to a penalty designed to prevent the Town from exercising its managerial prerogative to reduce the size of its police force. "[A] demand is improper if it sets up a system of penalties primarily designed to prohibit the public employer from exercising its statutory responsibilities even if, on its face, the demand is for premium pay."[12] But, under the Town's definition, all premium pay proposals could be viewed as penalties because they exact an amount of money from the employer for the exercise of what is otherwise a management prerogative.[13] The inquiry is whether the demand bears "no reasonable relationship to a particular hazard or to other circumstances affecting working conditions which it is designed to compensate."[14] As the reduction in workforce contemplated by the demand could,

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[11] *Town of Yorktown Police Benevolent Ass'n Inc.*, 35 PERB ¶4515, at 4550 n.15 (2002).

[12] *Village of Spring Valley Policemen's Benevolent Ass'n*, 14 PERB ¶3010, at 3017 (1981).

[13] *See Lynbrook Police Benevolent Ass'n*, 10 PERB ¶3067 (1977).

[14] *Village of Spring Valley*, *supra* note 6, at 3017.

among other things, result in an increased workload for the remaining unit employees, it cannot be said that the demand amounts to a penalty.[15] It is, therefore, mandatory.[16]

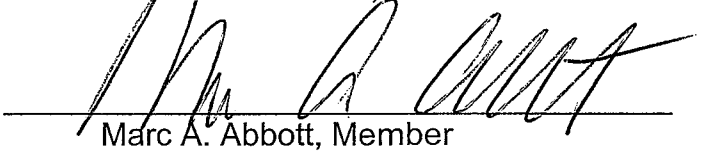
In reaching our conclusion that the aforementioned demands are mandatory subjects of negotiations, we are not deciding the merits of the demands, only their negotiability. Our decision herein should only be construed as a determination that the demands may properly be submitted to arbitration.

Based on the foregoing, the Town's exceptions are denied, except to the extent that we have clarified the ALJ's characterization of the stipulated record, and the ALJ's decision is affirmed.

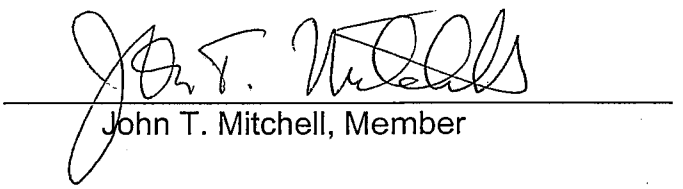
IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed.

DATED: April 25, 2002
Albany, New York

Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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[15]The Town's reliance on *Prue v. City of Syracuse*, 25 PERB ¶7539 (Sup. Ct Tioga County 1992), *rev'd*, 201 AD2d 894, 27 PERB ¶7502 (4th Dep't 1994), is misplaced. The Supreme Court, Tioga County, vacated an arbitrator's award that the City of Syracuse pay a retroactive salary increase if there were any layoffs of unit employees, finding that such a proposal was a penalty. The Appellate Division reversed the Supreme Court on the law, as well as on other grounds not here relevant, finding that the arbitrator's award had a rational basis and was neither arbitrary nor capricious.

[16]*See Fulton Fire Fighters Ass'n, Local 3063, IAFF, AFL-CIO*, 30 PERB ¶3012 (1997).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN ZITO,

Charging Party,

- and -

CASE NO. U-21928

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, NYSUT, AFL-CIO,

Respondent,

- and -

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

Employer.

JOHN ZITO, *pro se*

CHARLES D. MAURER, ESQ., for Respondent

DALE C. KUTZBACH, GENERAL COUNSEL (JERRY N. ROTHMAN and SUSAN MANDEL of counsel), for Employer

BOARD DECISION AND ORDER

The charging party, John Zito, has moved this Board to reconsider our decision and order previously issued on August 16, 2001.[1] The respondent, United Federation of Teachers, Local 2, AFT, NYSUT, AFL-CIO (UFT), has opposed the motion. The

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[1] *UFT, Local 2, AFT, NYSUT, AFL-CIO (Zito)*, 34 PERB ¶3029 (2001).

employer, the Board of Education of the City School District of the City of New York (Board of Education), has not responded.

Zito alleged that UFT violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by not processing a grievance that Zito had filed against the Board of Education.

On the instant motion to reconsider the Board's determination in this matter, Zito is essentially alleging a new violation of the Act based on evidence not available when the underlying charge was filed and decided by the Administrative Law Judge (ALJ). Zito complains that a conflict of interest arose when he filed an improper practice charge against UFT and, thereafter, sought legal representation from UFT in an appeal brought by the Board of Education to reverse an arbitrator's award which favored Zito. This new allegation, couched as a breach of UFT's duty of fair representation, is supported by correspondence and, specifically, a letter from UFT dated May 25, 2001, in which counsel for UFT advised Zito that outside counsel had been retained to represent him because UFT recognized that a potential for a conflict of interest existed.

The Board has granted motions to reopen proceedings on the basis of newly discovered evidence.[2] We have followed the rationale articulated in *Evans v. Monaghan*, 306 NY 312, 326 (1954), in which the Court of Appeals applied "the law of newly discovered evidence"[3] to administrative determinations where it could be done in conformity with the limitations which the courts have imposed upon themselves.

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[2]*City of Poughkeepsie*, 18 PERB ¶3066 (1985).

[3]*Adjunct Faculty Ass'n*, 18 PERB ¶3076, at 3164 (1985).

The courts have imposed two limitations on granting applications to reopen based upon newly-discovered evidence. The first is to refuse to reopen proceedings when, with due diligence, the new evidence was obtainable before the close of the original trial. The second is that it must be demonstrated that the evidence, "if introduced at a trial, would *probably* have produced a different result."[4]

Applying these two limitations to the instant application leads us to deny Zito's motion to reconsider. Zito argued the conflict of interest issue in his original exceptions to the Board but, because the issue had not been argued in the case before the ALJ, we declined to consider it in our earlier decision. Now, seven months later, Zito is attempting to reopen his case in order to raise the conflict of interest issue. Upon his own admission, the basis for this claim is found in the correspondence with UFT and, specifically, their letter of May 25, 2001. Zito, therefore, sat on his rights and failed to make a reasonably prompt application to reopen his case before the ALJ. Consequently, his motion to reopen must be denied.

In applying the second limitation, we find that the introduction of evidence, if timely, probably would not have produced a different result from our prior holding. The underlying improper practice charge alleged a violation of the duty of fair representation by UFT in the processing of a grievance filed by Zito. UFT's May 25, 2001 letter recognized the potential conflict of interest problem and provided Zito with outside counsel for a defense of the Board of Education's application to reverse the arbitration

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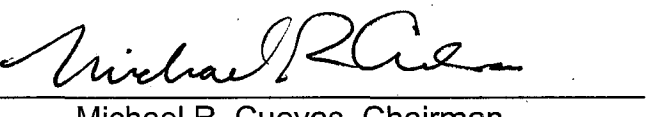
[4] *Id.*

award in Zito's favor. Thus, the introduction of this evidence would not warrant a contrary finding.

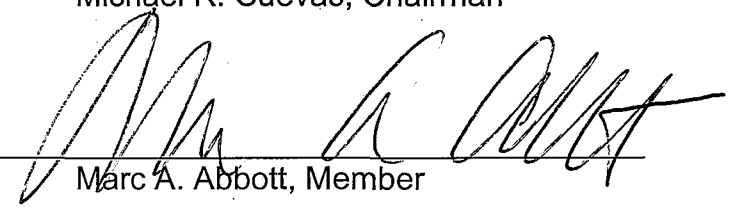
Having reviewed the moving papers, we determine that there is neither such newly discovered material nor overlooked propositions of law to justify reconsideration of our Decision and Order issued over seven and one-half months ago, on August 16, 2001.[5] Zito is attempting to resurrect, through this motion to reconsider, an improper practice charge that is otherwise time-barred under our Rules of Procedure (Rules).[6]

Accordingly, the motion for reconsideration is denied.[7] SO ORDERED.

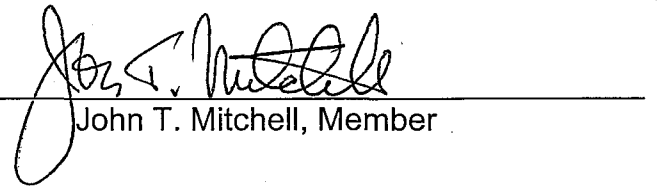
DATED: April 25, 2002
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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[5]*See Brentwood Union Free Sch. Dist.* 25 PERB ¶3027 (1992); *New York City Transit Auth.*, 24 PERB ¶3030 (1991); *Town of Brookhaven*, 19 PERB ¶3010 (1986).

[6]Rules, §204.1(a)(1).

[7]*See United Fed'n of Teachers (Freedman)*, 34 PERB ¶3005 (2001).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARVIN V. SANFORD,

Charging Party,

CASE NO. U-20907

-and-

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

RICHARD D. WOODS,

Charging Party,

CASE NO. U-20987

-and-

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

JOHNNIE A. FRITZ, JR.,

Charging Party,

CASE NO. U-21001

-and-

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

TOMAR HUBBARD,

Charging Party, **CASE NO. U-21005**

-and-

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

BRADFORD PITTS,

Charging Party, **CASE NO. U-21006**

-and-

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

In the Matter of

ROBERT W. YEATES,

Charging Party, **CASE NO. U-21010**

-and-

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Respondent,

-and-

CITY OF BUFFALO,

Employer.

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

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

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

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

BOARD DECISION AND ORDER

By decision dated September 28, 2001, the Appellate Division, Fourth Department, affirmed, in part, and reversed, in part, our decision in *Buffalo Police Benevolent Association.*[1] The Court remitted the matters to us for imposition of an appropriate remedy in accordance with its decision.[2] Our motion to reargue having been denied by the Fourth Department,[3] we now modify our remedy as directed by the court.

Our decision found that the Buffalo Police Benevolent Association (PBA) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it disseminated false and/or misleading information concerning the status of pending grievances and improper practice charges to unit members. The court reversed this finding, holding that the PBA's "mistake, negligence or incompetence with respect to the dissemination of

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[1]33 PERB ¶3060 (2000).

[2]*Buffalo Police Benevolent Ass'n v. PERB*, 34 PERB ¶7031 (4th Dep't 2001).

[3]*Buffalo Police Benevolent Ass'n v. PERB*, 35 PERB ¶ 7007 (4th Dep't 2002).

that information is not a sufficient basis"[4] for a finding that the PBA breached its duty of fair representation because there was not substantial evidence that the PBA was acting in a manner that was arbitrary, discriminatory or motivated by bad faith.

We also determined that the PBA breached its duty of fair representation by intervening in a CPLR article 78 proceeding commenced by the charging parties, Marvin V. Sanford, Richard D. Woods, Johnnie A. Fritz, Jr., Tomar Hubbard, Bradford Pitts and Robert W. Yeates, challenging the civil service examination for the position of detective in the City of Buffalo Police Department (City). The court found that the position asserted by the PBA was against the interests of Sanford, Woods and Fritz insofar as the PBA argued that article 24 of the Collective Bargaining Agreement (CBA) is not applicable to them. At the time of that proceeding, the PBA was representing those charging parties on grievances alleging that they were tenured under article 24 of the CBA. The PBA was also pursuing class action grievances (GR98-14 and GR98-267) on behalf of all detectives employed by the City in that position for more than eighteen months. The court found that although the PBA had a legitimate reason for intervening in that proceeding, it was not necessary for the PBA to assert the inapplicability of article 24 of the CBA. The court found that the PBA's assertion of that position in the Article 78 proceeding was evidence of arbitrariness, if not bad faith, and sustained our finding that the PBA had violated §209-a.2(c) of the Act. However, the court found that because Hubbard, Pitts and Yeates had not filed grievances based on article 24 of the CBA, our determination that the PBA had breached its duty of fair representation with respect to them must be annulled.

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[4]*Supra* note 2, at 7049.

Consistent with the Fourth Department's decision in these matters, we find that the charge must be and hereby are dismissed as to the allegation that the PBA violated §209-a.2(c) of the Act by furnishing unit employees with false and inaccurate information about the status of pending grievances and improper practice charges. Our order that the PBA cease and desist from disseminating false and/or misleading information regarding pending grievances and improper practice charges to its membership is hereby rescinded.

As to the allegations that the PBA violated §209-a.2(c) of the Act when it intervened in the Article 78 proceeding brought by Hubbard, Pitts and Yeates, we hereby dismiss the charges as to those allegations and rescind that part of our order that directed the PBA to reimburse Hubbard, Pitts and Yeates for any and all reasonable legal costs and related expenses which they incurred in connection with the Article 78 proceedings brought in March 1999 against the City and the Buffalo Municipal Civil Service Commission. We also rescind so much of our order that directed the PBA and the City to immediately move GR98-14 and GR98-267 (the class action grievances) to arbitration, and that the PBA incur the costs for the hiring of outside counsel to represent Sanford, Woods, Fritz, Hubbard, Pitts and Yeates in those proceedings.

WE, THEREFORE, ORDER that:

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

2. The PBA and the City immediately move grievances GR98-307, GR98-301, and GR99-2 to arbitration, and that the PBA incur the costs for the hiring of outside counsel to represent Sanford, Woods and Fritz in these proceedings.

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

DATED: April 25, 2002
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Buffalo (City) in the unit represented by Buffalo Police Benevolent Association (PBA) that:

1. The PBA will reimburse Officers Sanford, Woods, and Fritz for any and all reasonable legal costs and related expenses which they incurred in connection with the Article 78 proceedings brought in March 1999 against the City of Buffalo and the Buffalo Municipal Civil Service Commission.

2. The PBA and the City will immediately move grievances GR98-307, GR98-301, and GR99-2 to arbitration, and that the PBA will incur the costs for the hiring of outside counsel to represent Sanford, Woods and Fritz in these proceedings.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

City of Buffalo

. . . . . .

Dated . . . . . **By** . . . . . .
(Representative) (Title)

Buffalo Police Benevolent Association

. . . . . .

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL #264,

Petitioner,

-and-

CASE NO. C-5161

HOLLAND CENTRAL SCHOOL DISTRICT,

Employer,

-and-

HOLLAND SUPPORT STAFF ASSOCIATION, NEA/NY,

Intervenor.

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 Teamsters Local #264 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, Auto Mechanic, Auto Mechanic Crew Chief, Bus Attendant, Bus Driver, Cleaner, Clerk, Clerk-Typist, Cook, Cook Manager, Custodian, Food Service Helper, Head Grounds Worker, Grounds Worker, Head Bus Driver, Laborer, Laborer/Courier, Maintenance Mechanic Crew Chief, Maintenance Mechanic Helper, Painter, Registered Professional Nurse, School Monitor, Senior Account Clerk, Senior Clerk Typist, Teacher Aide, Offset Machine Operator.

Excluded: School Business Administrator, Superintendent of Buildings and Grounds, Transportation Supervisor (or Equivalent Position), Senior Account Clerk/District Treasurer, Secretary to the Superintendent of Schools/ District Clerk, Food Service Manager, Payroll Clerk, and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local #264. 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: April 25, 2002
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

TEAMSTERS LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5188

TOWN OF CAIRO,

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 Teamsters Local 294, International Brotherhood of Teamsters, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time highway department employees

Excluded: Highway Superintendent and all other employees

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294, International Brotherhood of Teamsters, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 25, 2002
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member