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State of New York Public Employment Relations Board Decisions from June 30, 2003

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from June 30, 2003

Keywords

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

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

In the Matter of

SARA-ANN P. FEARON,

Charging Party,

- and -

CASE NO. U-22693

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

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

Employer.

SHELLMAN D. JOHNSON, for Charging Party

**JAMES R. SANDNER, GENERAL COUNSEL (MARIA E. GONZALEZ of
counsel), for Respondent**

**DALE C. KUTZBACH, DIRECTOR OF LABOR RELATIONS AND
COLLECTIVE BARGAINING (MICHELE A. BAPTISTE of counsel), for
Employer**

BOARD DECISION ON MOTION

By decision dated February 28, 2003,¹ we affirmed the Administrative Law Judge's (ALJ) dismissal² of the improper practice charge that Sara-Ann Fearon had filed against the United Federation of Teachers (UFT) and the Board of Education of the City School District of the City of New York (District).

¹ 36 PERB ¶3009 (2003).

² 35 PERB ¶4606 (2002).

The charging party, Sara-Ann Fearon, has moved this Board to reconsider our decision and order. The respondent, UFT, and the employer, District, have not responded to the motion.

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

On the instant motion to reconsider the Board's determination in this matter, Fearon argues that the Board mistakenly overlooked the applicable law. In support of this argument, Fearon contends that the ALJ failed to consider the obligations created by the collective bargaining agreement, especially Article 24A entitled "Professional Conciliation".

The Board has granted motions to reopen proceedings on the basis of newly discovered evidence.³ We have followed the rationale articulated by the Court of Appeals in *Evans v. Monaghan*,⁴ in which the Court applied "the law of newly discovered evidence" to administrative determinations where it could be done in conformity with the limitations which the courts have imposed upon themselves.⁵

Fearon's motion is not based upon newly-discovered evidence such as might warrant consideration of a motion to reopen or reconsider.⁶ She merely alleges that the ALJ overlooked the import of the collective bargaining agreement provision regarding professional conciliation vis-à-vis UFT's obligation to prosecute grievances. This issue

³ *City of Poughkeepsie*, 18 PERB ¶3066 (1985).

⁴ 306 NY 312, at 326 (1954).

⁵ *See Adjunct Faculty Ass'n*, 18 PERB ¶3076 (1985).

⁶ *Town of Brookhaven*, 19 PERB ¶3010 (1986). *See also Adjunct Faculty Ass'n*, *supra* note 4.

was addressed in the ALJ decision.⁷ Consequently, since the allegations contained in her papers fail to allege any newly-discovered evidence, they are not appropriately before us. Such issues would be more properly addressed in a court review of the Board's earlier decision.

For the reasons set forth above, we decline to reconsider our February 28, 2003 decision in this matter. SO ORDERED.

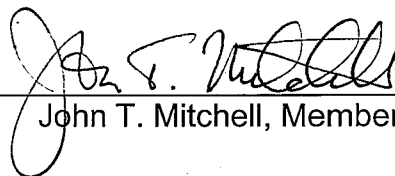
DATED: June 30, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁷ 35 PERB ¶4606, at 4901 (2002).

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

In the Matter of

**AMERICAN FEDERATION OF STATE, COUNTY and
MUNICIPAL EMPLOYEES, COUNCIL 66, LOCAL 1635,**

Charging Party,

- and -

CASE NO. U-23289

CITY OF ROCHESTER,

Respondent.

JOEL POCH, ESQ., for Charging Party

**LINDA S. KINGSLEY, CORPORATION COUNSEL (YVETTE
CHANCELLOR GREEN, of counsel), for Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the American Federation of State, County and Municipal Employees, Council 66, Local 1635 (AFSCME) to a decision of an Administrative Law Judge (ALJ) that dismissed AFSCME's charge alleging, as amended, that the City of Rochester (City) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by engaging in threatening and hostile treatment of a unit member because of the individual's relationship with the local unit president.

EXCEPTIONS

AFSCME has excepted to the ALJ's decision on several grounds which may be characterized as errors of law by the ALJ. The City filed a response in support of the ALJ's decision.

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

FACTS

The facts in this case are discussed in detail in the ALJ's decision.¹ Therefore, the Board will only repeat the facts relevant to AFSCME's exceptions.

The charge alleges that Anthony Giannavola began his employment with the City in September 1997 as a water maintenance worker assigned to the Water Bureau. During the period April 1, 1999 to April 1, 2000, Giannavola worked under the supervision of Tom Bergin, an Assistant Superintendent in the Water Bureau. The charge alleges that, from April 1, 1999 to April 2002, Giannavola was subjected to constant harassment by Bergin. AFSCME alleges that this conduct is the result of Giannavola's friendship with Anthony M. Gingello, the local unit president. AFSCME filed an amendment to the charge on October 17, 2002, alleging further examples of harassment of Giannavola.

The City, in its answer to the charge, denied the allegations and raised certain affirmative defenses.

At the hearing conducted before the ALJ on October 29, 2002, AFSCME's first witness, Giannavola, testified that, when he was first hired, his co-workers did not want to work with him or talk to him. He requested a transfer that placed him under the supervision of Bergin. He worked for Bergin from April 1999 to April 2000. With respect to the specific activities set forth in the amended charge that constituted the City's harassment, the record reflects that on each occasion of alleged harassment, Giannavola had violated a work rule. However, he was never disciplined beyond

¹ 36 PERB ¶4520 (2003).

counseling from John Bonaldi.² AFSCME recalled Giannavola to testify about an incident that occurred in April 2000 regarding an incident with a co-worker which resulted in Giannavola receiving a written reprimand.³

AFSCME called several other witnesses to testify to specific incidents that allegedly described the harassment directed at Giannavola. However, on cross-examination, it was made clear that it was Giannavola's work performance that precipitated each incident in question.

Bonaldi testified that, although Bergin was at times critical toward employees, Bergin was critical toward all employees, whether unit members or management. Bonaldi described his own encounters with Bergin when he was the object of Bergin's verbal criticism. On re-direct examination, Bonaldi testified that Bergin, while verbally abusive, never threatened anyone with discipline. He explained why Bergin was not happy that Giannavola was hired. At the time Giannavola was hired, the department had adopted the concept of total quality management to be used in the hiring process. Employees of the department were involved interviewing candidates. A candidate had been selected but the department was told they could not hire that person because Giannavola had been recommended by the union president.

At the close of AFSCME's direct case, both parties rested.

DISCUSSION

The ALJ correctly set forth the elements to be established by the charging party when a violation of §§209-a.1(a) or (c) of the Act is alleged. We agree with the ALJ

² The original charge filed April 8, 2002 states that "Bonaldi is management and this charge does not relate [to] nor involve him in any manner whatsoever."

³ Respondent's Exhibit #1.

that, upon this record, Bergin verbally abused Giannavola, as well as each and every other employee with whom he found fault. Bergin's verbal attacks on Giannavola do not appear on this record to be the result of any anti-union animus, but rather his usual unrestrained remarks regarding an employee's work performance. AFSCME argues in its brief that the Board should take a more global approach in reviewing the record for evidence of anti-union animus by recognizing Giannavola's constitutional right to associate with the unit president. While the Act certainly protects Giannavola's right to be active in AFSCME and associate with AFSCME officers, the City's actions regarding Giannavola must be found to have been taken to retaliate against him for the exercise of that right for a violation to be found.

While AFSCME argues that its witnesses' testimony is unrebutted, this argument ignores the witnesses' testimony on cross-examination. As the ALJ pointed out, the charging party must prove (1) that the affected individual was engaged in protected activity, (2) that such activity was known to the person(s) making the adverse employment decision, and (3) that the action would not have been taken but for the protected activity. The existence of anti-union animus may be established by statements or by circumstantial evidence.⁴

Any complaint Giannavola made to his union is unquestionably protected activity. Notwithstanding Giannavola's complaints, which were known to the City, AFSCME has failed to prove, either directly or circumstantially, that Bergin's actions would not have been taken but for the protected activity. The record is replete with testimony from AFSCME witnesses on cross-examination that established the work rule violations for which Giannavola was counseled and reprimanded. While Giannavola may have had a

⁴ See *Town of Independence*, 23 PERB ¶3020 (1990).

personal relationship with the unit president, on this record, we find that none of the alleged actions against him arose as the result of that relationship. Rather, it was his work performance, or lack thereof, that drew the ire of his superiors, especially Bergin, whose criticism of employees was universal, as evidenced by Bonaldi's testimony.

AFSCME points to its amended charge in support of its argument that Bergin's conduct was motivated by anti-union animus. The amended charge relates to incidents that occurred after the charge was filed. In any event, the testimony of Lewis Breedlove, supervising technician, contradicts the allegations of the amended charge. AFSCME alleges that, on September 25, 2002, Breedlove informed Giannavola that, on September 25, 2002, Bergin inquired about Giannavola's whereabouts prior to the end of the work day. Breedlove's testimony, however, provides an explanation for the inquiry. September 25, 2002 happened to fall during the week of the Water Bureau's mock disaster. When asked if Breedlove ever witnessed Bergin harass Giannavola, he answered "no". Although Bergin was not Giannavola's direct supervisor, Breedlove acknowledged that, because Bergin is Assistant Superintendent of the Bureau, he was a higher level supervisor, which provides a plausible explanation for his interest in Giannavola's whereabouts during a mock disaster drill.

Lastly, AFSCME argues that, procedurally, the City was permitted to avoid introducing any proof of legitimate business reason by resting at the close of the AFSCME's direct case. AFSCME contends that the transcript omits reference to the City's motion to dismiss upon which the ALJ reserved decision. This omission resulted in the ALJ failing to discuss the rationale of any ruling on the City's motion which AFSCME contends would have supported AFSCME's direct case. This argument lacks merit, in our opinion, because AFSCME failed to argue this issue in its brief to the ALJ.

Furthermore, AFSCME was aware of the contents of the transcript before its brief was filed and failed to take any steps to correct it.⁵ Since AFSCME made no effort to correct the transcript and neither the ALJ nor the City make reference to this issue, we will consider the transcript to be complete.

Furthermore, the burden does not shift to the respondent to demonstrate its legitimate business reasons unless the charging party has established a *prima facie* case.⁶ Here, the ALJ found that, upon the record, AFSCME failed to prove the necessary elements of a violation of the Act. We agree. As we have discussed, AFSCME's proof has been rebutted by its own witnesses. Although AFSCME argues that the timing of the alleged retaliatory actions provides the circumstantial evidence necessary to make out a *prima facie* case, we have held that timing alone is insufficient to support the finding of a violation of §§209-a.1(a) and (c).⁷

AFSCME argues that Bergin's verbal assaults on Giannavola were motivated by anti-union animus. These insults directed at Giannavola coincided with some activity which aroused Bergin's ire. The record is also clear that at no time was Giannavola's employment threatened. We have determined that, under certain circumstances, employer speech enjoys the same protections of the Act afforded to employees in the workplace.

⁵ See CPLR §5525. While the CPLR is not binding on PERB, reference to it is instructive as to procedural issues before us. See *State of New York (Dep't of Transp.)*, 23 PERB ¶3005 (1990), *conf'd*, 174 AD2d 905, 24 PERB ¶7014 (3d Dep't 1991).

⁶ See *State of New York (SUNY-Oswego)*, 34 PERB ¶3017 (2001).


⁷ *County of Monroe and Monroe County Sheriff*, 33 PERB ¶3044 (2000); *Town of North Hempstead*, 32 PERB ¶3006 (1999).

To make unlawful employer speech which is not accompanied by improper threats or promises would raise serious constitutional issues and would be inconsistent with the policies of the Act. In the latter regard, we have protected a wide variety of speech by employees and union officers. (citation omitted) Employer speech which is devoid of threat or promise deserves similar protection lest we unbalance the parties' bargaining and grievance relationships.⁸

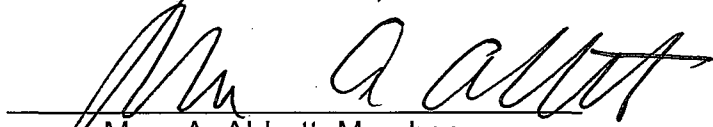
Based on the foregoing, we deny AFSCME's exceptions and affirm the decision of the ALJ.

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

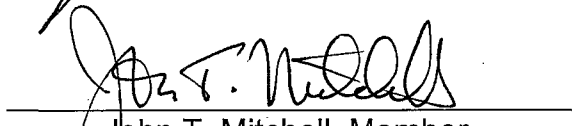
DATED: June 30, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁸ *Town of Greenburgh*, 32 PERB ¶3025, at 3055 (1999).

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

In the Matter of

LEWIS K. SHAYNE,

Charging Party,

- and -

CASE NO. U-23842

STATE OF NEW YORK (DEPARTMENT OF INSURANCE),

Respondent.

LLOYD SOMER, ESQ., for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Lewis K. Shayne to a decision of the Director of Public Employment Practices and Representation (Director) dismissing as deficient his improper practice charge which, as amended, alleges that it relates to two previous charges pending before this agency and incorporates additional issues relating to events which occurred subsequent to the filing of those other charges.¹

EXCEPTIONS

Shayne excepts to the Director's decision on the law. Shayne argues that the Director erred in dismissing the charge as untimely. The respondent, State of New York (Department of Insurance) (State), has not responded to Shayne's exceptions.

¹ Case Nos. U-22955 and U-23236, filed November 8, 2001 and March 18, 2002, respectively.

Based upon our review of the record and consideration of the arguments offered by Shayne, we affirm the Director's decision.

FACTS

Shayne's charge, filed November 7, 2002, alleged, *inter alia*, that the State violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) in that:

[T]his charge is directly related to two previous PERB charges . . . However, this charge brings a few more issues and relates to the events that happened subsequently to the previous charges.

By letter dated November 18, 2002, the Assistant Director of Public Employment Practices and Representation (Assistant Director) informed Shayne that the charge was deficient and advised him that the charge lacked facts which would constitute a violation that occurred within four months of filing the charge.

In response to the Assistant Director's letter, Shayne filed an amendment on December 10, 2002. By letter dated December 18, 2002, the Assistant Director informed Shayne that the amendment was deficient and advised him that the "reintroduction of . . . retaliatory acts" prohibits PERB from processing the charge on the theory of a "continuing violation". On February 3, 2003, Shayne filed a second amendment. However, he failed to provide specific facts and, instead, pled conclusory allegations intended to bolster the two prior charges pending before PERB.

The Director then dismissed the charge by decision dated March 6, 2003.²

² 36 PERB ¶4514 (2003).

DISCUSSION

Shayne argues in his exceptions that our prior decision in *Middle Country Teachers Association (Werner)*,³ supports his position that the amended charge sets forth a continuing violation which is timely. We disagree.

In reaching his decision, the Director relied upon our prior decision in *City of Yonkers*,⁴ where we affirmed the dismissal of a charge based upon the theory of a continuing violation to an alleged violation of §§209-a.1(a) and (d) of the Act. We found that, although a violation of an obligation to pay a wage increment might be a continuing one, it was not a violation cognizable under §209-a.1(a). We further found that §204.1(a)(1) of our Rules of Procedure (Rules) sets forth the applicable limitation period (four months) within which to file a timely charge. We held that this period was to be measured from either notice of an adverse action or the implementation of the adverse action.⁵

Shayne contends that the charge is timely and our decision in *Yonkers* is inapposite because, as he argues in his exceptions, July 9, 2002 is the implementation date of the adverse action complained of in the instant charge. Upon our review of the charge, however, we find that his argument fails. The Assistant Director advised Shayne that the charge was deficient because it pled no facts to substantiate the conclusory allegations of retaliation by the State resulting in the alleged adverse action

³ 21 PERB ¶3012 (1988).

⁴ 7 PERB ¶3007 (1974).

⁵ See also *State of New York (Governor's Office of Employee Relations)*, 22 PERB ¶3009 (1989).

on July 9, 2002. The amendments to the original charge continue to state the same conclusory allegations and, again, include references to the two earlier charges. Shayne contends that the prior charges, together with the instant charge as alleged, demonstrate a continuing violation.

We have recognized the theory of a “continuing violation” in only certain types of improper practice charges, none of which include alleged violations of §§209-a.1(a) and (c).⁶ In a similar case decided in 1993,⁷ the charging party was advised by the Assistant Director that his charge alleging a violation of §§209-a.1(a) and (c) was deficient because it alleged violations that occurred more than four months prior to the filing of the disputed charge and it already raised issues in earlier and still pending charges. Furthermore, the charging party failed to plead specific facts to support the conclusory allegations contained in the charge. The charging party filed an amendment acknowledging the similarities but insisting that the alleged violations were continuing. The Director dismissed the charge as untimely and we affirmed.

In the context of a §§209-a.1(a) or (c) charge, evidence that a violation continues to occur post-filing of a charge may be relevant if it demonstrates a continued course of conduct that relates back to the original charge.⁸ Such proof, however, is presented at the hearing, subject to the scrutiny of the Administrative Law Judge, and not presented as a separate and distinct charge.

⁶ For a discussion of these types of cases, see: Jerome Lefkowitz, et al., *Public Sector Labor and Employment Law*, 665 (2nd Ed. 1998).

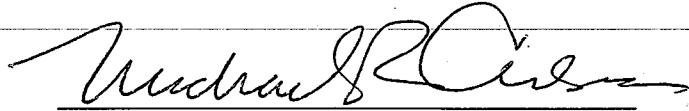
⁷ *State of New York (Governor's Office of Employee Relations) and Council 82, AFSCME, AFL-CIO*, 26 PERB ¶13058 (1993).

⁸ *County of Monroe and Monroe County Sheriff*, 36 PERB ¶13002 (2003).

Based upon the foregoing, we deny Shayne's exceptions and affirm the decision of the Director.

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

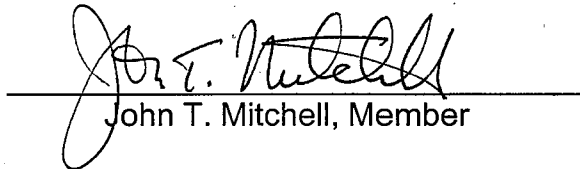
DATED: June 30, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**HUDSON VALLEY COMMUNITY COLLEGE
NON-INSTRUCTIONAL EMPLOYEES UNION,**

Petitioner,

-and-

CASE NO. C-5270

**COUNTY OF RENSSELAER AND HUDSON VALLEY
COMMUNITY COLLEGE,**

Employer,

-and-

**HUDSON VALLEY COMMUNITY COLLEGE UNIT OF
LOCAL 842, CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Hudson Valley Community College Non-

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

Included: All full-time and regularly scheduled part-time employees holding titles in the list annexed hereto as Appendix A.

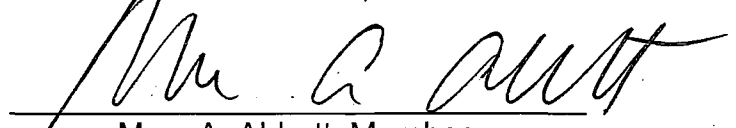
Excluded: Managerial and confidential employees.

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

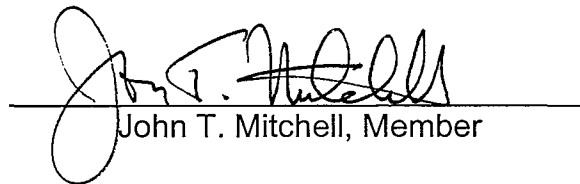
DATED: June 30, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

APPENDIX A

Administrative Assistant	Programmer, Computer
Aide, AV	Secretary I
Aide, Av, Senior	Secretary II
Editorial	Stenographer
Artist, Graphic	Stenographer, Senior
Auto Services Program Assistant	Stenographer, Principal
Assistant, Health Office	Supervisor, Athletic/Recreation
Assistant, Laboratory	Supervisor, Athletic Program Services
Assistant, Laboratory, Senior	Supervisor, Graphics
Athletic/Recreation Program Assistant	Supervisor, TV Center
Clerk	Technician, AV
Clerk, Senior	Technician, AV, Senior
Clerk, Principal	Technician, Electronics
Clerk, Account	Technician, Graphics
Clerk, Account Senior	Technician, Engineering, Senior
Clerk, Account Senior Payroll	Technician, TV Center
Clerk, Account, Principal	Technician, TV Center, Senior
Clerk, Mail and Supply	Typist
Clerk, Stores	Typist, Senior
Clerk, Stores, Senior	Typist, Principal
Clerk, Stores, Senior Inventory	Carpenter
Clerk, Stores, Principal	Electrician
Clerk/Typist	Electrician, Senior
Clerk/Typist, Account	Groundskeeper
Clerk/Typist, Account, Senior	Mason
Clerk/Typist, Senior	Mechanic, Air/Heat/Refrig.
Coordinator Data Analysis Trainee	Mechanic, Automobile
Coordinator Data Analysis I	Mechanic, Automobile, Senior
Coordinator Data Analysis II	Operator, Heavy Motor Equipment
Coordinator Intramural Programs	Operator, Light Motor Equipment
Development/Alumni Aff. Program Assistant	Painter
Engineer, Stationary	Supervisor II, Building Maintenance
Engineer, Stationary, Senior	Supervisor II, Custodial
Illustrator, Graphic	Supervisor II, Grounds
Information Processing Specialist, Trainee	Technician, HVAC
Information Processing Specialist	Worker, Building Maintenance
Information Processing Specialist, Senior	Worker, Custodial
Inventory Control Specialist	Worker, Custodial, EOC
Keyboard Specialist	Worker, Custodial, Special Assignment
Messenger	
Officer, Campus Safety	
Officer, Campus Security	
Operator, AV Equipment	
Operator, Computer	
Operator, Computer, Senior	
Operator, Data Entry	
Operator, Language Lab	
Operator, Printing Machine	
Operator, Telephone	
Payroll Clerk	
Photographer	
Printer, Offset	
Program Assistant, Educational Outreach	