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State of New York Public Employment Relations Board Decisions from December 1, 2004

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 1, 2004

Keywords

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

In the Matter of

MYRJA ROSADO,

Charging Party,

- and -

CASE NO. U-24695

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

PAUL L. DASHEFSKY, ESQ., for Charging Party

**MARTIN B. SCHNABEL, GENERAL COUNSEL AND VICE PRESIDENT
(VICTOR M. LEVY of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Myrja Rosado to a decision by an Administrative Law Judge (ALJ), dismissing her 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) by refusing to restore her to a daytime position on August 21, 2003, in retaliation for successfully pursuing a grievance, filed on July 25, 2003. The ALJ dismissed the charge, finding that Rosado had failed to prove that the Authority's refusal to reinstate her to the day-shift was a result of her exercise of protected rights.

EXCEPTIONS

Rosado excepts to the ALJ's decision, arguing that the ALJ erred on the facts and the law. The Authority cross-excepts to the ALJ's decision, arguing that, while the ALJ was correct in dismissing the charge for failure to establish a *prima facie* case, he erred by failing to grant the Authority's motion to dismiss the charge as untimely.

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

FACTS

The facts are set forth in the ALJ's decision and will be repeated here only as necessary to address the exceptions and cross-exceptions.¹

Rosado was hired by the Authority in 2002 as an Assistant Transit Management Analyst II. She has vocational training, two years of college, and many years of experience working in the construction industry. Rosado was assigned to the day shift and advised the Authority that she had to work that shift because she was responsible for the care of her grandmother in the evenings. Approximately four months after she was hired, Gustavo Gobbatto became the manager of the Track Design and Specifications Department where Rosado was working.

Gobbatto, who oversees the work performed by employees on both the day and night shifts, testified that more complex work is done on the day shift. He also testified that, at the time he became manager of the Department, all the employees who worked on the day shift, except Rosado, had engineering degrees. In May 2003, Gobbatto and Rosado had a confrontation about her use of sick leave. Gobbatto originally told her to

¹ 36 PERB ¶14572 (2004).

charge a day she was out of the office to personal leave, not sick leave. Rosado disagreed with him and, after consulting with her union, District Council 37, Local 375 (DC 37), spoke with Gobbatto, and he agreed that the day should be restored and her absence charged to sick leave. On May 23, 2003, Gobbatto contacted the Authority's time and attendance department and requested the correction on Rosado's behalf.

On June 4, 2003, Gobbatto, faced with increasing overtime costs on the night shift, advised Rosado that she was being transferred to the night shift. Gobbatto chose Rosado because she did not have an engineering degree and her transfer would be the least disruptive to the Department. On June 5, 2003, Gobbatto met with Rosado and Antonio Cabrera, Director of Track Engineering. Both Gobbatto and Rosado expressed their concerns about the transfer. Cabrera concurred with the transfer and advised both Gobbatto and Rosado to work on their communication problems.

Another meeting between Gobbatto, Rosado, and Cabrera was held on June 16, 2003, with Behrouz Fahti, a representative of DC 37, and Kenneth Mooney, Senior Director of Engineering. Rosado was offered the opportunity to transfer back to the day shift for ten days so that she could put her personal affairs in order. She rejected the offer. DC 37 thereafter filed a grievance on the transfer.

On July 3, 2003, Rosado's private attorney filed a letter with the Authority, alleging that Rosado's transfer was based upon sexual harassment and other grievances. The Authority responded by letter dated July 16, 2003, stating that the reason for Rosado's transfer was operational needs. The letter further stated that Rosado had not provided documentation to support her assertion that she could not work the night shift due to the medical needs of her grandmother.

On July 25, 2003, Rosado filed a grievance alleging that she still had not been credited for the personal day she had been forced to use in May 2003. Gobbatto again sought a correction from the time and attendance department, and the issue was resolved. On August 18, 2003, Rosado made a request by e-mail that Gobbatto transfer her back to the day shift. On August 21, 2003, Rosado provided Gobbatto with a doctor's note stating that she was responsible for the care of her grandmother in the evenings. Gobbatto responded on August 21, 2003, by letter to Rosado, denying her request, on the basis of hardship to the unit and the best interests of the unit.

DISCUSSION

The ALJ erred in not addressing the timeliness defense raised by the Authority in its answer and in its motion to dismiss.

Rosado's transfer to the night shift was implemented pursuant to the Authority's decision on June 4, 2003. Rosado sought, and received, further consideration of her request that she be reassigned to the day shift on June 5 and 16, and July 16, 2003. On July 25, 2003, Rosado filed her personal leave grievance. That grievance was thereafter satisfactorily resolved by Gobbatto. Then, Rosado, by e-mail on August 18, 2003, requested for the fourth time that Gobbatto transfer her back to the day shift. She then provided a doctor's note in support of her request on August 21, 2003. Gobbatto denied the request for the fourth time on August 21, 2003.

It is the filing of the grievance on July 25, 2003 that Rosado points to as the motivating factor behind Gobbatto's denial of her request for transfer back to the day shift on August 21, 2003. If Gobbatto's denial on August 21, 2003 was an independent act of the Authority, then Rosado's charge, filed on December 8, 2003, is timely, as it

was filed within four month's of the action complained of in the charge.² If Gobbatto's denial on August 21, 2003 is simply a reiteration of the Authority's previous position with respect to Rosado's requests for transfer back to the day shift, then the timeliness of the charge must be measured from the original action of the Authority on June 4, 2003, and the charge is untimely.

It is the original act or omission that triggers the filing period in §204.1(a) of the Rules. Subsequent reiterations of the initial act or omission pursuant to inquiry by a charging party do not extend the filing period or create a new one.³ We find that Gobbatto's August 21, 2003 denial of Rosado's request that she be returned to the day shift was simply a reiteration of the Authority's position, previously explained to Rosado on June 4, 5, and 16, and July 16, 2003. A new filing period is not triggered by Rosado's request for assignment to the day shift on August 18, 2003 and Gobbatto's reaffirmation of the Authority's position on August 21, 2003.⁴

We find, therefore, that Rosado's improper practice charge was untimely filed, more than four months after notification of her transfer to the night shift. We grant the Authority's cross-exception, deny Rosado's exceptions, and affirm the ALJ's dismissal of the improper practice charge, but for the reasons stated herein.

² Rules of Procedure, §204.1(a).

³ *United Fed'n of Teachers*, 23 PERB ¶13038 (1990).

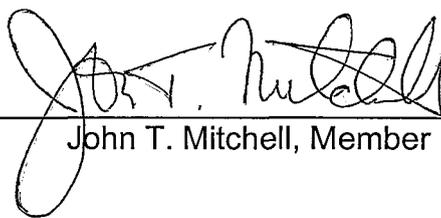
⁴ *Brighton Fire Dist.*, 10 PERB ¶13091 (1977).

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

DATED: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**NASSAU COUNTY INVESTIGATORS POLICE
BENEVOLENT ASSOCIATION, INC.,**

Petitioner,

-and-

CASE NO. C-5319

COUNTY OF NASSAU,

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO, NASSAU
LOCAL 830,**

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 Nassau County Investigators Police

Benevolent Association, Inc., has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Financial Investigator I, Financial Investigator II, Special Investigator I, Special Investigator II, Environmental Conservation Investigator, Electronic Surveillance Investigator, and Detective Investigator.

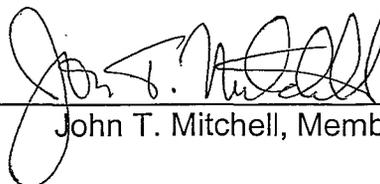
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Nassau County Investigators Police Benevolent Association, Inc. 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: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



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,**

Petitioner,

-and-

CASE NO. C-5402

COUNTY OF MONROE,

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

Included: All part-time employees in the titles Nursing Assistant, Licensed Practical Nurse, Registered Nurse, Nursing Supervisor, Grand Jury Stenographer, Laborer Heavy, Clerk IV-80, Public Health Sanitarian, Clerk Typist – 80, Food Service Worker, Ground Equipment Operator, Zoo Keeper, Medical Investigator, Building Service Worker, Registered Nurse – 80, Data Entry Operator – 80, Telephone Operator, Telephone Operator – 80, Clerk II with typing – 80, Clerk III with typing – 80, Clerk G2, Dietary Aide, Clerk Typist, Clerk G4, Working Foreman, Guard p.t., Senior Recreational Instructor p.t., Motor Equipment Operator, Clerk Typist – 80 hours, Forensic Attendant p.t., Clerk III with typing pd p.t. – 80, Senior Account Clerk 80, Driver Messenger, Clerk III – 80, Toxicology Technician p.t., Speech Pathologist, Zoo Attendant, Toxicologist I, Leisure Services Aide, Nutritionist p.t.

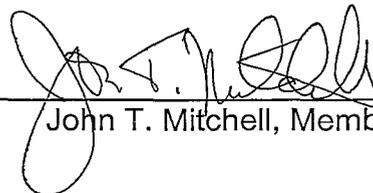
Excluded: Full-time managerial and confidential employees, as well as Exam Proctors, and part-time Deputy Sheriffs.

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

DATED: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



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-5422

**HEWLETT-WOODMERE UNION FREE
SCHOOL DISTRICT,**

Employer,

-and-

**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 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: Food Service Helper, salaried; Food Service Helper, hourly; Cleaner; Maintainer Supervisor; Custodian; Assistant Cook; Supervisor of Operations; Maintainer; Cook; Head Custodian 1; Information Technology Aide 1; AV Tech; Supervising Groundskeeper; Groundskeeper; Cook Manager; Assistant Head Custodian; Network Specialist 11; PC Support Tech; Information Technology Specialist 1.

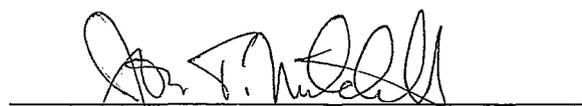
Excluded: All others.

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: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**ROOSEVELT CHILDREN'S ACADEMY WORKERS'
ASSOCIATION,**

Petitioner,

-and-

CASE NO. C-5425

ROOSEVELT CHILDREN'S ACADEMY,

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 Roosevelt Children's Academy Workers' Association has been designated and selected by a majority of the employees of the above-named public employer, in the units agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

UNIT 1:

Included: Teachers, Cooperating Teachers, and Nurses.

Excluded: All other employees.

UNIT 2:

Included: Administrative Assistants and Maintenance/Security
Workers.

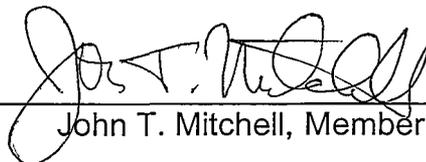
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Roosevelt Children's Academy Workers' Association. 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: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

**NIAGARA FALLS HOUSING AUTHORITY PART-TIME
EMPLOYEES UNION, AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 66, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-5431

NIAGARA FALLS HOUSING AUTHORITY,

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 Niagara Falls Housing Authority Part-Time Employees Union, American Federation of State, County and Municipal Employees, Council 66, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and

the settlement of grievances.

Included: Part-Time Resource/Community Center Aide, Part-Time Purchasing Clerk, and all less than 20 hours employees.

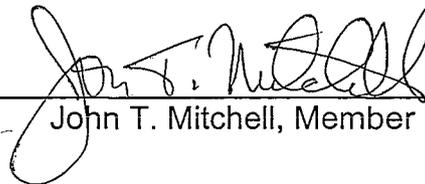
Excluded: All Department Heads, Director, Assistant Director, General Manager, Permanent Full-Time and Regular Part-Time Employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Niagara Falls Housing Authority Part-Time Employees Union, American Federation of State, County and Municipal Employees, Council 66, 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: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 791,

Petitioner,

-and-

CASE NO. C-5440

REGIONAL TRANSIT SERVICE, INC.,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 791 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Road Supervisors, Dispatchers, Radio Controllers, and Garage Foremen/Supervisors.

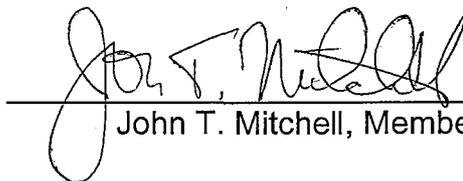
Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 791. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**ELLCOTTVILLE CENTRAL SCHOOL-RELATED
PROFESSIONAL ASSOCIATION NYSUT/AFT AFL-CIO,**

Petitioner,

-and-

CASE NO. C-5453

ELLCOTTVILLE CENTRAL 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 Ellicottville Central School-Related Professional Association, NYSUT/AFT-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time non-teaching employees of the Ellicottville Central Schools, including regular substitutes.

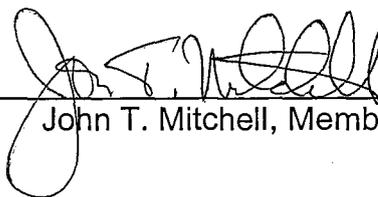
Excluded: All others.

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

DATED: December 1, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member