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State of New York Public Employment Relations Board Decisions from October 31, 2003

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 31, 2003

Keywords

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Comments

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

In the Matter of

**TRANSPORT WORKERS UNION OF GREATER
NEW YORK, AFL-CIO, LOCAL 100,**

Petitioner,

- and -

CASE NOS. CP-768 & CP-769

NEW YORK CITY TRANSIT AUTHORITY,

Employer,

- and -

**DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO,**

Intervenor.

**KENNEDY, SCHWARTZ & CURE (STUART LICHTEN of counsel), for
Petitioner**

**MARTIN B. SCHNABEL, VICE PRESIDENT AND GENERAL COUNSEL
(ROBERT DRINAN and MICHELE SHERIDAN of counsel), for Employer**

**JOEL GILLER, GENERAL COUNSEL (MARY O'CONNELL of counsel),
for Intervenor**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Transport Workers Union of Greater New York, AFL-CIO, Local 100 (TWU) to a decision of an Administrative Law Judge (ALJ) that found the titles of telecommunications specialist and computer

specialist, employed by the New York City Transit Authority (Authority), were most appropriately placed in the unit represented by District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (DC 37).

EXCEPTIONS

TWU excepts to the ALJ's decision that the at-issue titles share a greater community of interest with the unit represented by DC 37 on the basis of duties, promotions, benefits, rules and regulations, and salary. The Authority and DC 37 filed separate responses in support of the ALJ's decision.

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

FACTS

A full exposition of the facts is recited in the ALJ's decision.¹ We will confine our review to the salient facts relevant to our consideration of the exceptions.

On August 15, 2001, the TWU filed two petitions, one for the title of computer specialist (software) I, II, III and IV (CP-768) and the second, for the title of telecommunications specialist (voice) I, II, III and IV (CP-769). Both petitions argued that the titles are either encompassed within the scope of TWU's existing unit or that the titles should be placed in the unit

The Authority contended that the at-issue titles should be placed in a separate unit. In the alternative, the Authority argued that DC 37's bargaining unit is the appropriate placement of these titles. DC 37 thereafter intervened in the proceedings. Both proceedings were consolidated for hearing by consent of the parties.

¹ 36 PERB ¶4009 (2003).

TWU represents hourly paid operating and maintenance employees of the Authority in such titles as telephone maintenance and signal maintenance. TWU contends that the at-issue titles perform similar work.

DC 37 represents certain employees of the Authority who are members of various DC 37 locals. DC 37 contends that the at-issue titles share a community of interest with computer-related titles found in one of its locals, Local 2627.

The Authority employs telecommunications specialists in its department of telecommunications and information services (TIS), division of telecommunications. The Authority also employs computer specialists at the TIS. The chief of the Authority's division of telecommunications, Leonard Ciaccio, testified that the telecommunications division is organized into five categories: manager, professional, technical and engineering (PT&E), administrative and clerical supervisors, and hourly. It is within the PT&E category that the titles of telecommunication specialist and computer specialist are found.

The titles of telephone maintainer and signal maintainer are in the category of hourly employees. TWU represents hourly employees in the TIS division. TWU does not represent employees in the PT&E category of the TIS.

Although DC 37 does not represent the titles of telecommunications specialist and computer specialist, the salary and benefits received by DC 37-represented employees are applied by the Authority to the unrepresented employees in the TIS division, PT&E group.

The record established that there is a marked difference in terms and conditions of employment for employees in the PT&E category versus hourly employees. PT&E

employees are hired after the submission of an application, resume and an open-competitive exam. Hourly employees are hired from a civil service list compiled from an examination for the position. PT&E employees report to someone in a manager title, whereas hourly employees report to a supervisor. PT&E employees are assigned work by a manager; conversely, hourly employees receive their assignment from a supervisor. There is no seniority in work assignment or location for PT&E employees. They work a 35-hour work week. Hourly employees work a 40-hour work week. PT&E employees are salaried employees and do not receive overtime for work over 35 hours. Instead, PT&E employees receive compensatory time. They receive a pay raise whenever DC 37-represented employees receive a pay raise. Hourly employees receive pay raises as a direct consequence of the collectively negotiated contract between the TWU and the Authority.

The Authority called John Sporano, the general superintendent of allocation management. He had previously worked as a telephone maintainer and a supervisor M/S 1. In his current position, he supervises approximately seventy employees, some of whom are in TWU's unit and two of whom are in DC 37. He described the work of a telecommunications specialist as design, research, development, contract comment, write procedures and perform factory tests. They may assist the maintainers and, if they need help doing a test, the specialist will show them how the test is done. Sporano then characterized the work of telephone maintainers as installers of equipment.

DC 37 called Thomas Buneo, a telecommunications specialist, level one, to testify about his duties. He works in a section with eleven planners where he receives telecommunication request forms from fellow Authority employees. Each planner then

visits the site, makes a survey, determines the needs, makes recommendations and submits it to his supervisor.

The next witness DC 37 called, Anne Renton, a telecommunications specialist, testified that she works in the customer service center and receives calls from the help desk. She analyzes the problem to determine if it is a software, hardware or networking problem. She then gets the proper vendor or Authority personnel assigned to correct the problem.

TWU called David Blozen, a telephone maintainer, as a witness. He testified that his duties have been to function as a fiber optic network technician. The work is installing and repairing multiplexer MUX banks. He described how the work of telecommunications specialists and maintainer overlaps. However, on cross-examination, Blozen testified that he never reviewed contracts and he has never worked side by side with a telecommunications specialist.

TWU called Kevin McCawley as a witness. McCawley, a telephone maintainer, is also vice chair, telephone department chairman of the TWU local. He testified regarding the duties of a maintainer which include maintenance, trouble shooting, repair, testing and installation. On cross-examination, McCawley testified that he has never worked with a telecommunications specialist.

The Authority called Robert O'Tara, the vice president and chief information officer for the Authority. He described the various titles that he has held, including computer specialist I and II. As a computer specialist, O'Tara testified that a requirement of the position includes supervision over other employees. Also, the position is more of the system-related type of work. He opined that a computer

specialist would have to have knowledge of databases and a strong programming language background.

The titles in the line of promotion to computer specialist are programmer analyst trainee, programmer analyst and computer associate. These titles are currently represented by DC 37.

The signal maintainer duties are to maintain, repair, test and inspect signal equipment. Winton Habersham, general superintendent in technology signals, testified on behalf of the Authority. He previously worked as a signal maintainer and testified that a signal maintainer could not perform the work of a computer specialist because a computer specialist possesses knowledge and experience beyond that of a signal maintainer.

Edward Hissick, president of Local 2627 of DC 37, testified about the various titles Local 2627 represents in the TIS department.

Henry Williams, employed as a signal maintainer by the Authority, was called to testify on behalf of the TWU and explain the work of a signal maintainer. He testified that he worked with a computer specialist at a job site and that he observed the computer specialist doing some of the same job duties that signal maintainers perform. However, on cross-examination, Williams acknowledged that he did not meet the qualifications as a computer specialist.

The last witness the Authority called, John Weinberger, is the assistant chief officer, Metrocard operations, Automated Fee Collection (AFC), Maintenance Subway Operations. Weinberger testified about his experience in supervising computer associates and computer specialists in AFC operations. He also described the duties of

a revenue equipment maintainer, testifying that their prime responsibilities include prevention and corrective maintenance on the AFC equipment, the station level equipment turnstiles and vending equipment. He also contrasted the work of a computer associate and computer specialist. The primary function of a computer specialist within the Metrocard operation is to monitor the AFC network remotely from the mainframe computer down to the station level equipment. The difference between the two computer titles lay mainly with their degree of knowledge and experience.

TWU called Peter Foley, an employee of TWU while on leave of absence from the Authority. Foley's position with the Authority is revenue maintainer. In that capacity, Foley explained that he works with computer-based revenue equipment in the Metrocard operation. Foley testified that he maintains and repairs the revenue equipment through the use of a laptop computer. He is assigned to the AFC department, Metrocard Operation, and opined that the revenue maintainer and the computer specialists in the Metrocard Operations performed the same duties. However, he acknowledged on cross-examination that he does not have the qualifications to be a computer specialist (software).

DISCUSSION

TWU contends in its principal exception that the ALJ erred in finding that the at-issue titles share a greater community of interest with employees represented by DC 37. We disagree.

The TWU filed both a unit clarification and a unit placement petition for the at-issue titles. The ALJ dismissed the unit clarification petition and TWU has not excepted to that ruling.

With regard to the unit placement petition, however, TWU argues that the ALJ misapplied our decisions in reaching his conclusion that the at-issue titles share a greater community of interest with DC 37. We have held that “[a] unit placement petition is a mini-representation proceeding which puts the appropriateness of the unit under §207 of the Act in issue.”² Moreover, the unit placement petition proceeds from the finding or admission that the position [at issue] is not in the petitioner’s unit, but should be most appropriately placed there.³

Community of interest and administrative convenience are relevant to consider in the placement issue. The record before us supports the finding of the ALJ that the at-issue titles are most appropriately placed in the unit of computer-related titles represented by DC 37. Some of the work of the at-issue titles, such as analyzing problems, testing equipment, and using a database, is similar, in some respects, to the work of the titles represented by TWU. However, as that work relates to the design, research, development of tests and procedures and contract review, the at-issue titles are more closely involved with the Authority’s telecommunications and computer systems, as are the titles in the computer unit represented by DC 37.

In *Board of Education of the City School District of the City of New York*,⁴ we reviewed the Director’s decision placing telecommunications specialists in DC 37 Local 2627’s unit of computer-related job titles. We found there, as we do here, that the

² *Rye City Sch. Dist.*, 33 PERB ¶¶3053, at 3145 (2000).

³ *Board of Educ. of the City Sch. Dist. of the City of New York*, 26 PERB ¶¶4049 (1993), *aff’d*, 27 PERB ¶¶3026 (1994).

⁴ *Id.*

telecommunications titles and the computer-related titles share the same goals and objectives, have common supervision, more education and greater expertise than the hourly titles in TWU's unit. Thus, for the reasons more fully explained by the ALJ, the at-issue titles share more significant terms and conditions of employment with the employees represented by DC 37 than those few terms and conditions they share with employees in TWU's unit.

The other uniting criterion contained in §207 of the Act, administrative convenience, was considered by the ALJ. The Authority argued in its answer that the at-issue titles should be placed in separate units or, in the alternative, placed in an existing unit of DC 37. The ALJ found that placing the at-issue titles in separate units would be counterproductive to negotiations, especially since there is no evidence in the record to support such separation. The Authority's alternative argument supported placing the titles in an existing unit of DC 37. We have held that the administrative convenience criterion requires weight to be given to an employer's uniting preference.⁵ In this particular case, the factors considered under community of interest and the Authority's mission are supported by placement of the titles of computer specialist (software) I, II, III and IV and telecommunications specialist (voice) I, II, III and IV into DC 37's unit.

Accordingly, we hereby add the titles of computer specialist and telecommunications specialist to the unit represented by DC 37.⁶

⁵ *Malone Cent. Sch. Dist.*, 31 PERB ¶3050 (1998).

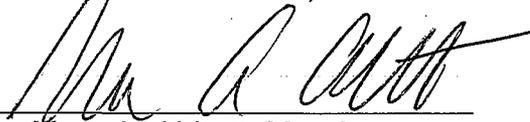
⁶ The majority status of the unit is not placed in issue by the accretion of these titles, therefore, no election is ordered. *Hammondspoint Cent. Sch. Dist.*, 33 PERB ¶3036 (2000); *New York Convention Ctr. Operating Corp.*, 27 PERB ¶3034 (1994).

IT IS, THEREFORE, ORDERED that the petitions filed by TWU in the instant proceeding must be, and they hereby are, dismissed.

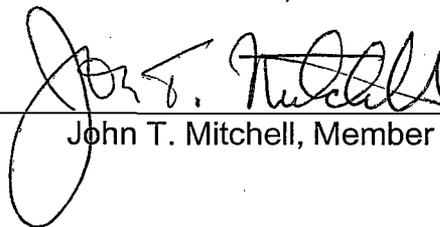
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-22682

**STATE OF NEW YORK (OFFICE OF MENTAL
HEALTH - SOUTH BEACH PSYCHIATRIC CENTER),**

Respondent,

-and-

UNITED UNIVERSITY PROFESSIONS,

Intervenor.

**WILLIAM P. SEAMON, GENERAL COUNSEL (STEVEN M. KLEIN of counsel),
for Charging Party**

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

LISA WILLIS, for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Office of Mental Health-South Beach Psychiatric Center) (State) to a decision of an Administrative Law Judge (ALJ), on an improper practice charge filed by the Public Employees Federation, AFL-CIO (PEF) alleging that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally entered into an agreement with the State University of New York (SUNY) for the provision of pharmacy management services by SUNY's Downstate Medical Center (Center) at the South

Beach Psychiatric Center (South Beach). PEF alleged in its charge that such services had been exclusively provided by PEF unit members. United University Professions (UUP), representing the employees at the Center, intervened in the proceeding and became a party for all purposes.¹

The ALJ found that the State violated the Act when it transferred management of the pharmacy at South Beach to the Center.

EXCEPTIONS

The State filed exceptions to the ALJ's decision and provided proof of service of those exceptions on PEF, but not on UUP. The State thereafter requested an extension of time to file its exceptions on UUP, arguing that UUP was inadvertently not served and that UUP consented to the late service. PEF filed a motion to dismiss the State's exceptions for failure to timely and properly serve a party to the proceeding. The State represents that UUP has not objected to the late service of its exceptions. However, UUP has not filed a response to the exceptions or to PEF's motion.

Based upon our review of the record and our consideration of the parties' arguments on PEF's motion to dismiss, we must dismiss the State's exceptions as untimely filed.

Section 213.2(a) of the Rules requires a party filing exceptions with PERB to also serve those exceptions on all other parties within the same 15 working day period and, in addition, to file proof of such service with us. It is clear from the record that UUP was not served with the State's exceptions within the time frame required and that, therefore,

¹ PERB's Rules of Procedure, §200.5.

no proof of service on UUP was filed with PERB with the State's proof of service on PEF.

In *Town/City of Poughkeepsie Water Treatment Facility*,² we stated:

We have consistently held that timely service upon other parties is a component of timely filing. Consequently, we will dismiss exceptions that have not been timely served. In prior decisions in which we have dismissed exceptions for failure of timely service, our decision has been prompted by an objection from one or more of the parties who was not timely served.(citation omitted) We here determine that requiring strict compliance with the filing requirements of our Rules with respect to the service of exceptions on all affected parties at the same time they are filed with the Board should not be dependent upon the urging of one of the parties to the proceeding.(citation omitted)

That UUP has not objected to the late service upon it by the State of its exceptions or that PEF objects to the late filing has no bearing on our decision. We have held that failure to properly and timely serve exceptions upon the other parties is a failure of timely service, warranting dismissal of the exceptions.³

Based on the foregoing, we do not reach the merits of the State's exceptions. The exceptions are dismissed and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the State of New York (Office of Mental Health-South Beach Psychiatric Center) restore the work of pharmacy management to the unit represented by PEF and make whole any unit employees for any loss of wages or benefits occasioned by the State's transfer of pharmacy management to employees of SUNY's Downstate Medical Center, with interest at the maximum legal rate;

² 35 PERB ¶13037, at 3105-06 (2002).

³ See *City of Albany*, 23 PERB ¶13027 (1990), *conf'd*, 181 AD2d 953, 25 PERB ¶17002 (3d Dep't 1992).

IT IS FURTHER ORDERED that the State of New York (Office of Mental Health-South Beach Psychiatric Center) sign and post the attached notice at all locations normally used to communicate with employees in the unit represented by PEF.

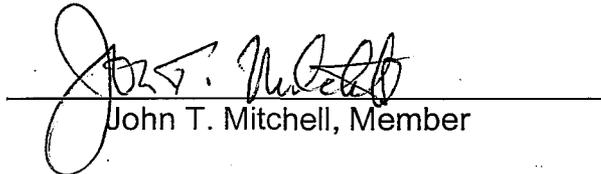
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Office of Mental Health – South Beach Psychiatric Center) in the unit represented by the Public Employees Federation, AFL-CIO, that the State of New York (Office of Mental Health – South Beach Psychiatric Center) will:

Forthwith restore the work of pharmacy management to the unit represented by PEF and make whole any unit employees for any loss of wages or benefits occasioned by the State's transfer of pharmacy management to employees of SUNY's Downstate Medical Center, with interest at the maximum legal rate.

Dated

By
(Representative) (Title)

STATE OF NEW YORK (OFFICE OF
MENTAL HEALTH – SOUTH BEACH
PSYCHIATRIC CENTER)

.....

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

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

In the Matter of

**TRANSPORT WORKERS UNION OF AMERICA,
LOCAL 100, AFL-CIO,**

Charging Party,

- and -

CASE NO. U-24228

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

**KENNEDY, SCHWARTZ & CURE, P.C. (STUART LICHTEN of counsel), for
Charging Party**

**MARTIN B. SCHNABLE, VICE-PRESIDENT AND GENERAL COUNSEL
(RHONDA J. MOLL AND EDWARD ZAGAJESKI of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Transport Workers Union of America, Local 100, AFL-CIO (TWU) to a decision of an Administrative Law Judge (ALJ) dismissing TWU's improper practice charge alleging that the New York City Transit Authority (Authority) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it retaliated against Andrew Joseph Saloma after the TWU filed improper practice charge U-23862 alleging that the Authority refused Saloma's request for union representation during a required physical examination.

EXCEPTIONS

TWU excepts to the ALJ's decision on the law and the facts, alleging that the ALJ erred by finding the Authority had a legitimate business reason in defense of the instant improper practice charge. The Authority filed a brief in opposition to TWU's exceptions and 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 are set forth in detail in the ALJ's decision.¹ We will confine our review to the facts relevant to the exceptions.

In 1983, the Authority employed Saloma as a train conductor. In 1985, the Authority promoted him to the position of train operator. As a train operator, the Authority required Saloma to undergo biannual physical examinations.

The record indicates that, on June 21, 2002, Saloma reported to the Authority's Medical Assessment Clinic (MAC) for his biannual physical examination.² During that examination, he admitted to drinking an occasional beer and that he had been in "rehab" treatment for substance abuse.³ He was referred to the Authority's psychologist, Dr. Mider, for substance abuse evaluation and was evaluated by Dr. Mider at the Authority's Psychological Services, a part of the Employees Assistance Program (EAP). Dr. Mider recommended that Saloma document proof of completion of a chemical dependency relapse prevention education/treatment program of three to four weeks duration.⁴ On July 28, 2002, Dr. Isenberg, at the MAC, referred Saloma to a treatment program at Arms Acres with a note requesting that the treatment program verify Saloma's participation.⁵

¹ 36 PERB ¶4556 (2003).

² Transcript, p. 28.

³ Transcript, p. 98.

⁴ Transcript, p. 106.

⁵ Transcript, pp. 109-10.

Arms Acres, however, responded to Jose Rosado, associate director of the grievance and discipline office of TWU. The letter indicated that Saloma was seen at Arms Acres and, after assessment, it was determined that Saloma was not in need of substance abuse treatment.⁶ No one at the Authority received this letter.

On August 30, 2002, Saloma returned to the MAC with his TWU representative, Michael Staton, and requested that Staton observe the examination. Saloma's request was denied and he was placed on suspended work status. On September 4, 2002, Saloma returned to the MAC with Staton. His request to have Staton present during the exam was again denied. On September 5, 2002, Saloma returned to the MAC for examination without Staton. At the examination, Saloma provided Dr. Isenberg with a copy of the Arms Acres letter to Rosado, which he had not previously received. Dr. Isenberg accepted the correspondence as compliance with the referral and returned Saloma to work without restrictions.

On October 8, 2002, the Authority served Saloma with a disciplinary notice for refusing to be examined without a TWU representative present. The Authority, however, withdrew the disciplinary notice on October 31, 2002.

On November 14, 2002, TWU filed an improper practice charge (U-23862) alleging, *inter alia*, that the Authority violated the Act when it refused Saloma's request for a TWU representative during the examination at the MAC. On April 2, 2003, a hearing was held on this charge. Dr. Michelle Alexander, the Authority's assistant vice-president for occupational health services, testified about the Authority's policy forbidding union representation at physical examinations. Dr. Alexander is also a certified medical review officer and has the experience and training to be considered a

⁶ Transcript, pp. 111-12.

substance abuse professional. Dr. Alexander explained that the medical director of the occupational and health services requires periodic audits of employees' medical records. Dr. Alexander testified that she also reviews employees' medical files.⁷

In preparation for the hearing in U-23862, Dr. Alexander reviewed Saloma's file with the Authority's counsel, Daniel Topper. It was during that review process that Dr. Alexander discovered that Dr. Isenberg had made a mistake.⁸ Dr. Alexander found the letter from Arms Acres to be nonresponsive to the referral.⁹ After the hearing on April 2, 2003, Dr. Alexander conducted a conference call with Drs. Isenberg and Mider to discuss the case before she went forward.¹⁰ Dr. Alexander testified that Dr. Isenberg admitted that he had made a mistake because he did not realize the difference between substance abuse treatment and substance abuse relapse prevention education.¹¹ Dr. Isenberg agreed to correct the error. He referred Saloma to a treatment program on April 11, 2003.

On April 25, 2003, TWU filed the instant charge, which is the subject of this appeal. The Authority denied the material allegations of the charge.

DISCUSSION

TWU argues that the Authority retaliated against Saloma because he participated in a protected activity. The ALJ did find that Saloma would not have been directed to

⁷ Transcript, p. 87.

⁸ Transcript, pp. 89-90, 96.

⁹ Transcript, p. 118.

¹⁰ Transcript, p. 149.

¹¹ Transcript, pp. 122-23.

enroll in a substance abuse relapse prevention program but for TWU filing the earlier improper practice charge.

It is axiomatic that 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. To establish improper motivation, a charging party must prove that he or she had been engaged in protected activities, and that the respondent had knowledge of the activities and acted because of those activities. If the charging party proves a *prima facie* case of improper motivation, the burden of going forward shifts to the respondent to establish that its actions were motivated by legitimate business reasons.¹²

The ALJ found that the Authority had a legitimate business reason for its actions, even though she found that Saloma would not have been directed to enroll in the dependency program had TWU not filed the charge in U-23862.

Our reasoning in *State of New York (Department of Correctional Services)*, 26 PERB ¶3055 (1993), is applicable here. There we found that there was no violation of the Act when hazardous duty pay was eliminated for three employees when the erroneous payment of those employees was first discovered during the investigation of a grievance. It was not the filing of the grievance, we found, which motivated the cessation of the payments to the three employees, but information revealed in the investigation of the grievance. Likewise, here, it was not the filing of the prior improper practice charge which prompted Alexander to order Saloma to participate in the substance abuse relapse prevention program, but Alexander's medical judgment that it was best for Saloma after she reviewed his records. Although the information about the

¹² *State of New York (State Univ. of New York-Oswego)*, 34 PERB ¶3017 (2001).

status of Saloma's treatment was first brought to Alexander's attention by the earlier improper practice charge, she was entitled to pursue that information and to act based upon the results of her review of his records.¹³

While the ALJ found the causal connection between the filing of the prior charge and the directive to Saloma, the ALJ also found that the record amply demonstrated that Alexander made her decision to request Saloma to complete a substance abuse relapse prevention program based upon her medical judgment after evaluating Saloma's records. The undisputed medical records contained Saloma's admission to past dependency on drugs and alcohol and recent social drinking. As a substance abuse professional, Alexander formed an opinion based upon her training and experience that an alcoholic cannot engage in social drinking. Furthermore, she was aware that Saloma, as a train operator, was employed in a safety sensitive position.

Alexander's decision was also based upon her awareness that an error had been committed by one of the Authority's physicians. She was cognizant of the appearance of retaliation that might follow her decision to correct this error on the eve of the hearing in U-23862. However, Alexander's undisputed testimony was that her decision to correct the error was based upon her concern as a substance abuse professional for Saloma's safety, as well as the safety of the public. There is no evidence in this record that Alexander's decision was motivated by animus toward either the TWU or Saloma.

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

¹³ *Brunswick Cent. Sch. Dist.*, 19 PERB ¶3063 (1986).

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

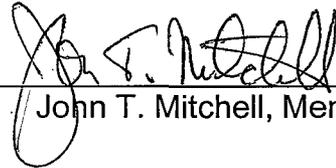
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

VED P. MALHOTRA,

Charging Party,

CASE NO. U-24384

- and -

**LOCAL 375, DISTRICT COUNCIL 37,
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO,**

Respondent.

VED P. MALHOTRA, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Ved P. Malhotra to a decision of the Director of Public Employment Practices and Representation (Director) dismissing as deficient the improper practice charge Malhotra filed alleging that Local 375, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (Local 375) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it failed to pursue his complaints that he was entitled to an advanced job title and/or higher salary from his then-employer, the New York City School Construction Authority (Authority).

Malhotra was advised by the Assistant Director of Public Employment Practices and Representation (Assistant Director) that his charge was deficient because he was a

retiree and Local 375 owed him no duty of fair representation. He further noted that no facts were pled that, if proven, would support a finding that Local 375's conduct while Malhotra was an employee was arbitrary, discriminatory or in bad faith, especially in light of the fact that Local 375 was investigating his claims pursuant to their letter to him of April 10, 2003. Malhotra responded that he had not received the assistance he sought from Local 375 while he was employed by the Authority.

The Director thereafter dismissed Malhotra's charge, finding that the charge was untimely filed, pursuant to §204.1(a) of the Rules of Procedure.¹ Additionally, the Director dismissed the charge for failure to plead any facts which would establish that Local 375 breached the duty of fair representation.

EXCEPTIONS

Malhotra argues in his exceptions that his case has been on-going since 1992 and that he has actively pursued it, with repeated requests for assistance from Local 375. He further alleges that he has brought the case to the Board's attention to avoid further delays, now that Local 375 has intervened on his behalf.

FACTS

Malhotra had sought Local 375's assistance from December 2001 through December 2002. He was advised by Local 375 at that time that his claim was untimely, that his job title was consistent with the terms of his hiring and that his salary was appropriate under the collective bargaining agreement. Malhotra then retired from the Authority's employ on December 2, 2002. Malhotra's charge was filed on July 16, 2003.

¹ Section 204.1(a)(1) of PERB's Rules of Procedure provides that a charge must be filed within four months of the action alleged to be improper under the Act.

DISCUSSION

Malhotra's charge is clearly untimely, having been filed more than four months after the last action by Local 375 upon which he bases his complaints and years after some of the actions alleged to be improper in his charge.²

Additionally, Malhotra concedes that Local 375 is actively pursuing claims on his behalf now. With respect to actions taken after his retirement, Malhotra has no standing to file an improper practice charge alleging a breach of the duty of fair representation.³

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

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

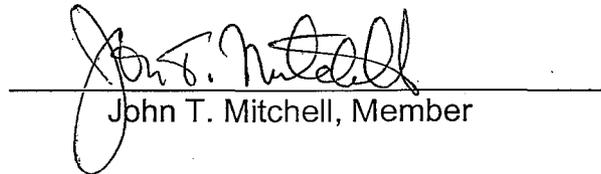
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

² *New York State Pub. Empls. Fed'n*, 27 PERB ¶3006 (1994).

³ See *Greece Cent. Sch. Dist., Greece Teachers Ass'n and NEA (Lanzillo)*, 28 PERB ¶3048 (1995), *conf'd sub nom, Lanzillo v. PERB*, 29 PERB ¶7003 (Sup. Ct. Albany County 1996).

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

In the Matter of

CHARLES JANAY,

Charging Party,

- and -

CASE NO. U-23625

NEW YORK STATE COURT CLERKS ASSOCIATION,

Respondent,

- and -

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Employer.

CHARLES JANAY, *pro se*

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

LAUREN P. DeSOLE, CHIEF OF EMPLOYEE RELATIONS (SHARON B. BOWLES of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge filed by Charles Janay alleging that the New York State Court Clerks Association (Association) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by failing to file an Equal Employment Opportunity Commission (EEOC) charge on his behalf, refusing to allow him the

opportunity to speak with the Association's attorney, failing to assist him in obtaining a work transfer and failing to respond to his inquiries about the filing of a grievance.

Janay's employer, the State of New York - Unified Court System (UCS), is made a statutory party pursuant to §209-a.3 of the Act.

EXCEPTIONS

Janay excepts to the ALJ's decision on both legal and factual grounds. The Association and the UCS support the ALJ's decision.

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

FACTS

A detailed description of the facts is set forth in the ALJ's decision.¹ We will confine our analysis to the salient facts relevant to our resolution of the exceptions.

Janay has been employed by UCS in the position of associate court clerk in Queens County Supreme Court since about 1996. Janay had been assigned to the Court's Kew Gardens facility. After he had worked at Kew Gardens for only about four months, Janay inquired about a transfer to the Long Island City facility which would be a shorter commute from his home in the Bronx.

Janay worked with Joel Cohen, an associate court clerk, who was also the secretary of the Association. Janay sought Cohen's assistance to effect a transfer to UCS's Long Island City facility. Cohen explained to Janay the procedure to request a transfer or reassignment. He counseled Janay regarding his right to request a transfer

¹ 36 PERB ¶4555 (2003).

but cautioned him that the sole authority to grant such request rested with UCS. Cohen interceded on Janay's behalf and had conversations with Anthony DeAngelis, chief clerk, Queens County Supreme Court. Cohen also spoke with his contacts in the Bronx and Manhattan courts.

Cohen thought that, as the result of his efforts on Janay's behalf, Janay was reassigned to the Long Island City facility in November 2000. However, in February 2001, Janay was transferred back to Kew Gardens because of a personality conflict with the judge to whom he had been assigned. Janay approached Cohen about a subsequent transfer back to Long Island City. Cohen advised Janay that the Association could not take any action where the member did not have the right to return to a specific facility.

Janay then contacted Kevin Scanlon, the Association president, who advised him to file a charge with the EEOC. Janay asked Scanlon to file the charge but he declined because the Association does not file that type of charge. Janay pointed out to him that the Association had filed such a charge in May 1998 on behalf of a member.

In his testimony, Janay denied that he was the victim of racial discrimination while working at the Long Island City facility. He felt, however, that the Association treated some of its members differently when it involved the Association offering assistance. Janay used the EEOC complaint as an illustration of the Association's disparate treatment. Cohen testified that the EEOC complaint Janay referred to created unrest within the Association which led to the Association to decide not to involve itself

in any further EEOC complaints.²

Janay met with the Association's grievance chairperson, Joseph Radice, in an effort to persuade the Association to file a contract grievance regarding his desire to transfer to the Long Island City facility. Radice explained to Janay that he would discuss the situation with the Association's attorney and report back to Janay. Janay insisted on speaking directly with the Association's attorney. Radice refused his request based upon Association policy.

Janay wrote to Scanlon in June and July 2002, asking for the Association's position regarding his transfer to the Long Island City facility. Janay testified that Scanlon never responded. Cohen testified that he spoke with Janay on several occasions about these letters. Janay denied having any such conversations with Cohen. On August 7, 2002, Janay filed the original improper practice charge and, thereafter, amended the charge on August 15, 2002.

DISCUSSION

In order to establish a violation of the duty of fair representation under the Act, Janay must demonstrate that the Association's actions toward him were arbitrary, discriminatory or taken in bad faith.³ The ALJ found that Janay failed to meet his burden of proof. We agree.

² The Board takes administrative notice of the improper practice charge filed by Wilfred E. Trotman against the Association alleging that the Association violated §§209-a.2(a), (b) and (c) of the Act by secretly using Association resources to file a charge with the New York City Commission on Human Rights on behalf of certain members of the Association. The charge was dismissed. *New York State Court Clerks Ass'n*, 33 PERB ¶4574 (2000).

³ *Civil Service Employees Ass'n 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).

Janay's charge is premised on the fact that the Association failed and refused to file an EEOC complaint when it had done so for other members and refused to prosecute a contract grievance on his behalf.

The ALJ credited Cohen's explanation of the Association's position with regard to filing EEOC complaints. This record fails to contradict Cohen's testimony or to demonstrate that the Association's actions with respect to the EEOC complaint were either arbitrary, discriminatory or done in bad faith.

We must, therefore, determine whether the Association's actions regarding the grievance violated the Act. In the absence of proof of arbitrariness, discrimination or bad faith,⁴ a union does not breach its duty of fair representation merely because it decides not to file a grievance on behalf of one of its members. We have held that we would not substitute our judgment for that of a union's regarding the filing and prosecution of grievances, since a union is given a wide range of reasonableness in these regards.⁵ The unrebutted testimony demonstrates that Janay spoke with Radice and was informed that the Association would not pursue his grievance and why. The Association is under no statutory obligation to agree with Janay's interpretation of the collective bargaining agreement.⁶

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

⁴ *Id.*

⁵ *District Council 37, AFSCME (Gonzalez)*, 28 PERB ¶3062 (1995).

⁶ *Amalgamated Transit Union, Div. 580, AFL-CIO and Central New York Reg'l Transp. Auth.*, 32 PERB ¶3053 (1999).

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

In the Matter of

MOHAMMAD SAIDIN,

Charging Party,

CASE NO. U-23697

- and -

**UNITED FEDERATION OF TEACHERS, NYSUT,
AFT, AFL-CIO,**

Respondent,

-and-

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

Employer.

MOHAMMAD SAIDIN, *pro se*

**JAMES R. SANDNER, GENERAL COUNSEL (MELINDA G. GORDON of
counsel), for Respondent**

**ROBERT WATERS, SUPERVISING ATTORNEY (ORINTHIA PERKINS of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Mohammad Saidin to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge which alleged that the United Federation of Teachers, NYSUT, AFT, AFL-CIO (UFT) violated

§209-a.2(c) of the Public Employees' Fair Employment Act (Act) in the handling of a grievance on his behalf. Saidin's employer, the Board of Education of the City School District of the City of New York (District) is made a statutory party pursuant to §209-a.3 of the Act.

Upon motion made by UFT and joined by the District, the ALJ dismissed the charge for failure to provide facts which would support a finding of a breach of the duty of fair representation, after the pre-hearing conference and after directing Saidin to file an offer of proof in support of the allegations in the charge.

EXCEPTIONS

Saidin excepts to the ALJ's decision, arguing that the ALJ erred by finding his amended charge did not plead and prove a *prima facie* case. UFT supports the ALJ's decision; the District has not filed a response to the exceptions.

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

FACTS

Saidin's charge stems from the UFT's representation of him in an arbitration hearing on a grievance UFT filed challenging a 1999 classroom observation report which rated Saidin as unsatisfactory. The arbitrator's decision ordered the District to modify portions of the observation report.

Saidin alleged in his amended improper practice charge that UFT failed to argue at the arbitration hearing that certain sections of the collective bargaining agreement between UFT and the District were not followed by the District in its conduct of the in-issue classroom observation and the issuance of the report that followed the

observation. Saidin alleged that UFT failed to follow his wishes in its conduct of the arbitration because one of the UFT representatives did not like him and that other employees' grievances had been processed in reliance upon the contractual provisions he relied upon. He also alleged that UFT and the District conspired to breach the duty of fair representation at the arbitration hearing.

After a pre-hearing conference on the charge, Saidin was directed by the conference ALJ to file an offer of proof in support of the facts alleged in his charge. Saidin's offer consisted of his amended charge, the in-issue observation report, the arbitrator's decision, a pamphlet entitled "Security in the Schools" and the UFT-District collective bargaining agreement. Thereafter, UFT made a motion to dismiss for failure to state a cause of action and the District joined in the motion.

DISCUSSION

In deciding a motion to dismiss, the facts alleged in the charge and the offer of proof must be viewed in a light most favorable to the charging party and every reasonable inference must be given to the facts alleged by the charging party.¹ Here, the ALJ held that even if all the facts pled by Saidin were true, the charge would not establish a breach of the duty of fair representation in violation of §209-a.2(c) of the Act.

In order to establish a breach of the duty of fair representation a charging party must prove that the employee organization acted in a manner that was arbitrary,

¹*County of Nassau (Police Dep't) (Unterweiser)*, 17 PERB ¶3013 (1984).

discriminatory or in bad faith.² Dissatisfaction with the employee organization's tactics or strategy in handling a grievance does not establish a violation of the Act.³

Here, UFT represented Saidin at the arbitration and succeeded in having some of the language in the observation report modified. UFT explained that certain of the provisions of the collective bargaining agreement upon which Saidin wanted UFT to rely were not relevant to his particular case. Even if UFT had been incorrect in its analysis of Saidin's grievance, a violation of the Act would not be established because mere negligence or error in judgment does not breach the duty of fair representation.⁴

Finally, Saidin's allegations that a UFT representative didn't like him, that UFT had processed other employees' grievances differently in circumstances similar to his, and had conspired with the District against him, are conclusory and cannot form the basis of a finding of a violation of the Act.⁵ Although given the opportunity to do so, Saidin did not allege any facts, in either the amended charge or the offer of proof, in support of those allegations.

Based on the foregoing, Saidin's exceptions are denied and the ALJ's decision is affirmed.

² *Civil Service Employees Ass'n, Inc. v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *affirmed on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

³ *Local 1655, District Council 37, AFSCME, AFL-CIO*, 25 PERB ¶3008 (1992).

⁴ *Council 82, AFSCME, AFL-CIO and State of New York (Div. of Parole)*, 35 PERB ¶3023 (2002).

⁵ *Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO*, 32 PERB ¶3044 (1999).

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

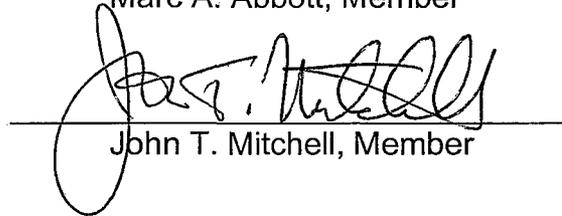
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

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

Charging Party,

- and -

CASE NO. U-23311

**STATE OF NEW YORK (DEPARTMENT OF
CORRECTIONAL SERVICES),**

Respondent,

- and -

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

Intervenor.

**NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Charging Party**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (VALERIE J. AYERS of
counsel), for Respondent**

HINMAN STRAUB P.C. (WILLIAM F. SHEEHAN of counsel), for Intervenor

BOARD DECISION AND ORDER

This matter comes before us on exceptions filed by the State of New York (Department of Correctional Services – Auburn Correctional Facility) (DOCS) and cross-exceptions filed by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), to an interim decision of an Administrative Law Judge (ALJ) dismissing DOCS' affirmative defenses. The ALJ found that PERB has jurisdiction over

the improper practice charge alleging a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) and, contrary to CSEA's contention, §205.5(d) of the Act is applicable to the charge.

EXCEPTIONS

DOCS excepts to the ALJ's interim decision on the law and the facts.

CSEA, in its cross-exceptions, argues that the ALJ's conclusion of law that our decision in *Sherburne-Earlville Central School District*¹ (hereafter, *Sherburne-Earlville*), is dispositive of the issues presented in the instant case, is in error.

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

FACTS

CSEA filed an improper practice charge on April 12, 2002, alleging that DOCS violated §209-a.1(d) of the Act by unilaterally assigning certain unit work to two DOCS employees in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA).² DOCS filed its answer denying the material allegations of the charge and alleging certain affirmative defenses, including timeliness, waiver and duty satisfaction.

On February 12, 2003, a hearing was held at which time it was revealed to the ALJ that a similar charge had previously been filed by CSEA and withdrawn as the result of a settlement agreement. In that charge, U-20434, dated October 29, 1998, CSEA alleged that DOCS violated §209-a.1(d) of the Act when it unilaterally assigned unit work to the same two non-unit employees to whom unit work was allegedly

¹ 36 PERB ¶13011 (2003).

² NYSCOPA intervened in this proceeding.

assigned in this instance. DOCS was represented by counsel from the Governor's Office of Employee Relations (OER) in both proceedings.

On December 2, 1998, CSEA and DOCS' Superintendent of Auburn Correctional Facility met to discuss the charge in U-20434 and the underlying work assignment. At that meeting, they entered into a written agreement, executed by the local CSEA president and vice-president, the maintenance supervisor and superintendent.³ Thereafter, on January 12, 1999, CSEA requested that its charge U-20434 be withdrawn. This request was approved by the Director of Public Employment Practices and Representation (Director). By letter dated January 22, 1999, the Director informed all parties through their counsel and/or representatives that the withdrawal request had been approved.

CSEA, during its opening statement, stated to the ALJ its theory that the instant charge, U-23311, was a breach of the settlement agreement reached in U-20434. As a consequence of this statement, the ALJ limited the scope of the hearing to DOCS' affirmative defenses and the ALJ's own inquiry into PERB's jurisdiction. At the conclusion of the first day of hearing, the ALJ adjourned the proceedings *sine die* in order to decide these threshold issues.

DISCUSSION

The ALJ's decision was an interim decision.⁴ As a general rule, this Board will not review interlocutory determinations of the Director or an ALJ until such time as all

³ The agreement was subsequently approved by DOCS' Assistant Commissioner of Labor Relations.

⁴ 36 PERB ¶4545 (2003).

proceedings below have been concluded, and review may be had of the entire matter.⁵ By adopting such a policy, the Board avoids the delay inherent in a piecemeal review of proceedings and prevents any prejudice and/or inefficient use of administrative resources arising from such piecemeal review.⁶

Consequently, it is only when extraordinary circumstances are present and/or in which severe prejudice would otherwise result if interlocutory review were denied that we will entertain a request for such review. This is such a situation.

DOCS has taken exception to the ALJ's interim decision on the law and the facts. DOCS contends that the ALJ erred by finding that PERB has jurisdiction over this matter. We agree. The ALJ concluded that the December 2, 1998 agreement is not a contract or agreement cognizable under the Act and, that PERB has jurisdiction over the alleged change in terms and conditions of employment. The ALJ interpreted our recent decision in *Sherburne-Earlville*⁷ as compelling that conclusion.

The ALJ's reliance on *Sherburne-Earlville* in deciding the jurisdictional issue is misplaced. *Sherburne-Earlville* involved the creation of an alleged practice by a supervisory employee that favored only certain members of CSEA's district-wide unit and existed without the knowledge or consent of the unit's bargaining representative or the superintendent of the school district. As we noted in *Sherburne-Earlville*, CSEA failed to prove mutuality in the creation of the alleged practice. Moreover, the ALJ's reliance on *Hudson Valley District Council of Carpenters v. State of New York*,

⁵ *County of Nassau*, 22 PERB ¶3027 (1989).

⁶ *United Fed'n of Teachers, Local 2 and New York State United Teachers*, 32 PERB ¶3071 (1999) (later history omitted).

⁷ *Supra*, note 1.

*Department of Correctional Services*⁸ (hereafter, *Hudson Valley*), is also misplaced. The court in *Hudson Valley* found that the agreements executed by the superintendents of two state correctional facilities were done without the requisite authority. However, the court noted that, while the Governor is the chief executive officer of the State, Executive Law, Article 24, establishes an Office of Employee Relations (OER). Executive Law §650 states, in substance, that OER was created to assist the Governor and direct and coordinate the State's efforts with regard to the State's powers and duties under the Act. Executive Law, §§650 and 653, designates the Director of OER as the Governor's agent in discharging these powers and duties under the Act. In *Hudson Valley*, OER was not involved in the execution of the subject agreements.

Here, CSEA revealed for the first time to the ALJ at the hearing that the instant improper practice charge was a breach of the settlement agreement dated December 2, 1998. This fact triggered our jurisdictional limitation imposed by §205.5(d) of the Act which states:

the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

We have held that a jurisdictional determination can be made at any stage of our proceedings, and it is properly based on any relevant information before us, however that information comes to our attention.⁹

⁸ 152 AD2d 105, 23 PERB ¶7514 (3d Dep't 1989).

⁹ *County of Onondaga and Sheriff of Onondaga County*, 30 PERB ¶3036 (1997). See also *City of Glens Falls*, 25 PERB ¶3011 (1992), *conf'd, sub nom. Glens Falls PBA v. PERB*, 195 AD2d 933, 26 PERB ¶7009 (3d Dep't 1993) (alleged breach of an oral agreement revealed for the first time at hearing).

CSEA contends that the December 2, 1998 agreement settling U-20434 does not comport with the definition of an agreement found in §201.12 of the Act and that the jurisdictional limitations imposed by §205.5(d) do not apply. We disagree. This line of reasoning adopted by both CSEA and the ALJ is unpersuasive because it ignores the facts of this case and our prior decisions. In U-20434, DOCS was represented by OER at all stages of the proceeding. The December 2, 1998 agreement resulted from an exchange of promises and was executed by the CSEA unit president and vice-president and the DOCS facility superintendent. The Director's acceptance of CSEA's withdrawal of the charge executed after the December 2, 1998 agreement was noticed to both CSEA's representative and counsel from OER. To reason that the December 2, 1998 agreement resulting in a withdrawal of U-20434 lacked the requisite legal authority and mutuality is factually and legally incorrect. The discussions between CSEA and the Superintendent of Auburn were entered into with the knowledge of OER and the resulting agreement was approved by DOCS itself.

We have previously held that a settlement agreement acting as a source of right to an employee organization divests us of jurisdiction over an improper practice charge alleging a violation of such agreement.¹⁰ In *County of Onondaga*,¹¹ a case similar to the instant appeal, the Deputy Sheriff's Benevolent Association (DSBA) filed an improper practice charge alleging a transfer of unit work in violation of §209-a.1(d) of the Act. We

¹⁰ See *State of New York (Dep't. of Taxation and Finance)*, 24 PERB ¶3034, at 3069 (1991), where we held that "[t]he jurisdictional limitation in §205.5(d) embraces any agreement as defined without regard to form or content. A claimed breach of ". . . an agreement ancillary to the parties' main contract (footnote omitted) lies as much beyond our jurisdiction as a violation of the written collective bargaining agreement."

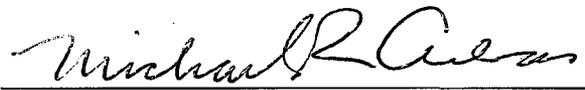
¹¹ *Supra*, note 9. See also *Warsaw Cent. Sch. Dist.*, 23 PERB ¶3022 (1990); *County of Suffolk*, 22 PERB ¶3033 (1989).

had previously determined the exclusivity of the unit work and, as a result of our determination, the County entered into a settlement in order to avoid further litigation. The DSBA alleged in its subsequent charge a breach of the settlement agreement. The ALJ requested briefs on the jurisdictional issue raised by the settlement agreement. Subsequently, the ALJ dismissed the charge pursuant to §205.5(d) of the Act. We affirmed the ALJ's decision but dismissed the charge conditionally pursuant to our jurisdictional deferral policy.¹²

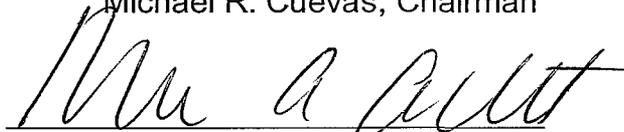
Based upon the foregoing, we grant DOCS' exception as to our jurisdiction and reverse the decision of the ALJ. Since we conditionally dismiss the charge, we need not reach at this time the other exceptions raised by DOCS.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, conditionally dismissed, subject to a motion to reopen in accordance with our established deferral policy.¹³

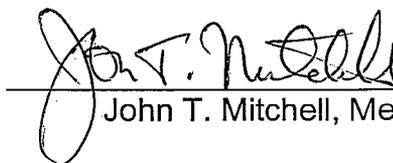
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

¹² CSEA, in its cross-exceptions, argues that should we decide to abstain from exercising jurisdiction over this charge, it should be conditionally dismissed. See *Town of Carmel*, 29 PERB ¶3073 (1996); *County of Suffolk*, 22 PERB ¶3033 (1989).

¹³ *Herkimer County BOCES*, 20 PERB ¶3050 (1987); *New York City Transit Auth.*, 4 PERB ¶3031 (1971).

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

In the Matter of

**NORTH MERRICK FACULTY ASSOCIATION, NEW YORK
STATE UNITED TEACHERS, AFT, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-5286

NORTH MERRICK UNION FREE SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the North Merrick Faculty Association, New York State United Teachers, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Teacher Aides.

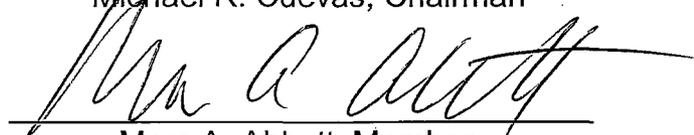
Excluded: All others.

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

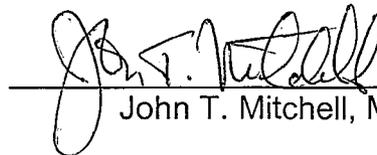
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-5311

**NEW HYDE PARK-GARDEN CITY PARK UNION
FREE SCHOOL DISTRICT,**

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

Included: All regularly scheduled full-time and part-time Cafeteria Aides/Monitors.

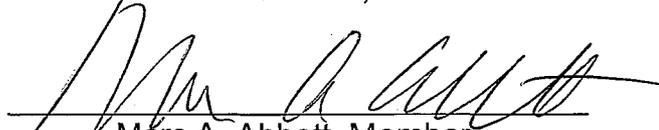
Excluded: All other employees.

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

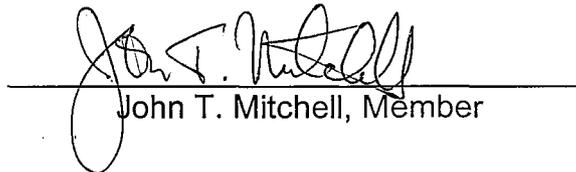
DATED: October 31, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member