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New York State Public Employment Relations Board

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This case comes to the Board on exceptions filed by the Transport Workers Union, Local 106, Transit Supervisors Organization (TSO) to a decision of an Administrative Law Judge (ALJ)\(^1\) dismissing an improper practice charge alleging that the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when MABSTOA unilaterally assigned Nicholas Palmiotti, a TSO bargaining member employed as a Transit Property Protection Supervisor (TPPS), to perform security camera work beyond the inherent scope of TPPS job duties and at locations within the New York City subway system under the jurisdiction of the New York City Transit Authority (NYCTA). The

\(^1\) 40 PERB ¶4535 (2007).
charge also alleges that the assignment of Palmiotti adversely impacted other TSO members by requiring involuntary overtime.

MABSTOA denied that it violated the Act and raised various affirmative defenses including res judicata and timeliness.

Following a hearing, the ALJ found the improper practice charge was barred by res judicata based on the dismissal by the Director of Public Employment Practices and Representation (Director), of an earlier improper practice charge filed by TSO, Case No. U-26513, pursuant to §204.1(a) of the Rules of Procedure (Rules). In the alternative, the ALJ concluded that TSO had failed to demonstrate that the assignment of Palmiotti violated the Act based on the following: a) although MABSTOA and NYCTA are separate employers, they are functionally integrated in the management and supervision of their respective employees; b) deployment of staff, including the assignment of an employee to perform work for another employer, constitutes a managerial prerogative under the Act; c) the duties assigned to Palmiotti were inherent duties of the TPPS position; d) the management rights clause of the collectively negotiated agreement between MABSTOA and TSO constitutes a waiver of the duty to bargain regarding assignments; and e) while the issue of an alleged increase in involuntary overtime may trigger an enforceable demand to negotiate its impact, TSO did not make a demand for impact negotiations.

**EXCEPTIONS**

In its exceptions, the TSO argues that the ALJ erred in applying res judicata to the dismissal by the Director of its earlier improper practice charge, as amended. In addition, it contends that the ALJ's alternative conclusion, that MABSTOA did not violate the Act when it unilaterally assigned Palmiotti to the at-issue duties, was in error. MABSTOA supports the ALJ's conclusions.
Based upon our review of the record and our consideration of the parties' arguments, we reverse the ALJ's dismissal of the charge based on the doctrine of res judicata but affirm, in part, the ALJ's alternative merit-based conclusion that MABSTOA did not violate the Act when it assigned Palmiotti to the duties at issue.

**Procedural Background**

On January 20, 2006, TSO filed an improper practice charge, Case No. U-26513, alleging that MABSTOA had violated §209-a.1(d) of the Act when it unilaterally assigned Palmiotti to help install and program security cameras on various days in NYCTA's subway system. The charge alleged that on January 5, 2006, TSO's President Robert Romaine wrote to NYCTA's Director of Labor Relations Ralph Agritelley objecting to Palmiotti's unilateral assignment on the grounds that Palmiotti was performing work for a different employer, NYCTA, and that the work was not within the TPPS job description. The charge further alleged that Palmiotti's assignment adversely impacted others within the TSO bargaining unit by requiring them to perform Palmiotti's work in his absence.

Consistent with §204.1(a) of the Rules, the Director engaged in an initial processing of TSO's charge by conducting a facial examination of the allegation. On January 25, 2006, the Director sent TSO a letter stating that the charge would not be processed due to deficiencies outlined in an attached deficiency notice. The Director's notice identified three specific reasons for the pleading's deficiency: it did not allege that Palmiotti was deficient, it does not contain the notice attached to the letter identifying the Director's stated reasons for the deficiency. In addition, the record does not include the amended charge TSO filed in response to the deficiency notice. For purposes of determining TSO's exceptions, the Board has taken administrative notice of the Director's articulated reasons contained in the deficiency notice as well as the allegations in TSO's amended charge.

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2 Although the record before the ALJ includes the Director's letter stating that the charge was deficient, it does not contain the notice attached to the letter identifying the Director's stated reasons for the deficiency. In addition, the record does not include the amended charge TSO filed in response to the deficiency notice. For purposes of determining TSO's exceptions, the Board has taken administrative notice of the Director's articulated reasons contained in the deficiency notice as well as the allegations in TSO's amended charge.
the duties assigned were not inherently part of Palmiotti's job duties or a related
incidental task; the charge failed to allege that the increased workload to other
bargaining unit members was substantial and that MABSTOA requires that the work be
performed in the same amount of time; and TSO did not specify the names of the
individuals involved or the time when the assignment was made.

On February 7, 2006, MABSTOA filed an amended charge responsive to the
Director's deficiency notice. The amended charge alleged, inter alia, that the installation
and programming of security cameras were not an inherent part of TPPS job duties or
related incidental tasks and that NYCTA general superintendent Joseph Corsello had
assigned Palmiotti to perform those duties since on or about late August 2005. The
amended charge did not allege when or how TSO first learned of Palmiotti's assignment.

Following the Director's facial examination of the amended pleading, he
concluded that the allegations did not set forth facts demonstrating that the charge, as
amended, was timely pursuant to §204.1(a) of the Rules because it alleged that the at-
issue assignment began in late August 2005. On February 15, 2006, the Director issued
a decision dismissing the amended charge.³ Prior to dismissing the amended charge,
the Director did not provide TSO with a second opportunity to amend the charge.

On March 1, 2006, TSO filed the present charge containing the identical
allegations of the earlier dismissed amended charge but adding one additional
allegation: TSO became aware of Palmiotti's assignment on November 8, 2005 during a
meeting with NYSTA general superintendent Joseph Corsello.

In a cover letter to the Director enclosing the new charge, TSO's counsel stated:

³ Manhattan and Bronx Surface Transit Operating Auth, 39 PERB ¶4528 (2006).
convenience so I could avoid the necessity of filing exceptions with the Board. I would greatly appreciate it if your office could inform me whether this charge would (sic) be processed by March 8th so that I would have time to draft and file (sic) exceptions, if required.

The Director processed the new charge and TSO did not file exceptions to the dismissal of the earlier amended charge. On March 8, 2006, the Director scheduled a pre-hearing conference to take place before an ALJ with respect to the new charge. In its answer, MABSTOA asserted both res judicata and timeliness as affirmative defenses. Subsequently, MABSTOA withdrew its timeliness defense.

Prior to the hearing before the ALJ, MABSTOA requested the opportunity to file a motion to dismiss on grounds of res judicata based on the Director’s deficiency dismissal of the earlier amended charge. In response, TSO stated that it was prepared to offer evidence during the hearing establishing that it first learned of Palmiotti’s assignment within four months prior to filing the charge. The ALJ deferred ruling on the res judicata issue until the close of the record and after the issue was briefed by the parties. Without objection, evidence was presented during the hearing regarding the time and circumstances when TSO learned of Palmiotti’s assignment.

Facts

MABSTOA is a public benefit corporation responsible for operating certain omnibus lines formerly owned and operated by two companies which were acquired by New York City immediately prior to the lines being transferred to MABSTOA. MABSTOA is a subsidiary of NYCTA and maintains bus facilities in Manhattan and the Bronx.\(^4\) Although separate legal entities, both are managed, supervised and administered under the same organizational structure. For example, the NYCTA Vice President for Labor

\(^4\) Public Authorities Law §§1203-a(1) and (2).
Relations is responsible for all labor relations at NYCTA and MABSTOA, as well as other related entities in New York City providing public transportation.

TSO is the collective bargaining representative for a supervisory unit of MABSTOA employees that includes seven employees holding the TPPS title.

TSO and MABSTOA are parties to a collective bargaining agreement that contains the following management rights clause:

Without limitation upon the exercise of any of its statutory powers or responsibilities, the Operating Authority shall have the unquestioned right to exercise all normally accepted management prerogatives, including the right to fix operating and personnel schedules, impose layoffs, determine work loads, arrange transfers, order new work assignments, and issue any other directive intended to carry out its managerial responsibility to operate the omnibus routes safely, efficiently, and economically.

The union fully accepts the Operating Authority’s basic right to manage the omnibus properties and exercise the management prerogatives stated in this Article, and in the law governing the Authority in a joint effort to place and keep the omnibus system on a safe efficient, economical operating basis. The Operating Authority recognizes that in the exercise of its rights and prerogatives to manage the omnibus properties, as set forth in this Article, it will preserve the rights of the employees and/or their representatives through the legal and orderly processes provided for in Article VI hereof.

TSO and MABSTOA are also parties to a July 17, 2000 side letter with respect to the commingling of NYCTA and MABSTOA’s staff at NYCTA’s central maintenance facility in East New York, Brooklyn. The side letter provides, inter alia, that:

2. The following applies to all other co-mingled facilities:

To the extent that co-mingling is extended into other areas, job locations and tours of the operation within or outside of the Department of Buses, where it does not already exist the parties agree to meet to discuss and negotiate the impact of

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5 Joint Exhibit 1, p. 27-28.
such a decision. If the parties cannot agree, existing contractual provisions will apply to the co-mingled facility or work.\(^6\)

On an annual basis, each MABSTOA TPPS picks his or her respective preferences from six fixed tours of duty and regular days off and one floater position.\(^7\) They do not pick their MABSTOA work location.

The primary duty of a TPPS is the supervision of Transit Property Protection Agents (TPPA) in protecting transit system property under MABSTOA jurisdiction in Manhattan and the Bronx. As part of their supervisory duties over security for MABSTOA locations, TPPS’s inspect TPPA assigned posts, patrol locations, check perimeter fences, conduct security investigations and survey and inspect security equipment to ensure they are functioning properly. Such supervisory duties include the inspection and maintenance of security cameras installed at MABSTOA locations as well as the downloading of video when necessary. In addition, their responsibilities and activities include responding to alarms, confronting unauthorized persons on NYCTA property and walking “along subway tracks where live (sic) third rail is present.”\(^8\) Prior to the assignment of TPPS Palmiotti to work in the subways beginning in August 2005, no TPPS employed by MABSTOA had been assigned there.

NYCTA also employs individuals in the TPPS and TPPA titles. NYCTA TPPA’s are sometimes assigned to work at MABSTOA work locations. When they are assigned to a MABSTOA worksite, they are supervised by a MABSTOA TPPS.

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\(^6\) *Supra*, note 5, at p. 28.

\(^7\) The floater was created by MABSTOA to provide a substitute TPPS in case of an absence.

\(^8\) Joint Exhibit 8, p. 2.
The NYCTA TPPSs are in a separate bargaining unit represented by the Surface Subway Supervisors Association (SSSA). NYCTA and SSSA are parties to a collective bargaining agreement that permits, in limited circumstances, for a TPPS employed by MABSTOA to perform SSSA bargaining unit work.

Within NYCTA's Department of Subways there is a Division of Security that is responsible for the supervision and management of security in all NYCTA and MABSTOA locations. The Division of Security employs a general superintendent who is responsible for maintaining security at all NYCTA and MABSTOA locations and for maintaining a central security command center. NYCTA's general superintendent supervises three NYCTA field superintendents who are responsible for the supervision of TPPSs whether employed by NYCTA or MABSTOA.

Beginning in August, 2005, MABSTOA assigned TPPS Palmiotti to assist in NYCTA's installation of a security camera system at subway locations. Palmiotti was chosen based on his experience with the security cameras at MABSTOA locations and because of his computer literacy. Palmiotti's assignment did not involve the actual physical installation of NYCTA's security cameras. Rather, his primary role was in assisting the vendor and maintenance employees in determining the best angle to capture surveillance images. Based on his computer knowledge, Palmiotti has also been assigned to work on the access control system for entry into NYCTA and MABSTOA's offices in Brooklyn.

During the hearing, TSO presented undisputed testimony that it was not until a November 8, 2005 meeting with NYCTA's Corsello that it obtained the information
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Following the meeting and immediately prior to the filing of the initial charge, TSO and NYCTA exchanged letters regarding the legality and appropriateness of the unilateral assignment to Palmiotti.

DISCUSSION

Exceptions to the Dismissal Based on Res Judicata

In its exceptions, TSO contends that the ALJ misapplied the doctrine of res judicata by dismissing the present charge based on the Director's deficiency dismissal of the earlier amended charge. TSO sets forth four bases for challenging the ALJ's application of res judicata: 1) the Director did not provide TSO with notice and a full and fair opportunity to litigate the question of timeliness prior to the dismissal of the earlier amended charge; 2) the Director's decision did not constitute a final and binding decision; 3) the ALJ erred in concluding that TSO did not contest the Director's decision; and 4) the ALJ failed to follow an earlier ALJ decision in Hempstead Union Free School District. 10

In support of its argument that it had been denied a full and fair opportunity to litigate the timeliness issue, TSO disputes the ALJ's conclusion that the Director had granted it an opportunity to respond to the issue. TSO cites to the fact that timeliness was not one of the three reasons specified in the Director's January 25, 2006 deficiency notice regarding the initial charge.

TSO claims that its March 1, 2006 cover letter to the Director along with the Director's processing of the new charge demonstrate that the Director's dismissal of the

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9 One week or two before, TSO had received some general information that Palmiotti had received an assignment.

10 34 PERB ¶4530 (2001).
the earlier amended charge was not final and binding. In the letter, TSO stated that if the Director did not process the charge, TSO was prepared to file exceptions to the dismissal of the earlier amended charge.\textsuperscript{11}

In opposition to the exceptions, MABSTOA argues that TSO had a full and fair opportunity to contest the Director’s decision by filing exceptions with the Board pursuant to §213.2 of the Rules. In addition, MABSTOA relies upon earlier Board decisions that have dismissed exceptions based on the failure of a party to serve exceptions in a timely manner.\textsuperscript{12}

For the reasons set forth below, we agree with TSO that the ALJ erred in dismissing the charge based on \textit{res judicata}.

Under appropriate circumstances, \textit{res judicata} and \textit{collateral estoppel} may constitute appropriate bases for dismissing a charge.\textsuperscript{13} Either doctrine may be applied to a prior quasi-judicial determination when a party has had a full and fair opportunity to litigate the issues before the administrative agency and the agency utilizes procedures that are “substantially similar to those used in a court of law.”\textsuperscript{14}

\begin{flushleft}
\textsuperscript{11} We agree with MABSTOA that TSO’s brief makes inappropriate reference to a purported conversation between TSO and the Director following the dismissal of the amended charge. Based on the fact that this purported conversation is not a part of the record before us, the Board has disregarded those references.

\textsuperscript{12} Town/City of Poughkeepsie Water Treatment Facility, 35 PERB ¶3037 (2002); State of New York (Office of Mental Health-South Beach Psychiatric Center), 36 PERB ¶3039 (2003).

\textsuperscript{13} Local 342, Long Island Public Service Employees, 20 PERB ¶3045 (1987); County of Nassau v PERB, 151 AD 2d 168, 22 PERB ¶7034 (2\textsuperscript{nd} Dept 1989), affd on other grounds, 76 NY2d 579, 23 PERB ¶7019 (1990); City of Fulton, 31 PERB ¶3021 (1998); State of New York (Div of State Police) 36 PERB ¶3048 (2003). However, §205(d)(5) of the Act expressly prohibits the granting of preclusive effect to determinations of fact and law contained in a report and recommendations of a Civil Service Law §75 hearing officer.

\textsuperscript{14} Ryan v NY Tel Co, 62 NY2d 494, 499, 503 (1984).
\end{flushleft}
for applying the doctrines include the need for finality in the resolution of litigated disputes, the avoidance of vexatious litigation and the preservation of administrative resources.\textsuperscript{15} Whether to apply either doctrine requires a review of the prior pleadings and the procedural context and record of the earlier case, along with the decision itself.\textsuperscript{16}

Pursuant to §204.2(a) of the Rules, the Director reviews newly filed charges as a gate-keeping administrative function to weed out facially deficient charges and thereby avoid the administrative burden of holding unnecessary conferences and hearings. Under the Rule, the Director has the authority to summarily dismiss a charge on the grounds that it fails to allege facts that, as a matter of law, constitute a violation under §209-a of the Act or fails to allege facts that would establish that the purported violation took place within four months prior to the filing of the charge. In essence, the initial processing constitutes a \textit{sua sponte} regulatory demurrer to the facial allegations of a charge.\textsuperscript{17}

Prior to dismissing a charge, pursuant to §204.2(a) of the Rules, the Director has no obligation to issue a notice to the charging party setting forth the reasons why the charge is deficient. Even when a deficiency notice is sent to the charging party, the

\textsuperscript{15} Chen v Fischer, 6 NY3d 94, 100 (2005).

\textsuperscript{16} In general, strict application of New York or federal civil practice precedent may be inappropriate due to the distinct procedures in the Rules along with the public policy underlying the Act. For example, in \textit{Town of Scriba}, 35 PERB ¶3011 (2002), the Board, relying on New York civil practice case law interpreting CPLR §3217(c), concluded that a stipulation withdrawing an improper practice charge “with prejudice” constituted a basis for the application of \textit{res judicata}. However, the Rules do not contain a provision similar to CPLR §3217(c) regarding the impact of a notice, stipulation or order of discontinuance.

\textsuperscript{17} In direct contrast to the Director’s ministerial function, when a charge is processed and assigned to an ALJ, the merits of the charge, along with defenses such as timeliness, are subject to adjudication pursuant to §212.4(j) of the Rules.
Director is not required to inform the charging party of every reason why the charge is deficient.\textsuperscript{18}

As a matter of practice, the Director sends a notice to a charging party setting forth the reason(s) for the deficiency. The notice informs the charging party that it may either amend the charge by a certain date, withdraw the charge or stand by its initial pleading. In addition, the notice warns the charging party that if it fails to respond to the notice the charge will be deemed withdrawn and the matter will be closed. Although the Director sends the respondent a copy of the notice, along with a copy of the deficient charge, the respondent is not obligated to respond until such time as the charge is processed.

In response to a deficiency notice, a charging party has a variety of options: it can voluntarily withdraw the charge; ignore the notice and have the charge be deemed withdrawn by the Director; amend the charge with the aim of correcting the deficiencies, and/or have the charge be subject to the Director’s summary dismissal. Although a charging party has the right to file exceptions to the Director’s decision, nothing in §204.2(a) of the Rules prohibits a charging party from filing a new charge, within the applicable period of limitation, containing supplemental allegations sufficient to have the new charge processed by the Director.

New York and federal civil practice do not include an analogous procedure where, upon filing, a complaint or petition can be dismissed \textit{sua sponte} based on a review of the sufficiency of the pleading’s allegations. Judicial determinations on the sufficiency of a complaint or whether a cause of action is barred by the statute of

\textsuperscript{18} \textit{New York City Transit Auth}, 20 PERB ¶3057 at 3125, n. 2 (1987). \textit{See also, UUP (Barry)}, 21 PERB ¶3025 at 3058 n. 3 (1988).
limitations are determined in the context of motion practice in which the parties are entitled to the opportunity to serve and file affidavits and exhibits.\textsuperscript{19}

As noted by the Court of Appeals in \textit{Reilly v Reid}\textsuperscript{20} the rigid application of the \textit{res judicata} doctrine can result in the deprivation of any forum to consider the merits of a dispute:

\begin{quote}
These strong policy bases, however, if applied too rigidly, could work conceivable injustice. In properly seeking to deny a litigant two "days in court", courts must be careful not to deprive [the litigant] of one.\textsuperscript{21}
\end{quote}

Courts will grant preclusive effect to the dismissal of a prior lawsuit based on the insufficiency of the pleaded allegations only if the new complaint "fails to correct the defect or supply the omission determined to exist in the earlier complaint."\textsuperscript{22} Only after the substance of a defendant's statute of limitations defense has been fully litigated will a judgment dismissing a claim on that ground be deemed on the merits "especially where the motion to dismiss the first action was treated as one for summary judgment on which the court considered submissions of the parties dehors the pleadings."\textsuperscript{23}

In the present case, the ALJ erred in dismissing TSO's charge based on \textit{res judicata}. The Director's summary dismissal of TSO's earlier amended charge, consistent with §204.2(a) of the Rules, constituted a decision on the sufficiency of the

\textsuperscript{19} See, CPLR §§3211, 3212; Fed. R. Civ. Pro. Rule 12(b).

\textsuperscript{20} 45 NY2d 24 (1978).

\textsuperscript{21} 45 NY2d at 28.

\textsuperscript{22} 175 East 74\textsuperscript{th} Corp v Hartford Accident & Indemnity Co, 51 NY2d 585, 590, n. 1 (1980); Amsterdam Savings Bank v Marine Midland Bank, NA, 140 AD2d 781, app dismissed, 68 NY2d 766 (1986).

\textsuperscript{23} Smith v Russell Sage Coll 54 NY2d 185, 194 (1981). See also, Spindell v Brooklyn Jewish Hospital, 35 AD2d 962 (2d Dept 1970), affd, 29 NY2d 888 (1972).
amended pleading and not the merits of the timeliness issue. The application of res judicata was inappropriate because the present charge included an additional allegation that corrected the pleading deficiency found by the Director in the earlier amended charge: TSO became aware of the acts alleged on November 8, 2005, within four months of the charge. Neither TSO nor MABSTOA were given notice of the timeliness deficiency in the amended charge or provided with the opportunity to correct the defect or litigate the issue prior to the Director's dismissal. In contrast, the application of res judicata might have been appropriate if the earlier amended charge had been dismissed in the context of an adjudication before an ALJ, pursuant to §212.4 of the Rules, after the parties had the opportunity to fully litigate the issue.

In reaching our holding, we disagree with the ALJ's conclusion that, for res judicata purposes, there is a distinction between a party withdrawing a charge following a Director's deficiency notice and the Director's summary dismissal of a charge on the same grounds. Although the distinction is relevant to the ability to file exceptions, it is not relevant to the issue of claim preclusion in the context of matters before this agency. In both situations, the Director is refusing to process the charge based on a facial deficiency of the pleading.

We note, however, that the Director's decision was final and binding with respect to the sufficiency of the original amended pleading after TSO failed to file exceptions pursuant to §213.6 of the Rules. By making a calculated choice to file the present charge without filing exceptions to the earlier dismissal, TSO risked the real potential

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24 See, Greenburgh No 11, Union Free Sch Dist, 33 PERB ¶3059 (2000). See also, County of Onondaga, 12 PERB ¶3035 (1979), confirmed sub nom. 77 AD2d 783, 13 PERB ¶7011 (4th Dept 1980); West Park Union Free Sch Dist, 11 PERB ¶3016 (1978); Board of Fire Commrs, Brighton Fire Dist, 10 PERB ¶3091 (1977); Captain's Endowment Assn, 10 PERB ¶3034 (1977).
that the Director's earlier decision would be given preclusive effect if the present charge was not processed because it, too, was deficient. But here, TSO filed a timely new charge correcting the deficiency found by the Director in the earlier amended charge, so that the application of res judicata was inappropriate.

Finally, we reject MABSTOA's argument that TSO had a full and fair opportunity to litigate the timeliness issue by filing exceptions to the dismissal of the earlier amended charge. The fact that TSO had the right to file exceptions does not mean that it had a full and fair opportunity to litigate the issue of timeliness. The Board's review of the summary dismissal would have been focused on and limited to the Director's construction of the original amended pleading and his application of the timeliness limitation to the facts pled.

Exceptions to the Dismissal on the Merits

In its exceptions to the ALJ's alternative merit-based rationale for dismissing the charge, TSO contends that as a matter of law under the Act, MABSTOA cannot unilaterally assign an employee to work at a NYCTA facility because MABSTOA and NYCTA are separate legal entities. It also claims that the ALJ erred in concluding that the at-issue duties assigned to Palmiotti are an inherent part of his TPPS duties. Finally, TSO asserts the ALJ erred in concluding that the management rights clause constitutes a waiver of MABSTOA's duty to negotiate the assignment of Palmiotti.

While we agree with TSO's argument that the parties' management rights clause does not constitute a waiver of the duty to bargain the issue raised in the charge, we
affirm the ALJ’s conclusion that MABSTOA did not have a legal obligation under the Act to bargain the assignment.25

The express terms of the management rights clause grants MABSTOA the prerogative to “arrange transfers” and “order new work assignments” in carrying out “its managerial responsibility to operate the omnibus routes safely, efficiently, and economically.” (emphasis added) Based on the specific language utilized in the contract clause, we are not persuaded that the management rights clause constitutes a clear and unambiguous grant of right to MABSOTA to assign an employee to duties unrelated and outside the operation of the omnibus routes.26

Although the negotiated agreement is not a waiver, we concur with the ALJ that MABSTOA did not have a duty to bargain the at-issue assignment under the Act. In general, the location(s) where an employer assigns an employee to perform his or her work duties is a nonmandatory subject of bargaining.27 The mere act of assigning an employee to perform duties at another employer’s work location does not alter the employer-employee relationship.28

25 Rather than constituting a waiver, the management rights clause, along with the July 17, 2000 side letter, can be construed as constituting a colorable claim of contractual right thereby constituting a ground for conditional dismissal. New York City Transit Auth (Bordansky), 4 PERB ¶3031 (1971).

26 See, County of Livingston, 26 PERB ¶3074 (1993); County of Allegany, 33 PERB ¶3019 (2000).

27 Orange County Comm Coll and County of Orange, 9 PERB ¶3068 (1976).

As the ALJ correctly concluded, the separate legal status of MABSTOA and NYCTA, including MABSTOA constituting a separate employer under the Act, is not a *per se* basis for concluding that the unilateral assignment of Palmiotti violated the Act.29

TSO’s reliance on the decision in *Romaine v New York City Transit Authority*30 is misplaced. In that Article 78 proceeding commenced against NYCTA only, the Appellate Division, Second Department, issued an order that prohibited NYCTA from mandating that TSO members employed by MABSTOA attend and participate in certain safety training. The Appellate Division did not determine any legal issues between TSO and MABSTOA under the Act. Contrary to TSO’s argument, the fact that NYCTA is prohibited from issuing a mandate to a MABSTOA employee does not mean that MABSTOA cannot unilaterally assign the employee under the Act.

The record does not include any evidence demonstrating that MABSTOA’s assignment of Palmiotti to perform duties in the subways altered his terms and conditions of employment. Palmiotti remains a MABSTOA employee subject to the negotiated agreements between TSO and MABSTOA. He remains subject to the same supervisory structure when working at MABSTOA work location.

The ALJ’s conclusion that MABSTOA TPPSs already perform security functions at both MABASTOA and NYCTA work locations is based on a credibility determination regarding the testimony of NYCTA’s Vice President of Labor Relations. TSO has not

29 Public Authorities Law §§1203-a(1) and (2); *Collins v Manhattan and Bronx Surface Transit Operating Auth*, 62 NY2d 361 (1984); *Rosas v Manhattan and Bronx Surface Transit Operating Auth* 109 AD2d 647 (1st Dept 1985); *Reis v Manhattan and Bronx Surface Transit Operating Auth*, 161 AD2d 288 (1st Dept 1990); *Romaine v New York City Transit Auth*, 34 AD3d 486 (2d Dept 2006); *MABSTOA*, 10 PERB ¶3094 (1977).

30 Supra, note 29.
filed an exception to the ALJ’s credibility finding and, therefore, the issue is waived.\(^{31}\)

Even if TSO had not waived the issue, the record fully supports the ALJ’s creditability determination. MABSTOA’s notice of examination expressly states that the duties and responsibilities of the position include responsibilities related to the security of NYCTA property including the subways.

We also concur with the ALJ’s finding that the duties assigned to Palmiotti are not outside the inherent duties of a MABSTOA TPPS. As noted, the notice of examination for the position states that the position is responsible for maintaining security at NYCTA work locations. Second, the record establishes that the duties of a MABSTOA TPPS include the inspection and maintenance of security cameras.

Finally, we reject TSO’s argument that MABSTOA’s negotiation proposal to expand the scope and nature of the current commingling of MABSTOA and NYCTA employees at MABSTOA worksites establishes that MABSTOA had a duty to negotiate Palmiotti’s assignment to a NYCTA worksite. The proposal is indicative of MABSTOA’s willingness to negotiate but is not probative as to whether such willingness was related to any such legal duty.

Based on the foregoing, we grant TSO’s exceptions, in part, but in all other respects affirm the decision and order of the ALJ.

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

DATED: November 5, 2007
Albany, New York

Jerome Lefkowitz, Chairman
Robert S. Hite, Member

\(^{31}\) Rules §213.2(b); Town of Orangetown, 40 PERB ¶3008 (2007).
This case comes to the Board on exceptions filed by the Suffolk County Correction Officers Association (Association) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended, alleging that the County of Suffolk and Suffolk County Sheriff (Joint Employer) violated §§209-a.1(a) and (d) of the Public Employees’ Fair Employment Act (Act) by submitting a sick leave demand, that included a Sick Leave Management Program (SLMP) proposal, in its petition for compulsory interest arbitration. The improper practice charge alleged, inter alia, that §209.4(h) of the Act forecloses the submission of the SLMP proposal to interest arbitration. The Joint Employer filed an answer denying that the proposal is precluded from submission to
interest arbitration pursuant to §209.4(h) of the Act and raising various affirmative defenses.¹

Following the parties' submission of a stipulation of facts and record in lieu of a hearing, the ALJ issued a decision dismissing the Association's charge, concluding that the SLMP proposal is not precluded from submission to interest arbitration because it does not raise "issues relating to disciplinary procedures and investigations", as that phrase is utilized in §209.4(h) of the Act.

EXCEPTIONS

In its exceptions, the Association argues that the ALJ misconstrued the relevant facts and misinterpreted the applicable law in concluding that the SLMP proposal is not precluded from submission to interest arbitration pursuant to §209.4(h) of the Act. Specifically, the Association contends that the SLMP proposal permits the Joint Employer to impose penalties and restrictions that are disciplinary in nature on employees deemed sick leave abusers and chronic sick leave abusers without following the negotiated disciplinary procedures contained in the parties' agreement.² The Joint Employer supports the ALJ's decision.

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

¹ The Joint Employer filed a separate improper practice charge, Case No. U-27251, challenging various Association proposals included in the Association's cross-petition for interest arbitration. Pursuant to a stipulation of settlement, the Association and the Joint Employer resolved all the issues that were raised in the two improper practice charges with the exception of whether the SLMP proposal was properly submitted to interest arbitration.

² Before the ALJ, the parties agreed that the SLMP proposal does not relate to "eligibility and assignment to details and positions" under §209.4(h) of the Act.
FACTS

The facts are fully set forth in the ALJ's decision. They are repeated here only as necessary to address the exceptions.³

The Association represents a bargaining unit comprised of various Correction Officer and Warden titles in the Suffolk County Sheriff's Department. The Joint Employer and the Association are parties to a collectively negotiated agreement for the period January 1, 1997-December 31, 1999 and a stipulation, dated December 4, 2001, that extended the agreement as modified.

Pursuant to Section 15 of the collectively negotiated agreement, all permanent full-time employees in the bargaining unit are entitled to:

the Progressive Discipline Systems, and changes thereto, as developed and directed by the Office of Personnel and Labor Relations. The parties agree to meet and confer within ninety (90) days of the final ratification of this agreement to clarify Section 15 as it applies to the Progressive Disciplinary Procedure. If the parties fail to agree, a mutually agreed upon third party neutral shall decide the issue. However, under no circumstances will a full time, permanent employee be terminated for disciplinary reasons, unless he/she is given the opportunity of a Section 75 Hearing.⁴

Under the negotiated provision, the Association can elect to proceed to arbitration in lieu of a Civil Service Law §75 hearing in cases when the Joint Employer is seeking termination as the penalty. When the Joint Employer seeks a penalty "less than termination", the provision provides that a Civil Service Law §75 hearing will be held.

The parties are at an impasse in their negotiations for a successor agreement and an October 6, 2006 mediation session was unsuccessful.

³ 40 PERB ¶4570 (2007).

⁴ The stipulation of facts and record does not contain the Progressive Disciplinary Procedure referred to in Section 15 of the agreement.
On or about November 9, 2006, the Joint Employer filed and served a timely petition for compulsory interest arbitration. The Association filed and served a timely cross-petition for interest arbitration, dated November 22, 2006.

The Joint Employer's petition for compulsory interest arbitration contains its various negotiation demands including a demand seeking to amend Section 8.7 of the parties' agreement relating to sick leave. Under the sick leave demand, the Joint Employer proposes the SLMP which it attached as a separate document.

In the definitional section of the SLMP proposal, the Joint Employer defines the criteria to be used in designating bargaining unit members as sick leave abusers or chronic sick leave abusers. A sick leave abuser is defined as an employee "who has 5 or more occurrences of sick leave, or 8 or more tours of sick leave, during any 12 month period." A chronic sick leave abuser is defined as a bargaining unit member who has: (a) been a sick leave abuser for 18 consecutive months; or (b) had 10 or more occurrences of sick leave, or 16 or more tours of sick leave during any 12 month period.

The SLMP proposal sets forth, in the rules and restrictions sections, various specific employment consequences when a correction officer utilizes sick leave or when the Joint Employer designates an employee as a sick leave abuser or a chronic sick leave abuser:

C.3. Correction officers who have returned to duty from any sick leave will not work scheduled overtime during the 7 days immediately following their return to duty, unless ordered by a Supervisor to do so.

C.4. Correction Officers who are designated sick leave abusers or chronic sick leave abusers will not:
   a. work scheduled overtime, unless ordered by a Supervisor to do so,
   b. switch a tour of duty,
   c. apply for preferred assignments or designations,
   d. pick new tour schedule if an opening occurs.
D.1. Correction Officers designated as sick leave abusers are restricted as follows:
   a. will not receive night differential pay while on sick leave, and
   b. restrictions cited in rule #4

D.2. Correction Officers designated as chronic sick leave abusers are restricted as follows:
   a. will not receive differential pay while on vacation; and
   b. subject to the same restrictions as a sick leave abuser.

In the duties section, the Joint Employer sets forth the enforcement procedures of the policy. Under the proposal, the Commanding Officer of the Joint Employer’s Medical Evaluation Section is responsible for monitoring and administrating the program including: (a) designating sick leave abusers and chronic sick leave abusers; (b) issuing written notification of the designation together with the applicable rights and restrictions; (c) issuing final determinations from appeals challenging the designation; and (d) removing the designation and issuing a written notification of the removal.

**DISCUSSION**

The Association’s exceptions presents the Board with its first opportunity to determine the scope of the exclusions from interest arbitration contained in §209.4(h) of the Act.

In 2005, Suffolk County correction officers were added to the class of public employees, under §§209.2 and 209.4 of the Act, who are entitled to interest arbitration to render a determination resolving an impasse in collective negotiations.\(^5\) At the same time, the Legislature added a new subsection (h) to §209.4 of the Act containing an explicit

\(^5\) L 2005, c 737, §3.
statutory exclusion of certain subjects from interest arbitration involving Suffolk County correction officers. Section §209.4(h) of the Act states:

With regard to Suffolk county correction officers the provisions of this section shall not apply to issues relating to disciplinary procedures and investigations or eligibility and assignment of details and positions, which shall be governed by other provisions prescribed by the law. (Emphasis added)

The exclusions contained in §209.4(h) of the Act are the same as those applicable to employees of the state police set forth in §209.4(e) of the Act.

In its exceptions, the Association contends the SLMP proposal is not arbitrable because the proposal contains adverse consequences and procedures for correction officers who use sick time and who are designated as sick leave abusers and chronic sick leave abusers. The consequences in the proposal are denial of overtime, night differential pay and the opportunity to switch a tour of duty or pick a new tour, all of which are contractual benefits. According to the Association, these adverse consequences constitute issues "relating to disciplinary procedures and investigations" as that phrase is utilized in §209.4(h) of the Act. We agree.

In construing the meaning of the exclusionary phrase "relating to disciplinary procedures and investigations" in §209.4(h) of the Act, it is appropriate to examine the use of the phrase "relating to" in other subsections of §209.4 of the Act. Most relevant to our analysis are §§209.4(e), (f) and (g) of the Act which grant compulsory interest arbitration to certain state police employees, state correction


7 McKinney's, Statutes §97; New York State Police Investigators Assn, 30 PERB ¶3013 at 3027 (1997), confirmed sub nom. New York State Police Investigators Assn v New York State Pub Empl Rel Bd, 30 PERB ¶7011 (Sup Ct Albany County 1997).
officers and certain deputy sheriffs. At the time the 2005 bill regarding Suffolk County correction officers was introduced, the Senate sponsor made explicit reference to prior amendments to §209.4 granting compulsory interest arbitration to state police officers, state correction officers and deputy sheriffs.8

In New York State Police Association,9 the Board analyzed the significance of the Legislature's use of the qualifying term "directly" to the phrase "relating to compensation" in §209.4(e) of the Act and concluded that the Legislature intended for the phrase to be narrowly construed to apply to only those issues where the sole, predominant or primary characteristic of the proposal seeks to effect a change in the amount or level of compensation. At the time, §209.4(e) of the Act provided:

With regard to members of any organized unit of investigators, senior investigators and investigator specialists of the division of state police, the provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed [sic] by law. (Emphasis added)

Following the Board's decision, the Legislature in 2002 amended §209.4(e) of the Act to provide:

With regard to members of any organized unit of troopers, investigators, senior investigators,

8 Sponsor's Memo, Bill Jacket, L 2005, c 737; L1995, c 432 and 437; L 2001, c 586; L 2003, c 696. As noted, the subject matter exclusions for employees of the state police in §209.4(e) of the Act are identical to those set forth in §209.4(h).

9 Supra, note 7.
investigator specialists and commissioned or non-commissioned officers of the division of state police, the provisions of this section shall not apply to issues relating to disciplinary procedures and investigations or eligibility and assignment to details and positions, which shall be governed by other provisions prescribed by law. (Emphasis added)

In amending §209.4(e) in 2002 and enacting §209.4(h) in 2005, the Legislature did not utilize the term “directly” as a qualifier to the phrase “relating to disciplinary procedures and investigations.”

In contrast, when the Legislature enacted §§209.4(f) and (g) of the Act that set forth the issues that can be subject to interest arbitration for state correction officers and deputy sheriffs, the Legislature utilized the language contained in the former §209.4(e) including the phrase “directly relating to compensation”:

...the provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed by law.

Following the decision in New York State Police Association\(^\text{10}\) we have held that the use of the term “directly” in §209.4(g) of the Act also demonstrates a legislative intent to narrow the range of arbitrable compensatory issues for deputy sheriffs to those

\(^{10}\) Supra, note 7.
where the sole, predominant or primary characteristic of the proposal seeks a change in
the amount or level of compensation.\footnote{11}

Based on the absence of the term “directly” in §209.4(h) of the Act, we conclude
that the plain meaning of the phrase “relating to disciplinary procedures” must be read
broadly and that the natural and most obvious construction of the phrase includes
proposals that seek to impose administrative sanctions for sick leave abuse.\footnote{12}

In \textit{City of New York},\footnote{13} the Board recently held that a proposal seeking to place
limits on the standards that an employer may apply in defining sick leave abuse is a
nonmandatory subject of bargaining. In reaching that conclusion, we relied upon
\textit{Poughkeepsie City School District},\footnote{14} where the Board found that an employer's policy
announcement setting forth the criteria for sick leave abuse did not alter any terms and
conditions of employment and, therefore, was nonmandatory. In contrast, policies
containing a nondiscretionary, progressive disciplinary system or the imposition of
automatic disciplinary penalties have been found to constitute a mandatory subject of
bargaining.\footnote{15}

\footnotetext[11]{Sullivan County PBA, Inc., 39 PERB ¶3034 at 3111 (2006); Putnam County Sheriff’s
Dept PBA, Inc., 38 PERB ¶3031 (2005); Ulster County Deputy Sheriff’s PBA, Inc., 38
PERB ¶3033 (2005).}

\footnotetext[12]{Gailband v Christian, 56 NY2d 890 (1982); Santarella v New York City Dept of Corr,
77 AD2d 844 (1st Dept 1980), revd, 53 NY2d 948 (1981); Frew Run Gravel Products,
Inc., v Town of Carroll, 71 NY2d 126, 131 (1987).}

\footnotetext[13]{40 PERB ¶3017 (2007).}

\footnotetext[14]{19 PERB ¶3046 (1986).}

\footnotetext[15]{County of Nassau, 31 PERB ¶3074 (1998); State of New York (OMH), 31 PERB
¶3051 (1998).}
In the present case, we disagree with the ALJ's conclusion that the adverse sanctions, set forth in the SLMP proposal, for the mere use of sick leave by correction officers and for those correction officers designated as a sick leave abuser, do not relate to "disciplinary procedures". In reaching his conclusion, the ALJ distinguished the proposed penalties in the SLMP proposal from the alternative disciplinary penalties provided in Civil Service Law §75(3): reprimand, a fine not to exceed one hundred dollars, suspension without pay or termination. While it is true that under Civil Service Law §75 the appointing authority is limited to a choice of four alternative penalties, it is equally true that under the Act, parties may negotiate alternative disciplinary procedures to replace the provisions of Civil Service Law §75. For example, in the present case, the parties have negotiated a disciplinary procedure in Section 15 of the collectively negotiated agreement that includes a progressive disciplinary system. Additionally, the courts in New York have recognized that the loss of contractual benefits can constitute a disciplinary penalty.

Furthermore, the SLMP proposal is not limited to identifying the criteria that the Joint Employer will utilize to designate a sick leave abuser but rather contains explicit automatic penalties for being so designated. In essence, the designation of being an abuser would

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16 Matteson v City of Oswego, 186 AD2d 1017 (4th Dept 1992); Brabham v Weinstein, 89 AD2d 566 (2d Dept 1982); Auburn Police Local 195, 10 PERB ¶3045, mot denied, 10 PERB ¶3060 (1977), revd, Auburn Police Local 195 v Helsby, 91 Misc2d 909, 10 PERB ¶7016 (Sup Ct Albany County 1977), affd, 62 AD2d 12, 11 PERB ¶7003, (3d Dept 1978), affd, 46 NY2d 1034, 12 PERB ¶7006 (1979).


18 It is unquestionable that if the SLMP proposal was limited to setting forth the applicable criteria, it would be nonmandatory under Poughkeepsie City School District, supra, note 14.
place a correction officer into a penalty box mandating the denial of night differentials, establishing limitations on overtime entitlement and creating restrictions relating to schedules and tours all of which constitute limitations on contractual benefits. In addition, it would penalize other correction officers for using sick leave by denying them a contractual right to work overtime for a full week.

The SLMP proposal implicates both sick leave, a subject of arbitration pursuant to §209.4(h) of the Act and disciplinary procedures, a subject which is precluded from arbitration by that provision. Applying a balancing test, we conclude that, on the specific facts before us, the disciplinary aspect of the proposal predominates. By including penalties impacting terms and conditions of employment for the mere use of sick leave, the SLMP proposal transforms sick leave use into a form of misconduct.

Therefore, we conclude that because SLMP proposes to impose penalties for the use of sick leave, it relates to disciplinary procedures and is, therefore, excluded from interest arbitration under §209.4 (h) of the Act.

Based on the foregoing, we grant the Association’s exceptions and reverse the decision of the ALJ. We, therefore, find that the Joint Employer has violated §209-a.1(d) of the Act by submitting a prohibited demand to interest arbitration.

IT IS, THEREFORE, ORDERED that the Joint Employer shall withdraw the SLMP proposal from interest arbitration.

DATED: November 5, 2007
Albany, New York

[Signatures]
Jerome Lefkowitz, Chairman
Robert S. Hite, Member
In the Matter of
COUNTY OF WESTCHESTER

for a determination pursuant to CSL §212.

BOARD DECISION AND ORDER

On October 5, 2007, the Westchester County Board of Legislators adopted Resolution No. 193-2007 (as amended) authorizing the termination of the Westchester County Public Employment Relations Board as established by Act No. 84-1967, as amended by Act No. 1-1968, and subsequently amended by Acts Nos. 65-1969 and 108-1970. Pursuant to the most recent resolution, all local provisions and procedures relating to the Westchester County Public Employment Relations Board were abolished. The County has published a notice of termination in County office buildings and in a newspaper of general circulation.

We find that the County of Westchester has fully complied with §203.6 of our Rules of Procedure to terminate a local public employment relations board and, therefore, we determine that our February 14, 1968 Order\(^1\) approving the establishment of the local public employment relations board should be rescinded.

\(^1\) County of Westchester, 1 PERB ¶ 350 (1968).
NOW, THEREFORE, WE ORDER that the order of this Board, dated February 14, 1968, approving the resolution establishing the Westchester County Public Employment Relations Board be, and the same hereby is, rescinded, effective December 4, 2007.²

WE FURTHER ORDER that all matters pending before the Westchester County Public Employment Relations Board as of December 4, 2007, be forwarded to PERB for further processing.

DATED: November 5, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

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² As relevant here, §203.6 of PERB’s Rules of Procedure, specifies that the effective date of a termination of a local public employment relations board shall not take effect until 60 days after PERB receives a certified copy of the local resolution to terminate the local board.
In the Matter of

LOCAL 317, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

-case no. C-5675-

VILLAGE OF HOMER,

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 Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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 Motor Equipment Operators in the highway, water and sewer departments.

Excluded: All elected officials, office clerical and seasonal employees and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 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: November 5, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member
STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of  

UNITED PUBLIC SERVICE EMPLOYEES UNION,  

Petitioner,  

-and-  

COUNTY OF FRANKLIN AND SHERIFF,  

Employer,  

-and-  

FRANKLIN COUNTY DEPUTY SHERIFF'S ASSOCIATION,  
COUNCIL 82, AFSCME, AFL-CIO,  

Incumbent/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: Cook, Cook Manager, Account Clerk/Civil Deputy, Correction Officer, Deputy Sheriff/Correction Officer, Senior Account Clerk, Correction Officer Sergeant, Deputy Sheriff/Correction Officer Sergeant, Deputy Sheriff/Civil Officer, Senior Account Clerk/Civil Deputy.

Excluded: Sheriff, Undersheriff, Principal Account Clerk/Typist, Correctional Facility Nurse, Warden.

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: November 5, 2007

Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
MALVERNE SECURITY ASSOCIATION, NYSUT, AFT, NEA, AFL-CIO,
Petitioner,

-and-

MALVERNE 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 Malverne Security Association, NYSUT, AFT, NEA, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: All full-time and part-time security personnel.

Excluded: Administrators, supervisors and all other employees of the District.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Malverne Security Association, NYSUT, AFT, NEA, 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: November 5, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTH BUFFALO CHARTER SCHOOL INSTRUCTIONAL
STAFF ASSOCIATION/NYSUT/AFT, AFL-CIO,

Petitioner,

-and-

SOUTH BUFFALO CHARTER SCHOOL,

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 South Buffalo Charter School Instructional
Staff Association/NYSUT/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: All Teachers, Teaching Assistants, Library Assistants, Reading Coaches, Counselors, Social Workers, Nurses, Mentors, Technology Coordinators and regular building Substitute Teachers employed by the South Buffalo Charter School.

Excluded: All supervisors, managerial and confidential employees, administrators, business office staff, clerical employees, per diem substitute teachers, security employees and maintenance employees employed by the South Buffalo Charter School.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the South Buffalo Charter School Instructional Staff Association/NYSUT/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: November 5, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member
In the Matter of

ITHACA SUBSTITUTES ASSOCIATION, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

ITHACA CITY 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 Ithaca Substitutes Association, NYSUT, 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: All per diem substitute teachers with a current letter of reasonable assurance of continued employed.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Ithaca Substitutes Association, NYSUT, 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: November 5, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member