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8-19-2002

## State of New York Public Employment Relations Board Decisions from August 19, 2002

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from August 19, 2002

### 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

**AMALGAMATED TRANSIT UNION, LOCAL 282,**

Petitioner,

- and -

**CASE NO. CP-760**

**REGIONAL TRANSIT SERVICE, INC.,**

Employer.

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**CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD (MATTHEW J. FUSCO of counsel), for Petitioner**

**HARRIS BEACH, LLP (PETER J. SPINELLI & MELISSA A. FINGAR of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Regional Transit Service, Inc. (RTS) to a decision of an Administrative Law Judge (ALJ) placing the title of Farebox Technician<sup>1</sup> in a unit of RTS employees represented by the Amalgamated Transit Union, Local 282 (Union), pursuant to a unit placement petition filed by the Union. The ALJ determined that the Farebox Technicians shared a community of interest with unit employees, rejecting RTS's argument that at least one of the Farebox Technicians has sufficient supervisory authority to make placement in the unit inappropriate.

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<sup>1</sup>Farebox Technicians are also known as Collection System Repair Persons.

### EXCEPTIONS

RTS excepts to the ALJ's decision primarily on factual grounds, arguing that the ALJ misread and incorrectly characterized the testimony, thus erring by basing her decision on the wrong facts. The Union supports the ALJ's decision, arguing that the record supports her factual findings and conclusions of law.

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

### FACTS

The relevant facts are set forth in the ALJ's decision and are summarized here only as necessary for this decision.<sup>2</sup> We find no reason, based upon our review of the record, to disturb the ALJ's credibility resolutions and factual findings.<sup>3</sup>

The Union represents a unit of approximately 400 employees, including 300 bus drivers and 100 maintenance employees. The bus drivers perform the duties normally associated with bus drivers, but they do not collect fares; fares are deposited directly by passengers into the farebox. The maintenance employees both maintain and repair buses and maintain RTS's physical plant. Employees within the unit also install the fareboxes in the buses.

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<sup>2</sup>*Regional Transit Service, Inc.*, 35 PERB ¶4010 (2002).

<sup>3</sup>An ALJ's credibility resolutions are entitled to great weight based upon substantial evidence. See *State of New York (PEF)*, 33 PERB ¶3046 (2000), *confirmed sub nom. Benson v. Cuevas*, 272 AD2d 764 (3d Dep't 2000), 35 PERB ¶7008 (2002), *motion for leave to appeal denied*, 95 NY2d 760 (2000); *State of New York-Unified Court System*, 28 PERB ¶3004 (1995).

The Farebox Technicians also do not handle any money directly. In concert with employees of a private security contractor, once a day, they transfer money from RTS's vault to the contractor's secure container.<sup>4</sup> While the Farebox Technicians are bonded, they have no responsibilities for accounting for receipts, counting money or taking custody of RTS's cash or receipts. They do not act as security guards for RTS, as the employees of the private contractor provide that service.

The primary function of the Farebox Technicians is to repair fareboxes and trim units, either on the bus or in their office, located next to the shop where unit employees overhaul bus transmissions and engines. Other unit employees work on RTS's buses, repairing heating and air conditioning systems.

The three Farebox Technicians - Ronald Sabernick, Jr., Agostino Ranieri and Keith Freeman - work as a team, dividing the work of their shop. They report directly to the Vice President of Operations for RTS, Paul Holahan. Sabernick is the most senior employee and is at the highest pay grade of the three, grade eleven.<sup>5</sup> Ranieri's salary is similar to the Technician II title in the bargaining unit. Sabernick does not assign work, approve overtime, schedule vacations or evaluate Ranieri or Freeman. The Farebox Technicians maintain their own vacation board, as do other unit employees, within the same or similar job classifications. Supervisors have their own vacation board and Sabernick is not included in that group.

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<sup>4</sup>The Farebox Technicians utilize an Authority forklift for this function. They also use the forklift to transfer large items to storage. The forklift is also operated by buildings and grounds maintenance personnel in the performance of their duties.

<sup>5</sup>Grade eleven is the same salary grade as supervisors.

### DISCUSSION

RTS argues that the ALJ did not consider the testimony of the witnesses as a whole and only highlighted the testimony that supported her ultimate conclusion. The ALJ's decision sets forth the facts in detail, discussing the testimony of each witness as relevant to the issues before her. That she accepted the facts as testified to by the Union's witnesses and made credibility resolutions in favor of those does not mean that she did not consider the evidence presented by RTS, only that she did not find it dispositive of the unit placement of the Farebox Technicians. As noted, *infra*, RTS has pointed to examples in the transcript that it contends contradict the ALJ's factual conclusions. However, our review of the record shows that the ALJ's factual findings are correct, there is no reason to disturb her credibility resolutions and, to the extent that there are factual errors, they do not compel disturbing the ultimate disposition of the case by the ALJ.<sup>6</sup>

RTS argues that because the title of Farebox Technician is excluded from the recognition clause in the parties' collective bargaining agreement, that the title may not be placed in the unit represented by the Union. As noted by the ALJ, we rejected this argument in *County of Rockland*,<sup>7</sup> where we held that:

Although public employers and employee organizations are encouraged to agree upon the composition of bargaining units, as well as the terms and conditions of employment of unit employees, when a representation dispute arises, PERB has the statutory duty, pursuant to §207 of the Act, to

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<sup>6</sup>See *Monroe Community College (Case)*, 29 PERB ¶¶3008 (1996). See also *Cayuga-Onondaga BOCES*, 32 PERB ¶¶3079 (1999).

<sup>7</sup>28 PERB ¶¶3063, at 3143 (1995).

determine the most appropriate bargaining unit consistent with the criteria contained therein. Agreements between the employer and the employee organization regarding unit inclusions and exclusions are, accordingly, not controlling. (Citing to *State of New York*, 1 PERB ¶399.85 (1968)).

A unit placement petition is, in substance and effect, a mini-representation proceeding calling only for a nonadversarial investigation and the application of the statutory uniting criteria in §207.1 of the Public Employees' Fair Employment Act (Act).<sup>8</sup> We, therefore, consider this case in the context of our decisions determining whether a community of interest, or the potential for a conflict of interest, exists between the petitioned-for employees and the employees in the bargaining unit. We have long held that the most appropriate unit is the largest that permits for effective and meaningful negotiations. As long as there is no potential or actual conflict, employees who have different occupations and terms and conditions of employment may be grouped together if they share a general community of interest.

RTS argues that the Farebox Technicians have an inherent conflict of interest with members of the bargaining unit based upon their duties and the disparity in salary between the Farebox Technicians and the employees represented by the Union. Within any large unit comprised of employees in various titles, there are potential conflicts of interest based upon the diverse duties performed, the training and skill required to perform job duties specific to a certain title and the location of the work performed. As noted by the ALJ, the Farebox Technicians work in the same facility as many of the mechanics and technicians in the bargaining unit. There is some interplay

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<sup>8</sup>*General Brown Cent. Sch. Dist.*, 28 PERB ¶3065 (1995).

between the Farebox Technicians and other unit employees. For example, cleaners in the unit report that a farebox needs to be repaired, other employees are responsible for drilling holes for installation of the farebox and the Farebox Technicians, as well as unit employees, utilize the forklift in the performance of their duties.

That there is a disparity in salary between the Farebox Technicians themselves, and between them and others in the bargaining unit, does not warrant dismissing the petition.<sup>9</sup> There is a community of interest between the employees in the at-issue titles and others in the bargaining unit represented by the Union in that they share a joint responsibility to ensure that RTS's buses are running in proper order, including the proper receipt of fares from passengers.

RTS also argues that the Farebox Technicians are guards and should not be placed in the bargaining unit with other, non-security titles, consistent with the policies and decisions of the National Labor Relations Board. Even were we to conclude that the Farebox Technicians, because they are bonded, have some responsibilities in the transfer of RTS's receipts and have had to review receipts in one instance when theft by a bus driver was suspected, are security personnel, we would not find that to be a sufficient basis, in and of itself, to exclude them from the Union's bargaining unit.<sup>10</sup> Even though, as argued by RTS, if they were guards, they would be entitled to a separate bargaining unit under the National Labor Relations Act, a separate unit under the Act

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<sup>9</sup>*Carthage Cent. Sch. Dist.*, 16 PERB ¶4055, *aff'd*, 16 PERB ¶3085 (1983).

<sup>10</sup>See *Lindenhurst Union Free Sch. Dist.*, 25 PERB ¶4038 (1992), *aff'd*, 26 PERB ¶3017 (1993). See also *Town of Brookhaven*, 33 PERB ¶4035 (2000); *Northport-East Northport Union Free Sch. Dist.*, 33 PERB ¶4014 (2000); *Seaford Union Free Sch. Dist.*, 31 PERB ¶4002 (1998).

would only be warranted if there were a demonstrated conflict of interest.<sup>11</sup> We do not find, on this record, evidence of such a conflict of interest.

Finally, RTS argues that Sabernick should be excluded from any bargaining unit because he is a supervisor. We have previously held:

There is no prohibition against mixed units of supervisors and rank-and file employees. . . . It is the nature and level of supervisory functions which have always determined whether a mixed unit of supervisors and subordinates is most appropriate or a unit of supervisors separate from the rank-and-file is most appropriate.<sup>12</sup>

Here, at best, Sabernick, given his seniority, may guide the work of the other Farebox Technicians. He has been called upon from time to time to offer input and to fill in for an absent supervisor. There is, however, no record evidence that he does anything more than make recommendations to his co-workers about their work and, on occasion, to his superiors, who are the decision-makers. Such responsibilities do not warrant his exclusion from the bargaining unit.<sup>13</sup>

We find, therefore, that the Farebox Technicians share a sufficient community of interest with employees in the Union's bargaining unit to warrant placement in that unit.

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<sup>11</sup>We have removed employees from a bargaining unit because of their performance of a full range of law enforcement functions. See *County of Erie and Sheriff of Erie County*, 29 PERB ¶3031 (1996) (fragmenting deputy sheriffs from an existing unit that included correction officers and civilian personnel); *County of Rockland*, 32 PERB ¶3074 (1999) (fragmenting investigative and narcotics aides working as undercover narcotics agents for the County's District Attorney's Office from an inclusive unit of County employees).

<sup>12</sup>*County of Genesee*, 29 PERB ¶3068, at 3159 (1996).

<sup>13</sup>See *County of Steuben*, 34 PERB ¶3023 (2001).

Based upon the foregoing, we deny the exceptions of RTS and affirm the decision of the ALJ.

Accordingly, the petition is granted and the title of Farebox Technician is hereby placed in the unit represented by the Union. SO ORDERED.

DATED: August 19, 2002  
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

**WILLIAM T. BRUNS,**

Charging Party,

- and -

**CASE NO. U-13349**

**COUNCIL 82, AFSCME, AFL-CIO AND  
STATE OF NEW YORK (DIVISION OF PAROLE),**

Respondents.

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**KATHLEEN C. BRUNS, for Charging Party**

**CHRISTOPHER H. GARDNER, GENERAL COUNSEL (MARIA B. MORRIS of  
counsel), for Council 82, AFSCME, AFL-CIO**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE of  
counsel), for State of New York (Division of Parole)**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by William T. Bruns to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge he filed alleging that the State of New York (Division of Parole) (State) and Council 82, AFSCME, AFL-CIO (Council 82) violated, respectively, §§209-a.1(a) and (c) and §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by entering into an agreement at arbitration, which settled a grievance Bruns had filed concerning his claim to overtime pay.

Bruns' charge had been limited by the hearing ALJ to three allegations:

1. The settlement agreement between the State and Council 82 regarding Bruns' claim for overtime pay;
2. The failure of Council 82 to process Bruns' grievance regarding payment of a uniform allowance in a timely manner as required under the collective bargaining agreement;
3. The failure of Council 82 to process Bruns' grievance for longevity pay.

At the subsequent hearing in this matter, Bruns withdrew the allegations that his uniform allowance grievance had not been processed in a timely manner and that his longevity pay grievance had not been processed. At the close of Bruns' direct case, both Council 82 and the State moved to dismiss the remaining aspect of the charge for failure to present a *prima facie* case. The ALJ reserved judgment on the motions and then closed the record.

In his decision, the ALJ confirmed his earlier ruling limiting the charge to the three allegations.<sup>1</sup> The decision then dealt with the only remaining issue open at the close of Bruns' case: the agreement entered into at arbitration by the State and Council 82 in settlement of Bruns' overtime grievance. Giving Bruns every reasonable inference to be drawn from the evidence and testimony made part of the record during Bruns' direct case, the ALJ found that there was no evidence of any improper motivation on the part of the State in entering into the agreement in settlement of Bruns' grievance and that there was no evidence of any disparate treatment of Bruns in the settlement of his grievance.

As to Council 82, the ALJ determined that it had not breached its duty of fair representation to Bruns in its processing of his grievance and in reaching the settlement agreement with the State.

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<sup>1</sup>35 PERB ¶4538 (2002).

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

### PROCEDURAL MATTERS

This charge has been twice before us on interlocutory appeals from interim rulings of the Assistant Director of Public Employment Practices and Representation (Assistant Director) or an ALJ and it has been the basis of rulings in other improper practice charges filed by Bruns relating to the at-issue allegations. In 1993, Bruns requested that the processing of this charge be held in abeyance pending a decision in an earlier charge he had filed (U-12252). We denied his interlocutory appeal of the Assistant Director's determination that the instant matter would not be held pending the outcome of Bruns' other litigation.<sup>2</sup> Despite our earlier decision, the matter was apparently thereafter put on hold pending our determination in U-12252.<sup>3</sup> In the interim, we dismissed an additional improper practice charge filed by Bruns (U-14203), noting:

Other allegations relating to the handling of his Fair Labor Standards Act (FLSA) overtime claim by Council 82's retained counsel are the basis of his charge in Case No. U-13349. As these claims are the basis of improper practice

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<sup>2</sup>*State of New York (Div. of Parole) and Council 82, AFSCME, 26 PERB ¶3028 (1993).*

<sup>3</sup>*State of New York (Div. of Parole) and Security and Law Enforcement, Council 82, AFSCME, AFL-CIO, 27 PERB ¶3016, at 3040-41 (1994), where we noted, at n.13, that:*

...Bruns filed an improper practice charge on March 23, 1992 (Case No. U-13349) alleging that the State and Council 82 had improperly settled this overtime grievance and all related claims at an arbitration held on February 19, 1992. That stipulation of settlement provides that Bruns receive \$4,878.28 as final payment for all compensable hours worked by him in 1988 and specifically references the monies paid and later disallowed by Parole on December 19, 1990. Case No. U-13349 is being held pending the decision in this case.

charges already before PERB, they too must be dismissed. (footnote omitted) The propriety of Council 82's actions in these respects will be adjudicated in the context of the already pending charges. A second charge premised on the same grounds is unnecessary and inappropriate.<sup>4</sup>

Finally, we denied Bruns' interlocutory appeal of the ALJ's decision to limit the hearing on the instant charge to the three allegations set forth, *supra*.<sup>5</sup>

The Assistant Director's initial determination that this charge would not be held in abeyance pending the processing of U-12252 is not before us and we, therefore, do not reach it. However, Bruns has excepted to the ALJ's determination that the hearing would be limited to the three allegations set forth, *supra*. We hereby deny Bruns' exceptions to the ALJ's rulings in that regard. The other allegations set forth in Bruns' amended improper practice charge, received May 15, 1992, allege contract violations by the State or violations by both the State and Council 82 of the Fair Labor Standards Act (FLSA), a federal statute, over which PERB has no jurisdiction. As to the allegations in the improper practice charge relating to the handling of Bruns' FLSA claim by Council 82's attorney and the deduction by the State of \$2,692.29 from Bruns for overpayment of overtime, those incidents occurred well before four months prior to the filing of the instant charge and are, therefore, untimely.<sup>6</sup>

Bruns further argues, essentially, that our decision in U-14203 was a directive that all the allegations in the instant charge were to be heard by the ALJ. Our decision in U-14203 merely indicated that the duplicative allegations in U-14203 would be

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<sup>4</sup>*State of New York (GOER) and Council 82, AFSCMCE, AFL-CIO*, 26 PERB ¶3058, at 3102 (1993).

<sup>5</sup>*Council 82, AFSCME and State of New York (GOER and Div. of Parole and Div. of Budget)*, 32 PERB ¶3040 (1999).

<sup>6</sup>Rules of Procedure (Rules), §204.1(a)(1).

dismissed because they would be "adjudicated in the context" of U-13349. We made no finding as to the merit of those allegations nor did we make a finding as to the procedural aspects of the processing of U-13349, we only determined that the allegations that were made first in U-13349 would be decided in that case. Bruns has no right under the Act or the Rules to repeat allegations in subsequent improper practice charges to seek different or additional rulings.<sup>7</sup> Our decision in U-14203 provides Bruns with no guarantees as to the ultimate treatment of his numerous allegations, only that each allegation would be considered and addressed in the processing of the charge, even if the conclusion reached by the Director of Public Employment Practices and Representation (Director), Assistant Director or assigned ALJ is that certain allegations are beyond our jurisdiction, are untimely or are without merit.

Bruns' remaining procedural exceptions deal with rulings made by the ALJ, both declining to issue some of the subpoenas requested by Bruns prior to the hearing and by refusing to accept into evidence certain documents offered by Bruns at the hearing. Bruns argues that the testimony sought to be elicited from the witnesses to be subpoenaed was relevant to his case. We find no basis in the record to disturb the ALJ's declination to issue the requested subpoenas. Bruns also argues that he has been held to a higher standard of relevant evidence than is warranted by our Rules or by the Federal Rules of Evidence. The Federal Rules of Evidence are not applicable to our proceedings. While we do not require compliance with the technical rules of evidence in our proceedings,<sup>8</sup> we rely upon New York precedent to answer questions

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<sup>7</sup>*Local 589, Int'l Ass'n of Fire Fighters (AFL-CIO)*, 15 PERB ¶4568, *aff'd on other grounds*, 15 PERB ¶3116 (1982), (subsequent case history omitted).

<sup>8</sup>Rules, §212.3(e).

with respect to evidence. Bruns argues that the several exhibits declined to be accepted into evidence by the ALJ either on relevance or foundation grounds were improperly excluded. Even though the technical rules of evidence do not apply to our proceedings, we do hold the parties to the accepted standard for relevance.<sup>9</sup> Administrative decisions must be based upon substantial evidence,<sup>10</sup> which, in New York, is evidence which is both relevant and probative.<sup>11</sup> Our review of the record provides no basis to reverse the ALJ's rulings as to the documents in issue.

Council 82 argues that Bruns' exceptions to the ALJ's decision do not meet the requirements of §213.2(b) of the Rules in that there are no references to the transcript and that the exceptions are replete with conclusory statements. Our Rules require specificity in the filing of exceptions to facilitate our review of the arguments made in the exceptions, and to ensure that exceptions are supported by factual references to the transcript or exhibits or to legal precedents. We will consider the exceptions filed by Bruns to the extent that review of the voluminous record without page reference is possible and to the extent that Federal case law, which forms the legal basis of most of Bruns' legal arguments, is relevant and applicable to decisions issued by this Board.<sup>12</sup> It is not our responsibility, nor the responsibility of the other parties to this action, to

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<sup>9</sup>That which is logically probative of some matter to be proved is relevant. *Fisch on New York Evidence*, §3, at p. 3 (Edith L. Fisch, ed., 2<sup>nd</sup> ed. 2977)

<sup>10</sup>*300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY2d 176 (1978); *Matter of Stork Rest. v. Boland*, 282 NY 256 (1940).

<sup>11</sup>*Consolidated Edison Co. of New York v. NLRB*, 305 US 197 (1938); *Matter of Ralph v. Board of Estimate of the City of New York et al*, 306 NY 447 (1954).

<sup>12</sup>See *City of New Rochelle*, 18 PERB ¶3021 (1985).

ascertain what, if any, record basis exists for Bruns' arguments, when Bruns has made his references to the record general, conclusory and without page number.

Finally, both the State and Council 82 argue in their responses to Bruns' exceptions that Bruns has attempted to introduce new evidence and raise new arguments in the exceptions, which this Board may not consider. We will not consider the new evidence offered by Bruns as part of the exceptions.<sup>13</sup>

### FACTS

The relevant facts are set forth in detail in the ALJ's decision and are repeated here only as they relate to the exceptions filed by Bruns.

Bruns is a Warrant and Transfer Officer (WTO) employed by the State in the Division of Parole (Parole). He transports parole violators and prisoners both within New York and from other states. At all times relevant to this charge, Bruns was a member of the unit represented by Council 82.

Effective July 27, 1986, WTO's became eligible for payment of retroactive and prospective overtime compensation as a result of the State's compliance with the FLSA. Bruns submitted his overtime claims but thereafter filed a grievance on March 2, 1989, alleging that he had not been paid overtime owed him for the period July 7, 1988 through October 26, 1988.<sup>14</sup> Parole informed Bruns and Council 82 on April 24, 1989,

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<sup>13</sup>See, *Smithtown Fire Dist.*, 28 PERB ¶3060 (1995); *Town of Greece*, 26 PERB ¶3004 (1993); *Civil Service Employees Ass'n, Inc. and State of New York (Rockland Psychiatric Center), (Reese)*, 25 PERB ¶3012 (1992); *Manhasset Union Free Sch. Dist.*, 24 PERB ¶3003 (1991); *Margolin v. Newman*, 130 AD2d 312, 20 PERB ¶7018 (3d Dep't 1987), *appeal dismissed*, 71 NY2d 844, 21 PERB ¶7005 (1988).

<sup>14</sup>Bruns filed an additional overtime grievance and, subsequently, Council 82 also filed a grievance on Bruns' behalf relating to overtime compensation for the period July 7, 1988 through December 31, 1988. See *State of New York (Div. of Parole) and Security and Law Enforcement, Council 82, AFSCME, AFL-CIO*, 27 PERB ¶3016 (1994).

that the Office of the State Comptroller (OSC), had suspended payment of all WTO overtime claims pending a review by the OSC Management Audit staff. All claims had to be certified and, with the assistance of Council 82's attorney, some of Bruns' claims were paid.

Eventually, the grievance seeking the payment of the balance of the overtime compensation that Bruns claimed was scheduled for arbitration.<sup>15</sup> Council 82's attorney represented Bruns and Council 82 at the arbitration hearing. After several days of hearing and the presentation of Bruns' case, the State made a settlement offer to Council 82. The terms of the settlement were payment of the entire number of hours in dispute, but did not include interest, liquidated damages and attorney's fees, which Bruns had insisted upon. The arbitrator advised the State and Council 82 that he did not believe he had the authority to award liquidated damages and attorney fees and that if he ordered interest, it would not be for the period prior to September 1990. Over Bruns' objection, Council 82 signed the settlement agreement.

#### DISCUSSION

The ALJ correctly stated the standard which must be applied when ruling on a motion to dismiss at the close of a charging party's case. The ALJ "must assume the truth of all of charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."<sup>16</sup>

The proof required in a §§209-a.1(a) and (c) case is that the charging party establish that he or she was engaged in a protected activity, the employer knew of the protected activity and that the complained of employer's action would not have been

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<sup>15</sup>The grievance concerned overtime worked by Bruns from July 7, 1988 through December 31, 1988, including 101 hours of overtime initially disallowed by the State and 127.5 hours of overtime retroactively disallowed and offset by the State. At issue was also 18.5 hours of overtime that Bruns had adjusted at the State's direction.

<sup>16</sup>*County of Nassau (Police Dep't)*, 17 PERB ¶3013, at 3030 (1984).

taken but for the exercise of protected rights by the charging party.<sup>17</sup> The proof required in a duty of fair representation case, alleging a violation of §209-a.2(c) of the Act, is that the union's actions were deliberately invidious, arbitrary or taken in bad faith.<sup>18</sup>

The ALJ determined that, giving Bruns every reasonable inference to be drawn from the record before him, the actions of the State and Council 82 in reaching a settlement of the grievance of Bruns' overtime claims did not violate the Act. We agree.

There is no evidence that the State settled the grievance for any improper reason or that its proposed settlement agreement discriminated against Bruns or treated him in a disparate manner from other, similarly situated, WTOs. The attorney who represented the State at the arbitration had no previous involvement with Bruns and there is no evidence that anyone from Parole was involved in initiating the settlement. Additionally, an action taken by an employer to resolve or minimize the impact of a grievance, absent improper motivation, does not violate the Act.<sup>19</sup>

As to Council 82, "[o]ur decisions have always recognized that a union is and must be afforded a wide range of reasonableness in making decisions associated with the processing of a grievance, including how far it will proceed with a particular grievance or case (citation omitted)."<sup>20</sup> We have been "loath to substitute our judgment for that of an employee organization" in determining the strategy to be used in an arbitration hearing or the decision to settle a grievance at any step of the contractual

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<sup>17</sup>*State of New York*, 33 PERB ¶3046 (2000).

<sup>18</sup>*Civil Service Employees Ass'n Local 1000 v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

<sup>19</sup>*State of New York (Dep't of Soc. Serv.)*, 26 PERB ¶3035 (1993); *Savona Cent. Sch. Dist.*, 20 PERB ¶3055 (1987).

<sup>20</sup>*Transport Workers Union of Greater New York and NYCTA (Amaker)*, 32 PERB ¶3004, at 3009 (1999).

grievance procedure.<sup>21</sup> Absent evidence that the action taken by the union is arbitrary, discriminatory or taken in bad faith, no breach of the duty will be found.

The evidence in the record establishes only that Bruns was dissatisfied with Council 82's presentation of his case at arbitration and with the terms of the agreement that ultimately settled his grievance. Dissatisfaction with the union's handling of a grievance does not establish a violation of §209-a.2(c) of the Act.<sup>22</sup> Even were we to conclude, as urged by Bruns, that Council 82 made errors in its calculations of the amount owed to Bruns when it agreed with the figures offered by the State, such an error would constitute, at best, mere negligence. Disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the representation duty. Even negligence or an error in judgment does not establish such a violation.<sup>23</sup> The other numerous, self-aggrandizing, and, at times, circuitous arguments and allegations made in Bruns' exceptions are beyond the scope of the improper practice charge as processed.

Based on our review of the record and our consideration of the parties' arguments, we deny the exceptions filed by Bruns and affirm the decision of the ALJ.

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<sup>21</sup>*Public Employees Federation (Levy)*, 33 PERB ¶¶3061, at 3179-80 (2000).

<sup>22</sup>*Local 1635, District Council 37, AFSCME, AFL-CIO*, 25 PERB ¶¶3008 (1992).

<sup>23</sup>*Civil Service Employees' Ass'n (Kandel)*, 13 PERB ¶¶3049 (1980).

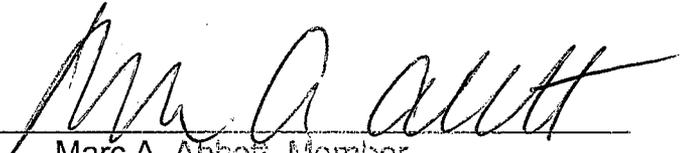
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is,  
dismissed in its entirety.

DATED: August 19, 2002  
Albany, New York



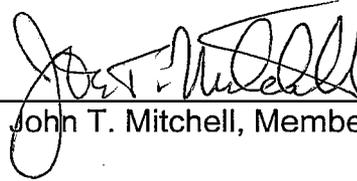
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Michael R. Cuevas, Chairman



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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

**POLICE BENEVOLENT ASSOCIATION OF  
NEW YORK STATE TROOPERS, INC.,**

Charging Party,

**CASE NO. U-21048**

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- and -

**STATE OF NEW YORK (DIVISION OF STATE  
POLICE),**

Respondent.

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**GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for  
Charging Party**

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

**BOARD DECISION AND ORDER**

This case comes to us on an exception filed by the Police Benevolent Association of New York State Troopers, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge on a motion to dismiss at the close of its case. The charge alleged *inter alia*, that the State of New York (Division of State Police) (State) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the interpretation of "probation" as used in disciplinary settlements. According to the PBA, the State's interpretation may result in a trooper's termination from employment without a hearing.

**EXCEPTIONS**

The PBA excepts to the ALJ's decision, alleging that the ALJ erred by requiring the PBA to show a change in a prior practice in order to sustain its burden of proof.

The State responded that the ALJ's decision was correct. We agree.

### FACTS

The facts, based upon the parties' stipulated record, are fully set forth in the ALJ's decision.<sup>1</sup> We will review only the facts relevant to the PBA's exceptions.

The improper practice charge alleged that State police officers who complete their probationary period achieve a property right in their employment which cannot be taken away without a hearing. Furthermore, under Rule 3 of the Rules and Regulations of the Division of State Police (Division), officers who obtain the permanent rank of trooper, sergeant, lieutenant and major have the right to a due process hearing. The charge further alleges that:

[I]t has been a long-standing practice that members who achieve permanent employment status and accept Division level probation as a penalty do not waive the rights and protections afforded under Executive Law §215(3) and Rule 3, including but not limited to, their right to a hearing.

The State submitted an answer which generally denied the material allegations of the charge and interposed certain defenses, including an averment that there had been no change in a term or condition of employment.

A hearing was held on March 7, 2002,<sup>2</sup> at which time the parties stipulated to the documents to be included in the record. The PBA then rested without calling any witnesses, and relied upon the documentary record in evidence. The State then moved to dismiss the PBA's charge on the ground that the PBA failed to prove a *prima facie* case. The ALJ reserved and adjourned the hearing in order to permit the parties to

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<sup>1</sup>35 PERB ¶4546 (2002).

<sup>2</sup>The ALJ that noted the passage of time between the filing of the charge and the hearing resulted from the parties' attempt to resolve the dispute.

brief the motion. Thereafter, the ALJ granted the State's motion and dismissed the charge.

The PBA alleges in its exceptions that the ALJ erred when he determined that it failed to meet its burden of proof when it did not establish a change in a prior practice. The PBA argues that, where no prior practice existed, its burden is met by establishing the new practice together with proof that the new practice is itself a mandatory subject of bargaining. We disagree.

The standard of proof with which to judge the merits of a motion to dismiss is long established.<sup>3</sup> The question thus presented is whether the evidence produced by the charging party, including all reasonable inferences to be drawn therefrom, is sufficient in the absence of rebuttal evidence. Our recent decision in *State of New York (PEF)*<sup>4</sup> dealt with a similar situation in which the charging party stipulated to the documentary record before the ALJ and rested without calling any witnesses. The State moved to dismiss the charge at the close of the charging party's case. The ALJ granted the State's motion to dismiss based upon the charging party's failure to prove a change in practice. We held that the charging party has the burden, in an improper practice charge alleging a change in past practice, to demonstrate by a preponderance of the evidence that a change in a work rule has occurred, not merely to establish the current practice.

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<sup>3</sup>*County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).

<sup>4</sup>33 PERB ¶3024 (2000), *conf'd sub nom, Benson v. Cuevas et al*, 288 AD2d 542 (3d Dep't 2001). See also *County of Dutchess*, 32 PERB ¶3047, *conf'd sub nom. Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO v. Cuevas et al*, 274 AD2d 930, 33 PERB ¶7012 (3d Dep't, 2000); *Town of Ramapo*, 33 PERB ¶3021 (2000).

We note that among the documents made part of the stipulated record is a letter dated June 3, 1999, to the PBA's counsel from the State Police Office of Counsel that unequivocally set forth the position of the State:

This letter reiterates the long standing position that the Division of State Police can, and will, in the appropriate case terminate the employment of a member who has agreed to be restored to probation to satisfy a personnel complaint . . . .

The PBA attorney responded on June 17, 1999 controverting the position taken by the Division. Since the PBA has alleged a change in practice,<sup>5</sup> it must, therefore, demonstrate the conditions that existed prior to the implementation of the alleged change. It must be established that the practice was unequivocal, had been in existence for a significant period of time, and that unit employees could reasonably expect such practice to continue.<sup>6</sup> Under the "best evidence rule", this is a question of fact which exists independent of the stipulated documents from counsel.<sup>7</sup> However, the stipulated record in this case was devoid of any evidence that demonstrated the working conditions that existed prior to the implementation of the alleged new work rule.

The record, up to the point at which the motion to dismiss was made, merely contained the self-serving declarations made by PBA's counsel which is not material to the inquiry. The alleged practice was still in dispute at the close of the PBA's direct case as evidenced by the letter from Division's counsel made a part of the stipulated record.

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<sup>5</sup>ALJ Exhibit #1.

<sup>6</sup>See *County of Nassau*, 24 PERB ¶3029 (1991).

<sup>7</sup>*Richardson on Evidence*, §572, at p. 581-582 (Jerome Prince, ed., 10<sup>th</sup> ed. 1973).

Since we are constrained by our precedents to consider only the charging party's direct case when a motion to dismiss has been made,<sup>8</sup> we must dismiss the charge on the record before us. The PBA pled certain affirmative facts which it failed to prove in its direct case through the use of independent evidence, and which were controverted by the State.<sup>9</sup>

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

IT IS, THEREFORE, ORDERED that the charge herein be, and it hereby is, dismissed in its entirety.

DATED: August 19, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>8</sup>County of Nassau (Police Dep't), *supra*, note 3.

<sup>9</sup>See *City of Yonkers*, 10 PERB ¶3020 (1977).

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

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In the Matter of

**MARK L. NAGY, M.D.,**

Charging Party,

- and -

**CASE NO. U-22042**

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

Respondent.

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**SANDERS & SANDERS (JANET M. GUNNER of counsel), for Charging Party**

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

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Mark L. Nagy, M.D., to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge, which, as amended, alleged that the State of New York (State University of New York at Buffalo) (State) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it terminated him from his position as Clinical Assistant Professor of Otolaryngology at the State University of New York at Buffalo School of Medicine and Biomedical Sciences (SUNYAB) because of his exercise of protected rights.<sup>1</sup>

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<sup>1</sup>Nagy's charge also contained allegations that United University Professions, Inc. (UUP), which represents a unit of professional university employees of the State, violated §209-a.2(c) of the Act by failing to represent him regarding his termination from employment. Those allegations were later withdrawn by Nagy.

At the hearing in this matter, after Nagy had rested, the State made a motion to dismiss the charge, arguing that Nagy failed to establish that he was a public employee within the meaning of the Act, that he failed to establish that he had been engaged in protected activity and that he failed to establish that, but for his protected activities, his appointment to the faculty would have been renewed. The ALJ closed the record and accepted briefs from both parties on the State's motion.

In deciding the motion, the ALJ did not address Nagy's public employee status, but, giving Nagy the benefit of all reasonable inferences that could be drawn from the evidence he presented,<sup>2</sup> he found that Nagy had not established a nexus between the filing of his grievance and his non-renewal.

#### EXCEPTIONS

Nagy excepts to the ALJ's decision, arguing that the record establishes that the decision to not renew his appointment was improperly motivated. The State supports the ALJ's decision.<sup>3</sup>

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's dismissal of Nagy's improper practice charge, but on different grounds.

#### FACTS

The facts are set forth in detail in the ALJ's decision and are repeated here only as relevant to the issues before us.

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<sup>2</sup>*County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).

<sup>3</sup>The State reserved the right to cross-except to the ALJ's determination that, for the purposes of deciding the motion to dismiss, Nagy is a public employee, if the Board should reverse the ALJ's dismissal for failure to prove a *prima facie* case.

Nagy was appointed on July 1, 1997, to an unsalaried, full-time position as Clinical Assistant Professor in the Department of Otolaryngology at SUNYAB. SUNYAB, through its Board of Trustees, has promulgated certain policies which constitute rules of the Trustees for the government of the SUNY. The Trustees developed a plan under which clinical practice income was to be managed, which is set forth in Article XVI of the policies.<sup>4</sup> As a faculty member at SUNYAB, Nagy was obliged to participate in the plan under the terms of Article XVI. Nagy's sole compensation was from the clinical practice group in which he participated. He has never received a salary from SUNYAB and he has never paid dues or agency fees to UUP.

In April 1998, Nagy was advised by SUNYAB that he and others in his group were not in compliance with the plan. Nagy opposed the requirement of continued participation in the plan as a protest to what he saw as inequities in the plan. In October 1998, Nagy withdrew from the plan. SUNYAB then changed his faculty status from unsalaried, geographic full-time faculty to volunteer, informing Nagy that, as he was no longer participating in the plan, he was no longer a faculty member. UUP thereafter filed a grievance on behalf of Nagy and other salaried physicians.<sup>5</sup>

Nagy was reinstated to his unsalaried, geographic full-time faculty position in June 1999, based upon SUNYAB's presumption that Nagy was now in compliance with the plan. Nagy thereafter decided not to participate in the plan. He was informed on

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<sup>4</sup>See *State of New York (State University of New York-SUNY at Buffalo) (Egan)*, 35 PERB ¶13019 (June 12, 2002), in which the practice plans are discussed in detail.

<sup>5</sup>The grievance was denied at step 1 based upon a determination that, since the doctors had been reinstated, the issue was moot.

June 16, 2000, that he would not be renewed because of his noncompliance with the plan requirements.

### DISCUSSION

Consistent with our decision in *County of Nassau (Police Department)*, *supra*, the ALJ decided the motion to dismiss by giving Nagy the benefit of every reasonable inference that could be drawn from the evidence in the record at the close of his case. He assumed for the purposes of his decision, that Nagy was a public employee within the meaning of §201.7(a) of the Act.

The Act applies to "public employees," who are defined to include . . . any person holding a position by appointment or employment in the service of a public employer . . . .<sup>6</sup> Our jurisdiction is limited to cases involving public employees.<sup>7</sup> Thus, the ALJ should have considered Nagy's employment status first so as to determine whether PERB has jurisdiction over the instant charge.

This Board has not had the opportunity to address this particular issue before. The Act defines "public employee" generally, with no reference to compensation. But the Act "provides a working definition, not an exact equation, for ascertaining who is a 'public employee'. In deciding whether particular persons or classes of individuals are

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<sup>6</sup>Act, §201.7(a). See also *City of New York v. District Council 37, AFSCME et al*, 33 PERB ¶7503 (Sup. Ct. New York County 2000).

<sup>7</sup>*N.Y. Public Library v. PERB et al*, 45 AD2d 271, *aff'd* 37 NY2d 752 (1975); *New York Institute for the Education of the Blind v. Fed of Teachers' et al*, 83 AD2d 390, *aff'd* 57 NY2d 982 (1982) (subsequent history omitted).

encompassed within the definition, traditional concepts of employee status deserve consideration as do the realities of the working relationship.”<sup>8</sup>

Traditional concepts of employment recognize that the receipt of compensation, in some form, is required in defining a person as an “employee”.<sup>9</sup> In an Opinion of Counsel,<sup>10</sup> it was determined that unpaid members of an auxiliary police force were not public employees within the meaning of the Act because they did not receive compensation from the municipality, even though they worked a mandated number of hours per day, passed required training and received uniforms from the municipality.

Several years later the rationale articulated by PERB’s Counsel was adopted by the Office of Collective Bargaining of the City of New York (OCB) and confirmed by Supreme Court, New York County, in a case where the court affirmed OCB’s determination that unsalaried podiatry residents were not “public employees” within its jurisdiction.<sup>11</sup> We agree and here hold that Nagy is not a public employee within the meaning of the Act.<sup>12</sup>

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<sup>8</sup>*State of New York (Dep’t of Corr. Serv.)*, 5 PERB ¶4040, at 4070 (1972), *aff’d* 6 PERB ¶3033 (1973), *conf’d*, *Prisoners’ Labor Union at Bedford Hills v. PERB*, 44 AD2d 707, 7 PERB ¶7006 (2d Dep’t 1974), *motion for leave to appeal denied*, 35 NY2d 641 (1974).

<sup>9</sup>*See Black’s Law Dictionary* (6<sup>th</sup> ed. 1990) which defines employee as “one who works for an employer; a person working for salary or wages.” *See also* Gen. Mun. L., §682 which defines “public employee” as “any person directly employed and compensated by a government . . . .”

<sup>10</sup>8 PERB ¶5009 (1975).

<sup>11</sup>*New York City Office of Collective Bargaining*, 13 PERB ¶7522 (Sup. Ct. New York County 1980).

<sup>12</sup>That Nagy sought a salary from the State, in addition to the compensation he received from the plan, and that there were efforts on the part of both SUNYAB and UUP to obtain State compensation for him is not dispositive. His appointment was to an unsalaried position and it is to that position that he lays claim in this matter. He has never received compensation from the State.

As Nagy is not a public employee, we cannot exercise jurisdiction over this improper practice charge. We, therefore, do not reach the merits of his improper practice charge or the ALJ's decision on the merits.

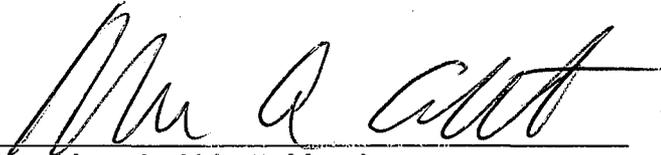
Based on the foregoing, we deny Nagy's exceptions and affirm the ALJ's dismissal of the charge, but on the grounds set forth, *supra*. We grant the State's motion to dismiss the charge for lack of jurisdiction.

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

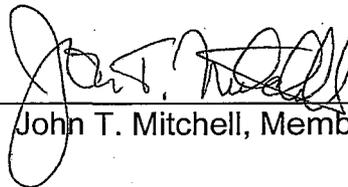
DATED: August 19, 2002  
Albany, New York



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

**WESTHAMPTON BEACH POLICE BENEVOLENT  
ASSOCIATION,**

Charging Party,

- and -

**CASE NO. U-22411**

**INCORPORATED VILLAGE OF WESTHAMPTON  
BEACH,**

Respondent.

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**ALLEN M. KRANZ, ESQ., for Charging Party**

**INGERMAN SMITH, LLP, (ANNA M. SCRICCA, ESQ. of counsel), for  
Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on the exceptions of the Westhampton Beach Police Benevolent Association (Association) and the cross-exceptions of the Incorporated Village of Westhampton Beach (Village) to a decision of an Administrative Law Judge (ALJ) dismissing the improper practice charge filed by the Association, which alleged that the Village had violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it abolished the position of lieutenant held by David Doyle and demoted him to sergeant because of the exercise of protected rights.

The ALJ dismissed the charge on a finding that, while Doyle was engaged in protected activities and the Village was aware of his activities, the Village had taken the

complained of action for legitimate business reasons and not because of anti-union animus.

### EXCEPTIONS

The Association argues in its exceptions that the ALJ erred in finding that Doyle's objection to the change in his duties was not a protected activity within the meaning of the Act, in limiting the proof of protected activities to those allegedly engaged in by Doyle prior to the issuance of the memorandum of the chief of police to the Village Board of Trustees (Village Board) recommending the abolition of the lieutenant's position and Doyle's demotion to sergeant, and in finding that the reasons advanced by the Village were not pre-textual.

The Village cross-excepts to the ALJ's decision, arguing that the ALJ erred in finding that Doyle was engaged in any protected activity prior to the date of the chief's memorandum. The Village's response otherwise supports the decision of the ALJ.

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

### FACTS

Doyle was a lieutenant on the Village's police force from 1994 to November 13, 2000, at which time, pursuant to a resolution of the Village Board, the lieutenant position was abolished and Doyle was demoted to sergeant, with a concomitant reduction in salary. Both the lieutenant and sergeant titles are within the bargaining unit represented by the Association. Doyle was Association vice-president in 1987, the only office he has held in that organization.

Raymond Dean became a sergeant in the Village's Police Department on April 6, 1999, having transferred from the police force of the Town of Southampton. By Village Board resolution dated May 6, 1999, Dean was appointed acting provisional chief of police upon the retirement of the prior police chief. On November 8, 1999, Dean was provisionally appointed acting police chief and, on December 28, 1999, he became chief of police.

Doyle had protested Dean's transfer to the department to the prior chief of police, but there is no evidence that Doyle's protest was made known to either Dean, the Mayor or the Village Board. Shortly after his appointment as provisional acting chief of police, Dean appointed two Village police officers to sergeant in May 1999 and assigned to them some duties previously performed by Doyle, despite Doyle's complaints to Dean about the reassignment of his duties.

In July 1999, Doyle wrote Dean a department memorandum advising him of what he believed was an error in purchasing a police vehicle with blue, as well as red, emergency lights, expressing his opinion that such lights on a police vehicle were not permitted by the Vehicle and Traffic Law. Dean recalled a conversation with Doyle about the lights, but not receiving a memorandum.

After Dean's appointment as provisional chief of police in November 1999, Doyle spoke with the Mayor and protested the scheduling of a promotional test for chief of police which excluded Doyle. The Mayor told him he was not qualified for the position, although Doyle testified that the Mayor also told him that he was not liked by the Village Board and that if he continued to push, consideration would be given to abolishing the lieutenant's position. Doyle apparently spoke with officials of the Association before and

after his conversation with the Mayor. The Association did not accompany him to his meeting and did not take any action, save the filing of the instant charge, after the meeting.

In July 2000, an interest arbitration award was issued, setting the terms of the Village-Association contract for the years 1998 through 2002, the term of the award having been agreed upon by the parties. The interest arbitration award, *inter alia*, lowered the starting salary of unit employees, granted a salary increase, gave the Village the right to set a new duty chart with eight-hour shifts instead of ten-hour shifts and a squad system. In response to the arbitration award, Dean was asked by the Village Board to review the department and make recommendations as to how the cost of the award could be borne by the Village and how the shift and scheduling changes could be accomplished.

On July 19, 2000, Dean sent a memorandum to the Mayor, recommending that the new duty chart commence on October 1, 2000, that three additional police officers be hired, and that the number of sergeants be increased from three to five. Dean also recommended that the position of lieutenant be abolished and Doyle be demoted to sergeant. Dean explained that Doyle was effectively performing the duties of a road sergeant and had no management responsibilities. He further opined that the money saved in salary could be applied to the costs of the arbitration award and, furthermore, that two other sergeants had complained that the lieutenant was performing the duties of sergeant at a higher salary.

Doyle was called back to duty from a vacation day on September 17, 2000. He filed a grievance on September 21, 2000. Doyle's grievance, and five others, were

thereafter resolved by the Association and the Village. Doyle was credited for the day. In October 2000, Doyle sent Dean a memorandum regarding the staffing for the Halloween parade, pointing out what he believed were safety concerns raised by the manner in which Dean staffed the parade.

On November 13, 2000, the Village Board passed a resolution abolishing the position of lieutenant and returning Doyle to the sergeant's position, with a loss of \$6800 in salary. Doyle testified that both Dean and the Mayor told him his position was abolished due to fiscal concerns.

#### DISCUSSION

The ALJ correctly noted that the proof required to establish a violation of §§209-a.1(a) and (c) of the Act is that the charging party was engaged in a protected activity, the employer was aware of the protected activity and that the employer acted because of those activities and without legitimate business reasons for its action.<sup>1</sup>

The ALJ found that Doyle was engaged in protected activities and that Dean was aware of his activities, but dismissed the charge on a finding that Dean and the Village acted pursuant to legitimate business reasons. The ALJ found that the operative date of the Village's action was Dean's memorandum of July 19, 2000, recommending that the lieutenant position be abolished and that Doyle be demoted to sergeant. The evidence shows that although the Village Board did not act until November 13, 2000, its action in abolishing the lieutenant position and demoting Doyle was based solely on Dean's

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<sup>1</sup>See, *State of New York (State Univ. of New York at Buffalo)*, 33 PERB ¶3020 (2000); *City of Salamanca*, 18 PERB ¶3012 (1985).

memorandum. The ALJ, therefore, considered only those activities that occurred prior to the date of Dean's memorandum.

Of the activities during that time frame - Doyle's conversation with the prior chief protesting Dean's transfer to the department, Doyle's memorandum to Dean about the blue lights on the new police car and Doyle's meeting with the Mayor, complaining about there being no open competitive examination for the position of chief of police - the ALJ found all to be protected within the meaning of the Act. He found, however, that Dean was only aware of the problem Doyle had with the police car lights and that Dean had not recommended the abolition of the lieutenant's position because of Doyle's memorandum.

The Act affords certain rights and protections to public employees. These are specified in §§202 and 203 of the Act and comprise the right of employees to organize, and to be represented in the negotiation of agreements and the administration of grievances arising thereunder. Violation of these rights by public employers constitutes violations of §§209-a.1(a), (b) and (c) of the Act.<sup>2</sup> Actions taken by an employee individually that are not prompted or encouraged by the employee organization or which are not taken pursuant to established employee organization policy or the collective bargaining agreement, do not constitute activity protected by the Act.<sup>3</sup>

The three actions under consideration here were all undertaken by Doyle individually. He is not an elected or appointed representative of the Association and he

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<sup>2</sup>*Board of Educ. of the City Sch. Dist. of the City of New York and United Fed'n of Teachers*, 19 PERB ¶3006 (1986).

<sup>3</sup>*Metropolitan Suburban Bus Auth.*, 23 PERB ¶3006 (1990).

did not represent himself as such in any of these incidents. He did not represent that he was speaking on behalf of the Association or the unit members, nor was he accompanied by any representatives of the Association. His memorandum regarding the police car lights was addressed to Dean as chief and Doyle only identified himself as lieutenant, with no reference to the Association.

The ALJ found each of these actions to be protected activities on Doyle's part. He points to the collective bargaining agreement and a department practice of having employees communicate safety concerns to their direct supervisor and found that Doyle's complaint about the police lights was the reporting of a safety concern, in furtherance of an Association policy and the practice between the parties. The ALJ's reliance on *Village of New Paltz*<sup>4</sup> is, however, misplaced. There, the employee identified himself as a union shop steward, although he was not, and represented that his safety complaints were being made on behalf of his union. That activity, taken for and on behalf of an employee organization, is clearly protected by the Act. Doyle's complaint, however, is, and appears to be, an individual employee's complaint about a potential safety and liability issue. To the extent that Doyle testified that there was an established department practice which required employees to report safety concerns to their direct supervisors that arose from the labor-management committee provisions in the collective bargaining agreement, the ALJ found, pursuant to *Metropolitan Suburban Bus Authority, supra*, that the activity was protected. We disagree.

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<sup>4</sup>25 PERB ¶3032 (1992).

As was the case with the employee in *Metropolitan Suburban Bus Authority, supra*, Doyle was making an individual complaint pursuant to what he perceived his duty as lieutenant to be, not pursuant to any specific contract language or directive from the Association. Therefore, we do not find that his report was an exercise of a right protected by the Act and reverse the ALJ's decision to the extent that he found otherwise.

As this was the only activity of Doyle's within the relevant time period that was known by Dean and, as the ALJ properly found, because Dean's recommendation to abolish the lieutenant's position and demote Doyle was not motivated by Dean's concerns about Doyle's police car light concerns, our inquiry ends here. The other two actions engaged in by Doyle were never made known to Dean, who wrote the memorandum in-issue, that was accepted by the Village Board in July 2000, and which formed the sole basis for its November 2000 resolution abolishing the lieutenant's position and demoting Doyle.

Further, the two actions were once again actions taken by Doyle as an individual. That other police officers complained, individually, to the former chief of police about Dean's transfer does not transform Doyle's complaint into a concerted activity protected by the Act. Likewise, Doyle's complaint to the Mayor about the examination for the chief of police was an individual complaint.<sup>5</sup> His reiteration of the

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<sup>5</sup>We do not find that Doyle's conversation with the Association prior to speaking to the Mayor, wherein he asked the Association's permission to speak to the Mayor individually about the examination, converted an individual action into one that was taken on behalf of the Association. The ALJ's reliance on *County of Westchester, 32 PERB ¶3018 (1999)* (subsequent history omitted), is misplaced. While holding a union office is not required to come within the Act's protection, there the employee was identified by the employer as being a union representative or at least actively involved in union matters, and the employee held himself out as a union representative or activist.

complaint to the Association does not compel a finding that the complaint itself was undertaken on the Association's behalf or at its direction or that Doyle was acting as an authorized representative of the Association when he complained to the Mayor.

For the reasons set forth above, we deny the Association's exceptions and grant the Village's exceptions. We affirm the ALJ's dismissal of the charge based upon our finding that Doyle was not engaged in protected activities during the relevant time frame. We also affirm the ALJ's finding that the Village's action was based upon legitimate business reasons.

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

DATED: August 19, 2002  
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,**

Charging Party,

-and-

**CASE NO. U-22413**

**TOWN OF NORTH HEMPSTEAD,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL BAMBERGER  
of counsel), for Charging Party**

**LAURY L. DOWD, DEPUTY TOWN ATTORNEY, for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the Town of North Hempstead (Town) to an Administrative Law Judge's (ALJ) decision that found that the Town violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it transferred the president of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) bargaining unit from his in-house title of Director of Permit Division to his civil service title of Building Inspector II.

The Town alleged in its answer that there was a legitimate business reason for the transfer and raised, as an affirmative defense, that Section XV of the parties' collective bargaining agreement permitted its action.

EXCEPTIONS

The Town excepts from each and every part of the ALJ's decision on the law and the facts. More specifically, the Town excepts from that part of the decision that found the transfer interfered with the unit president's use of union release time and that the Town had neither legitimate business reasons nor a colorable contractual right to transfer the unit president.

CSEA filed cross-exceptions to that part of the ALJ's decision finding that the unit president's transfer was not motivated by anti-union animus.

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

FACTS

Daniel LoMonte has been employed by the Town since 1982, with only a brief interruption in 1992. He has been in the civil service title of Building Inspector II since about 1995 or 1996. He also held the in-house title of Permit Division Director since about 1995 or 1996. LoMonte has been unit president of CSEA since July 1998. Pursuant to the terms of the parties' collective bargaining agreement, he is entitled to two days per week leave for union business.<sup>1/</sup>

David Wasserman became the Town's Commissioner of Buildings in May 2000. Subsequent to his appointment, he spent the next few months gaining an understanding of the internal operation of the department. He testified that he felt that

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<sup>1/</sup>Joint Exhibit #1, Section XVI(f), Miscellaneous.

the most immediate need was to increase the pace within which permits could be reviewed and issued,<sup>2/</sup> even though the department faced significant physical and financial constraints. During this time period, he was developing the department's budget for the next calendar year. This included staffing and the potential of bringing into the department additional, or different, staff to accomplish his goals. Wasserman testified that it soon became evident to him that the "bottle neck" in the flow of work in the Permit Division of his department was in the examination of plans. The department had one full-time examiner, a part-time examiner and the Director, LoMonte. LoMonte's time was split between his director duties and "whatever activities he might otherwise be involved with. That was understood."<sup>3/</sup>

In the Fall of 2000, Wasserman planned a reorganization of the department which had an impact on the Permit and Inspection Divisions. The reorganization took place on January 2, 2001<sup>4/</sup> and involved the transfer of LoMonte from the Permit Division to a filled position in the Inspection Division. Wasserman testified that it was his intention to use LoMonte's experience with construction inspection to make up for the impending manpower shortage in the Inspection Division because of a pending retirement and the departure of an inspector.<sup>5/</sup>

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<sup>2/</sup>Transcript, p. 150.

<sup>3/</sup>Transcript, pp. 151-152.

<sup>4/</sup>ALJ Exhibit #1.

<sup>5/</sup>Transcript, p. 153.

Wasserman also testified that, prior to the reorganization, there were occasions when LoMonte was out of the office and Wasserman, who needed to speak with him regarding pending permit applications, was unable to reach him by phone.<sup>6/</sup> Subsequent to the reorganization, LoMonte carried a cell phone and could be reached while performing the duties of a building inspector.<sup>7/</sup>

On February 21, 2001, CSEA filed its improper practice charge alleging, *inter alia*, that the Town violated §§209-a.1(a) and (c) of the Act when Wasserman transferred LoMonte to the Inspection Division on January 2, 2001. The Town generally denied the allegations and asserted as an affirmative defense that Section XV of the collective bargaining agreement provides the Town with the authority to transfer employees to new assignments.

#### DISCUSSION

Although CSEA argues in its charge that the Town violated §§209-a.1(a) and (c) of the Act, the ALJ found "that CSEA failed to demonstrate that Wasserman or any other Town representative acted upon union animus, that is, with a specific intent to harm the union or LoMonte because of his union involvement." We agree that no animus on the part of Wasserman is established on this record.<sup>8/</sup>

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<sup>6/</sup>Transcript, pp. 182-183.

<sup>7/</sup>Transcript, p. 154.

<sup>8/</sup>The Town moved to dismiss the charge at the close of CSEA's direct case. The ALJ denied the motion at the hearing. Since the Town took no exception to this ruling, we need not address this issue.

However, even though the ALJ found no anti-union animus, she found that LoMonte's transfer violated the Act. The ALJ determined that, because LoMonte would not have been transferred "but for" his use of union release time - a protected activity - the Town violated §§209-a.1(a) and (c) of the Act, even without any evidence of anti-union animus. It is with this conclusion that we disagree.

We reaffirmed in *State of New York (SUNY-Oswego)*<sup>9/</sup> that, with regard to cases involving interference and/or discrimination, 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. The existence of improper motivation and/or anti-union animus may be established by statements or by circumstantial evidence, which may be rebutted by the presentation of legitimate business reasons for the action taken, unless found to be pretextual.<sup>10/</sup> In *State of New York (Department of Correctional Services)*,<sup>11/</sup> we held also 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 requisite 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.

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<sup>9/</sup>34 PERB ¶13017 (2001).

<sup>10/</sup>See also *Cayuga-Onondaga Board of Cooperative Educational Services (Hoey)*, 32 PERB ¶13079 (1999).

<sup>11/</sup>25 PERB ¶13050, at 3106 (1992).

Our inquiry must, therefore, include an analysis of the Town's stated reasons for transferring LoMonte.

In *State of New York (Unified Court System)*,<sup>12/</sup> we reiterated that there is no statutory right to union release time. The right to employee organization leave necessarily derives from a negotiated contractual provision or non-contractual practice. However, once such a provision is negotiated into a collective bargaining agreement, an employer's interference with, or discriminatory treatment because of, an employee's choice to exercise such a union release provision violates §§209-a.1(a) and (c) of the Act, unless there is a corresponding contractual right being exercised by the employer<sup>13/</sup> or the employer is acting pursuant to a legitimate business purpose.<sup>14/</sup>

Here, the ALJ found no evidence of anti-union animus and rejected the business reasons proffered by the Town in support of its decision to transfer LoMonte.

We find that the Town offered legitimate business reasons for its transfer of LoMonte to the Inspection Division. That the ALJ articulated other potential solutions to Wasserman's perceived need to more fully staff the Permit Division and address the needs of the Inspection Division, does not warrant the conclusion reached by the ALJ that the decision to transfer LoMonte was motivated solely by his use of union release

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<sup>12/</sup>26 PERB ¶3046 (1993)

<sup>13/</sup>"A corresponding contract right necessarily involves the same subject matter as the contract right at issue in a charge." *Riverhead Cent. Sch. Dist.*, 32 PERB ¶3070, at 3166 (1999).

<sup>14/</sup>*County of Nassau*, 27 PERB ¶3011 (1994).

time. In the absence of anti-union animus, the review of the articulated business reasons offered by an employer in support of a management decision does not include the substitution of an ALJ's judgment for the judgment of the employer. That an ALJ may have addressed an employment issue in a different way than it was addressed by the employer does not render the employer's stated legitimate business reasons "pretextual" unless the articulated reasons are so lacking in merit as to define "pretext".

The Act does not insulate union officers of any type or at any level from the adverse effects of an employer's properly motivated managerial decisions.<sup>15/</sup> The Act ensures only that employees are not interfered with, discriminated against or improperly advantaged in their employment relationship because of their decisions with respect to union membership, office or participation.<sup>16/</sup>

We find that LoMonte was transferred to the Inspection Division because of the legitimate business reasons articulated by Wasserman both to LoMonte and on the record and largely unrebutted by CSEA. Given the absence of any anti-union animus on the part of Wasserman and the Town, and Wasserman's several concerns regarding the staffing and operation of both the Permit and Inspection divisions in light of the Town's fiscal situation, we find that LoMonte's transfer was not violative of §§209-a.1(a) and (c) of the Act.

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<sup>15/</sup>See *State of New York (Unified Court System)*, *supra*, note 12.

<sup>16/</sup>See, *County of Nassau*, *supra*, note 14.

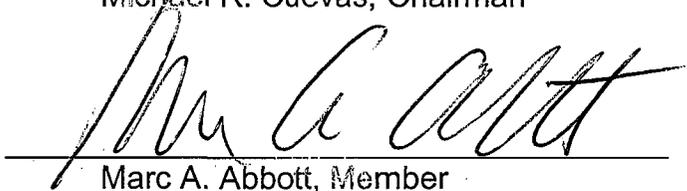
Based upon our review of the record, we deny CSEA's exceptions and reverse the decision of the ALJ.

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

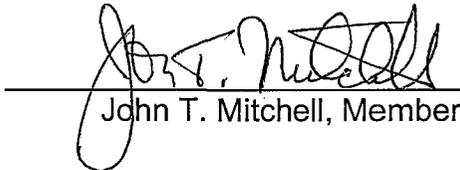
DATED: August 19, 2002  
Albany, New York



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

**TRANSIT SUPERVISORS ORGANIZATION,**

Charging Party,

- and -

**CASE NO. U-22541**

**NEW YORK CITY TRANSIT AUTHORITY,**

Respondent.

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**COLLERAN, O'HARA & MILLS (DENIS A. ENGEL of counsel), for Charging Party**

**MARTIN B. SCHNABEL, GENERAL COUNSEL (CAROLINE LAGUERRE-BROWN of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the New York City Transit Authority (NYCTA) to a decision of an Administrative Law Judge (ALJ) which found that the NYCTA violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally assigned Level I (SSI) supervisors to zone supervision. The Transit Supervisors Organization (TSO), which filed the improper practice charge, filed cross-exceptions.

**EXCEPTIONS**

The NYCTA's exceptions relate generally to the ALJ's decision on the law and the facts and, more specifically, to the ALJ's finding that the NYCTA unilaterally

assigned nonunit SSI supervisors to the task of zone supervision, a task performed by Level II (SSII) supervisors.

The TSO's cross-exceptions relate to the ALJ's factual determination that the proof failed to establish exclusivity over booth audits and investigations conducted by SSI supervisors.

### FACTS

The ALJ's findings of fact are set forth in her decision<sup>1</sup> and we will review the salient facts in the record only insofar as they relate to the exceptions.

A letter dated July 18, 2001, to the conference ALJ outlined the three work duties in contention:

1. Exercising supervisory responsibility over employees working at groups of one or more subway stations or "zones";
2. Conducting revenue or "booth" audits in station booths manned by station clerks located at subway stations throughout the subway system; and
3. Conducting investigations of operational/mechanical problems with subway turnstiles and gates and of passenger accidents.

The ALJ noted in the factual exposition of her decision that the TSO's sole witness was Arlene Brown, a long-tenured employee with the NYCTA and currently a SSII supervisor. Brown testified that a reorganization of the supervisors took place in 1985. She was, at that time, promoted from SSI supervisor to SSII supervisor and assigned to supervise a zone. She testified on direct examination that ". . . there were

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<sup>1</sup>35 PERB ¶4526 (2002).

other instances in the past year where Level One Supervisors had been given jobs with responsibility for coverage of zones of stations."<sup>2</sup>

When asked by the ALJ whether there had been instances beyond six months when SSIs were sent out to perform the work of SSIs; she replied in the affirmative.<sup>3</sup> Brown fixed a time prior to 2000 in response to the ALJ's question about when SSIs would be sent to resolve reported problems.<sup>4</sup> At the conclusion of Brown's testimony, TSO rested its direct case. NYCTA moved that the ALJ dismiss the charge upon the ground that TSO failed to adduce facts sufficient to prove a violation of §209-a.1(d) of the Act. The ALJ reserved on the motion and NYCTA presented its case.<sup>5</sup>

Charles Glasgow, Director of Labor Relations for the NYCTA, testified, however, that SSIs have been performing the same functions since the 1985 reorganization. Vivian Campbell, a New York Station Transit Division Superintendent, corroborated his testimony that supervision of employees has always been shared by SSIs and SSIs.

#### DISCUSSION

The ALJ summarily disposed of two preliminary issues prior to deciding the merits of TSO's case; to wit, timeliness and collateral estoppel.

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<sup>2</sup>Transcript, p. 17.

<sup>3</sup>Transcript, p. 28.

<sup>4</sup>Transcript, pp. 28-29.

<sup>5</sup>TSO failed to take exception to the ALJ ruling on this issue. Therefore, pursuant to §213.6(b) of our Rules of Procedure (Rules), a review of this issue will not be dealt with on this appeal.

On the issue of timeliness, NYCTA did not raise the defense in its answer to the improper practice charge. Rather, it raised timeliness by way of a written motion to amend the answer verified on November 26, 2001. This was subsequent to the hearing on November 21, 2001 and prior to receipt of the transcript on December 1, 2001. By letter dated December 11, 2001, the ALJ informed the parties that NYCTA motion had been denied.<sup>6</sup>

In addition, TSO argues in favor of "judicial estoppel" on the basis that because NYCTA received a favorable result in an earlier litigation involving the SSIs and SSIIIs,<sup>7</sup> it is now precluded from making contrary factual assertions. The ALJ correctly noted that the aforesaid case was dismissed on the threshold finding of untimeliness and no substantive findings were made. Therefore, the doctrine of judicial estoppel would be inapplicable.<sup>8</sup>

NYCTA argues in its exceptions that the ALJ erred in her findings with regard to the assignment of SSIs. NYCTA also argues that the ALJ's order is based upon errors of law and fact. TSO argues in its cross-exceptions that Brown's testimony was clear

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<sup>6</sup>NYCTA failed to take exception to the ALJ's denial of its motion to dismiss on timeliness. Consequently, as no exceptions have been taken to that aspect of the ALJ's decision, the issue is not before the Board on appeal. We make no finding as to timeliness. *State of New York (Office of Mental Health)*, 31 PERB ¶3051 (1998); see also Rules, §213.2(b)(4), which provides that an exception which is not specifically urged is waived.

<sup>7</sup>NYCTA, 26 PERB ¶4595, *aff'd*, 26 PERB ¶3081 (1993).

<sup>8</sup>TSO failed to take exception to the ALJ ruling on these issues it raised. They will not be dealt with on this appeal.

and concise and that TSO met its burden of proof on the issue of exclusivity over both audits and mechanical investigations by SSIs.

The ALJ decided these factual questions based upon well-established case law that requires TSO to demonstrate that the supervisory work at issue has been performed exclusively by unit employees and that the tasks reassigned to nonunit employees are substantially similar to the unit work.<sup>9</sup> Thus, the ALJ's focus was on whether the supervisory work at issue was done exclusively by the SSIs.

Based upon this record, we find that the ALJ erred in determining that zone supervision had been performed exclusively by the SSIs and we, accordingly, must reverse that part of the decision.

The ALJ correctly found no exclusivity in any of the three areas referred to in the July 18, 2001 letter. However, she contradicted herself on the issue of "zone" supervision. On the one hand, she concluded that "the evidence compels me to conclude that both SSIs and SSIs perform supervisory functions with respect to employees and that such has been the case since the 1985 reorganization." On the other hand, she also concluded that the additional element of the assignment of SSIs to zone supervision violated the Act because zone supervision is exclusive to SSIs. We disagree.

The ALJ failed to support her finding in favor of the SSIs on the issue of zone supervision. She merely states that "all witnesses have acknowledged that such duty

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<sup>9</sup>See *County of Onondaga*, 24 PERB ¶¶3014 (1991), *conf'd*, 187 AD2d 1014, 25 PERB ¶¶7015 (4<sup>th</sup> Dep't 1992), *motion for leave to appeal denied*, 81 NY2d 706, 26 PERB ¶¶7003 (1993). See also *Niagara Frontier Transp. Auth.*, 18 PERB ¶¶3083 (1985).

has been exclusive to the SSIs . . . .” The ALJ did not sufficiently evaluate the testimony of TSO’s sole witness, Brown. Brown’s testimony on the issue of zone supervision was ambiguous, at best. When asked by TSO counsel whether supervision of zones was an exclusive level SSIs responsibility, she replied “[B]asically, yes.” When asked further whether there came a time last year (2000) that SS’s had been given positions or responsibility for supervising zones or stations, she replied “Yes.”<sup>10</sup> Brown’s description of zone supervision incorporated duties performed by SSI supervisors as well.<sup>11</sup>

More importantly, TSO failed to introduce any evidence indicating that NYCTA specifically assigned SSIs and SSIs to specific geographical areas or zones. TSO introduced into the record an excerpt of the NYCTA Rules and Regulations entitled “Supervisor (Stations).”<sup>12</sup> Rule 166 sets forth duties and responsibilities of SSIs and SSIs in general terms. TSO would have us construe these regulations strictly when, in fact, these are merely representative of typical assignments within a class. The regulation also explains that “[A]ll personnel perform related work and such other duties as the New York City Transit Authority is authorized by law to prescribe in its regulations.”

Further, the two witnesses called by NYCTA, Glasgow and Campbell, offered un rebutted testimony as to the sharing of supervisory responsibilities by the two titles.

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<sup>10</sup>Transcript, p. 16.

<sup>11</sup>Transcript, p. 15.

<sup>12</sup>Charging Party Exhibit 4.

As Glasgow testified, the SSII title was created to groom supervisory employees to take on managerial responsibilities.<sup>13</sup> In that regard, the record demonstrates an overlap of duties performed by SSIs and SSIIs. This was also illustrated by TSO's witness, Brown, who testified that, in the absence of an SSII, she would assign an SSI.<sup>14</sup>

We do not find, on this record, that the TSO has established exclusivity over any of the at-issue duties. We, therefore, grant the NYCTA's exceptions, deny the TSO's cross-exceptions, and reverse the decision of the ALJ on the issue of zone supervision. The remainder of the ALJ's decision is affirmed.

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

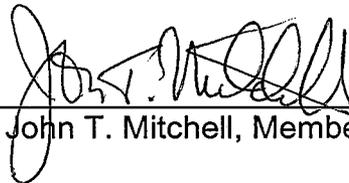
DATED: August 19, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>13</sup>Transcript, p. 34.

<sup>14</sup>Transcript, p. 26.

**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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**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 New York State Law Enforcement Officers Union, District Council 82, AFSCME, 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: 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.

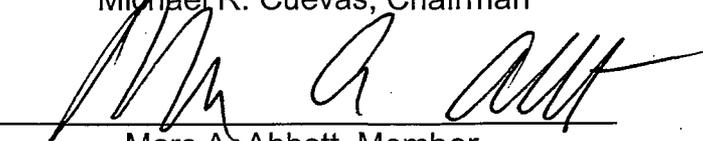
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

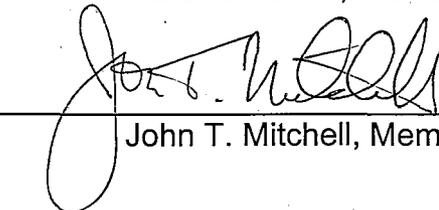
DATED: August 19, 2002  
Albany, New York



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

**TEAMSTERS LOCAL 791,**

Petitioner,

-and-

**CASE NO. C-5159**

**GREECE CENTRAL SCHOOL DISTRICT,**

Employer,

-and-

**GREECE SUPPORT SERVICES EMPLOYEES  
ASSOCIATION, NEANY,**

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 Teamsters Local 791 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: Non-instructional unit consisting of regularly employed non-instructional personnel in the following departments: the Transportation Department, including substitutes therein; the Buildings and Grounds Department, including Custodial; the Food Service Department; the Business Office; the Personnel Services Office; the Instructional Services Office, the Information Services Department; Central Stores; Print Shop; the Community Services Office; and Continuing Education Office.

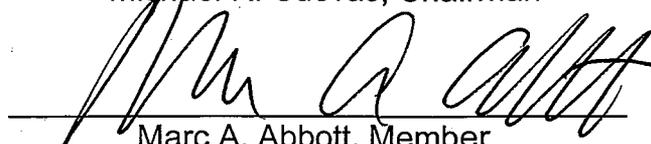
Excluded: District Administrators, Supervisors of Support Staff, substitutes, and also high school custodial foreman, Supervisor of Central Stores, Transportation Assistant, and Secretary of Support Services Director.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 791. 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.

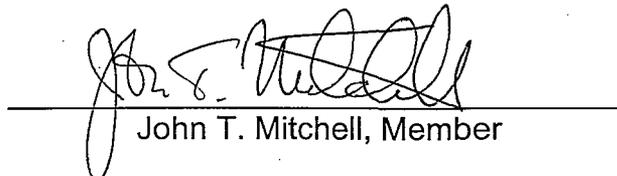
DATED: August 19, 2002  
Albany, New York



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

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

Petitioner,

-and-

**CASE NO. C-5200**

**TOWN OF VESTAL,**

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

Included: All regular full and part-time employees who work in the Department of Fire, Engineering, Code, Police, Tax Collector, Assessor, Court, Business, Town Clerk, Supervisor, Water and Recreation.

Excluded: Department heads, elected officials, police officers, seasonal employees, library employees, operating engineers, employees who work less than 300 hours in a calendar year, Senior Account Clerk-Payroll, Confidential Appointment to the Town Supervisor, Secretary to the Town Attorney, Assistant Water Superintendent, Deputy Highway Superintendent, and part-time Mechanic.

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

DATED: August 19, 2002  
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

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

Petitioner,

-and-

**CASE NO. C-5215**

**SOUTHERN WESTCHESTER BOARD OF  
COOPERATIVE EDUCATIONAL SERVICES,**

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

Included: All classified staff titles, including the following: Account Clerk, Account Clerk/Typist, Account Clerk/Typist (senior), Accountant, Accountant Jr., Adaptive Equipment Specialist, Administrative Assistant, Administrative Assistant Jr., Assistant Supervisor of Transportation, Auto Mechanic Foreman, Bus Dispatcher, Clerk/Transportation Office, Clerk Spanish Speaking, Community Aide, Community Aide (10 mos.), Community Aide (Spanish), Community Worker, Computer Aide, Control Operation Supervisor-Office Management, Cook-Manager (10 mos.), Cued Speech Interpreter, Data Entry Operator, Departmental Aide, Duplicating Machine Operator, Film Inspector, Food Service Helper (10 mos.), Head Bus Driver, Head Custodial Worker, Health Claims Processor, Interscholastic Athletic Assistant, Inventory Control Clerk, Job Coach/Bus Driver, Job Development Specialist, Library Assistant, Licensed Practical Nurse, Off Asst-Automated Systems, Off Line Equipment Operator, Office Assistant, Office Asst.-Automated Systems Sp Sp, Office Asst II/Staff Attendance, Parent Trainer (10 mos.), Payroll Clerk, Personnel Assistant, Prof. Development Specialist, Purchasing Assistant, Regional Certification Assistant, Registered Professional Nurse, Safety & Security Officer, Scheduler/Assigning Coordinator, School Monitor (10 mos.)-NC, Senior Account Clerk, Senior Clerk, Sign Lang Inter IIC (10 mos.), Sign Lang Inter IIC (10 mos.), Sign Lang Inter II (10 mos.), Sign Lang Inter (10 mos.), Sports Desk Asst. (12 mos.), Sr. Job Development Specialist, Sr. Office Assistant, Sr. Office Asst/Auto Systems, Sr. Payroll Clerk, Sr. Typist, Sr. Typist (10 mos.), Staff Asst-Automated Systems, Staff Asst-RIC, Stenographer, Systems Control Clerk-Off Mgmt, Telephone Operator, Telephone Operator-PT, Translator (10 mos.), Typist, Word Processing Operator.

Excluded: Secretary to Chief School Official, Secretary to School Official, Assistant Business Manager, Executive Secretary/Typist.

All other employees.

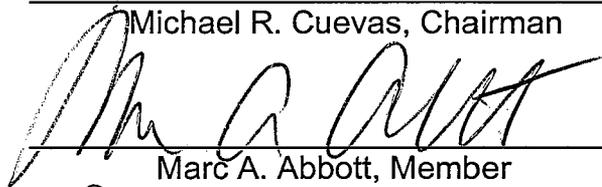
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and

other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 19, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member