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8-10-2010

## State of New York Public Employment Relations Board Decisions from August 10, 2010

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from August 10, 2010

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TOWN OF WALLKILL,**

Charging Party,

**CASE NO. U-28331**

- and -

**TOWN OF WALLKILL POLICE BENEVOLENT  
ASSOCIATION, INC.,**

Respondent.

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In the Matter of

**TOWN OF WALLKILL POLICE BENEVOLENT  
ASSOCIATION, INC.,**

Charging Party,

**CASE NO. U-28379**

-and-

**TOWN OF WALLKILL,**

Respondent.

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**JOHN M. CROTTY, ESQ., for Town of Wallkill Police Benevolent  
Association, Inc.**

**HITSMAN, HOFFMAN & O'REILLY LLC (JOHN F. O'REILLY of counsel),  
for Town of Wallkill**

**BOARD DECISION AND ORDER**

These cases come to the Board on exceptions filed by the Town of Wallkill (Town), to a decision by an Administrative Law Judge (ALJ) on an improper practice charge (Case No. U-28331) filed by the Town alleging that the Town of Wallkill Police Benevolent Association, Inc. (PBA) violated §209-a.2(b) of the Public Employees' Fair

Employment Act (Act) by seeking to negotiate a proposal for the continuation of the disciplinary procedure in an expired collectively negotiated agreement, and an improper practice charge (Case No. U-28379) filed by PBA alleging that the Town violated §209-a.1(d) of the Act by refusing to continue to negotiate for a successor agreement until PBA formally withdrew its disciplinary proposal.<sup>1</sup>

In lieu of a hearing, the parties stipulated to a record that included the pleadings and the exhibits attached thereto. Following briefing by both parties, the ALJ issued a decision dismissing the Town's charge alleging that PBA violated §209-a.2(b) of the Act, and finding that the Town engaged in bad faith negotiations in violation of §209-a.1(d) of the Act.

#### EXCEPTIONS

In its exceptions, the Town asserts that the ALJ erred in failing to dismiss PBA's charge as moot based upon the terms of a memorandum of agreement between the parties. In addition, the Town urges reversal of the ALJ's decision on the grounds that the record establishes that its conduct in negotiations did not constitute a violation of §209-a.1(d) of the Act, and that the conduct of PBA violated §209-a.2(b) of the Act. Finally, the Town challenges the ALJ's remedial order requiring the Town to post a notice stating that it will forthwith refrain from negotiating in bad faith. PBA supports 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

The relevant facts are not in dispute. In November 2007, the parties began

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<sup>1</sup> 42 PERB ¶4583 (2009).

negotiations for an agreement to commence on January 1, 2006. At the time that negotiations commenced, the terms and conditions of employment for unit employees were set forth in an expired collectively negotiated agreement (expired agreement), as modified by subsequent memoranda of agreements and an interest arbitration award for the period January 1, 2004 through December 31, 2005. Among the employment terms that were continued was a negotiated police disciplinary procedure set forth in Article 29 of the expired agreement.<sup>2</sup>

In its November 2007 negotiation proposals, the Town sought PBA's agreement to extirpate Article 29 from any successor agreement. At the negotiations session on January 22, 2008, PBA presented a proposal to continue the terms of Article 29 under a new agreement. During that bargaining session, the Town notified PBA that it considered PBA's proposal to continue the Article 29 disciplinary procedures to be a prohibited subject of negotiations.

At an April 16, 2008 negotiations session, the Town again proposed the elimination of Article 29, and it demanded that PBA formally abandon its proposal to continue the contractual disciplinary procedures. PBA representatives refused to withdraw its proposal to continue the Article 29 disciplinary proposals.

On May 2, 2008, the Town sent PBA a letter stating that an improper practice charge was being filed due to PBA's refusal to withdraw its proposal to continue the terms of Article 29. In addition, the Town cancelled the bargaining session scheduled for May 5, 2008, and stated it would not agree to continue to engage in negotiations until such time as PBA agreed to withdraw its proposal to continue the disciplinary

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<sup>2</sup> In January 2007, the Town Board (Board) enacted a Local Law for the purpose of creating a new Town police disciplinary procedure to replace Article 29 of the expired agreement based upon the Town's legal opinion that the negotiated procedure was a prohibited subject of negotiations and unenforceable.

procedures contained in Article 29.

Throughout the negotiations, the Town repeatedly reiterated its position that a police disciplinary procedure is a prohibited subject, and it demanded that PBA refrain from seeking to negotiate the subject. During those negotiations, PBA presented its police discipline proposal as being interrelated and interconnected with its other proposals on wages, hours and other terms and conditions of employment. PBA took the position that if the negotiated disciplinary procedure were found to be a prohibited subject or it acceded to the Town's legal position regarding police discipline, PBA would have the right to withdraw or alter its other pending proposals, and make other proposals.

On November 21, 2008, the parties entered into a memorandum of agreement (MOA) for a successor agreement commencing on January 1, 2006 that did not eliminate or expressly continue the terms of Article 29. Instead, the parties agreed to reserve their respective rights and arguments in cases pending before PERB and the courts:

- H. Each party reserves its rights, without prejudice, regarding its positions concerning police discipline that is the subject of court litigation pending in Orange County Supreme Court and in any court appeal(s) taken. This agreement does not constitute a waiver by either party to continue such litigation, nor shall this agreement in any way modify or alter the pre-existing disciplinary procedures contained in the collective bargaining agreement.
- I. Each party reserves its rights, without prejudice, regarding its positions concerning police discipline that is the subject of proceeding(s) pending before the New York State Public Employment Relations Board (PERB), and in any administrative and/or judicial appeal(s) taken. This agreement does not constitute a waiver by either party to continue such PERB matters, nor shall this agreement in any way modify or alter the pre-existing disciplinary procedures contained in the collective bargaining agreement.

### DISCUSSION

Contrary to the Town's exceptions, the fact that the parties entered into an MOA after the filing of PBA's improper practice charge, does not render the charge moot, but is relevant in examining the appropriate remedy.<sup>3</sup> During the processing of a charge, the concepts under the mootness doctrine may be applied when the charge involves unique facts and circumstances, and only when the application of the doctrine is consistent with the policies of the Act.<sup>4</sup>

We conclude that the application of the mootness doctrine, under the facts and circumstances of the present case, would be inconsistent with the Act. A party does not have the right to cease participating in negotiations because it may believe that the other party's bargaining position constitutes an improper practice.<sup>5</sup> The refusal to continue to negotiate in good faith violates a central obligation under the Act. Resumption of negotiations following the filing of an improper practice charge, which results in an agreement, does not render moot the breach of that duty.<sup>6</sup>

The Town's reliance upon the terms of the parties' MOA to support its argument is misplaced. The MOA expressly states that each party reserves its rights and arguments in the charges pending at PERB with respect to police discipline, and that neither party waives the right to pursue its respective charge. The MOA did not provide that the parties' respective charges in the present case would be withdrawn.

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<sup>3</sup> *Westchester County Medical Center and Westchester County*, 13 PERB ¶3038 (1980); *CSEA*, 25 PERB ¶3057 (1992); *Town of Huntington*, 27 PERB ¶3039 (1994); *Dutchess Comm Coll*, 41 PERB ¶3029 at 3131, note 16 (2008).

<sup>4</sup> *City of Peekskill*, 26 PERB ¶3062 (1993); *Solvay Teachers Assoc*, 28 PERB ¶3024 (1995).

<sup>5</sup> *Schenectady PBA*, 21 PERB ¶3022 (1988).

<sup>6</sup> See, *CSEA*, 25 PERB ¶3057 (1992).

Therefore, based upon the nature of the Town's conduct, and the express terms of the parties' MOA, we find no merit to the Town's mootness argument.

Next, we turn to the Town's exceptions challenging the merits of the ALJ's decision finding that the Town violated §209-a.1(d) of the Act, and dismissing the Town's charge alleging that PBA violated §209-a.2(b) of the Act.

We affirm the ALJ's finding that the Town violated §209-a.1(d) of the Act by unilaterally discontinuing negotiations after three bargaining sessions over a disagreement with PBA's bargaining positions because it views the negotiation of police disciplinary procedure as being prohibited. Under the Act, a party may not condition continued negotiations on the other party's capitulation to a legal argument, agreement to a negotiations proposal or the withdrawal of a negotiations proposal. Furthermore, the courts and PERB have repeatedly rejected the Town's argument that the subject of the Town's police disciplinary procedure is prohibited.<sup>7</sup> As a result, we need not readdress that legal argument.

Contrary to the Town's argument, the ALJ did not err in dismissing the Town's improper practice charge alleging PBA violated §209-a.2(b) of the Act. In support of its exceptions, the Town cites PBA's efforts to negotiate the continuation of the negotiated disciplinary procedures, and PBA's refusal to withdraw the proposal despite the Town's legal argument. As previously noted, the subject of the disciplinary procedures for Town police is not prohibited, and therefore PBA did not violate the Act by insisting on

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<sup>7</sup> *Town of Wallkill v CSEA*, 42 PERB ¶7508 (Orange County Supreme Court 2008); *Town of Wallkill*, 42 PERB ¶3017 (2009), *pet dismissed Town of Wallkill v New York State Pub Empl Rel Bd*, 43 PERB ¶7005 (Albany County Supreme Court 2010). See also, *Town of Wallkill v Town of Wallkill PBA*, 56 AD3d 482, 42 PERB ¶7506 (2d Dept 2008), *lv denied* 12 NY3d 709, 42 PERB ¶7507 (2009).



negotiating its proposal.<sup>8</sup>

In addition, we find nothing in the stipulated record to support the conclusion that PBA violated §209-a.2(b) of the Act by stating during negotiations that its disciplinary proposal is interrelated with its other proposals. During negotiations, a party is entitled to seek to have its proposals treated as interrelated or treated separately so long as the party's overall conduct evinces a sincere desire to reach an agreement.<sup>9</sup> We reach a similar conclusion with respect to PBA's statements about its future position in negotiations if the subject of police discipline was found to be a prohibited. Such statements alone are insufficient to demonstrate a violation of the duty to negotiate in good faith pursuant to §209-a.2(b) of the Act.

Finally, the recommended remedial order requiring the Town to post a notice is fully consistent with our precedent.<sup>10</sup>

Based upon the foregoing, we find that the Town violated §209-a.1(d) of the Act and affirm the decision of the ALJ and her proposed remedial order.

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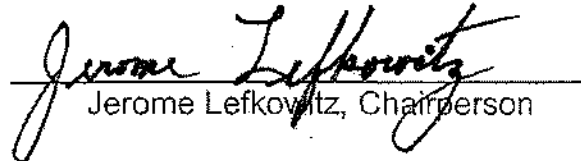
<sup>8</sup> In her decision, the ALJ relied upon *State of New York*, 37 PERB ¶3008 (2004) to conclude that a party's insistence that a prohibited subject may be negotiated prior to impasse does not violate the duty to negotiate in good faith. Although *State of New York, supra*, does state, citing to *Peekskill Cent Sch Dist*, 16 PERB ¶3075 (1983) and *Monroe-Woodbury Teachers Assn*, 10 PERB ¶3029 (1977), that both prohibited subjects and nonmandatory demands may be advanced until the final stages of the impasse procedures, that decision was in error. The two decisions relied upon by the Board in *State of New York* held only that a party may insist on a nonmandatory proposal being the subject of negotiations and mediation. The *State of New York* decision erroneously conflated the important distinctions between a nonmandatory and a prohibited subject; a prohibited subject may not be negotiated even before impasse. Therefore, we reverse *State of New York* with respect to its treatment of prohibited subjects.

<sup>9</sup> See, *Southampton PBA*, 2 PERB ¶3011 (1969).

<sup>10</sup> *CSEA, supra* note 6.

IT IS THEREFORE ORDERED that the Town shall sign and post the attached notice at all physical and electronic locations customarily used by the Town to post notices to unit employees.

DATED: August 10, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, 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

The Town of Wallkill hereby notifies all employees in the bargaining unit represented by the Town of Wallkill Police Benevolent Association, Inc. that the Town of Wallkill will forthwith refrain from negotiating in bad faith with the Town of Wallkill Police Benevolent Association, Inc.

Dated .....

By .....

**On behalf of the Town of Wallkill**

*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**

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In the Matter of

**SOUTHAMPTON TOWN SUPERIOR OFFICERS  
ASSOCIATION, INC.,**

Petitioner,

-and-

**CASE NO. C-5805**

**TOWN OF SOUTHAMPTON,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

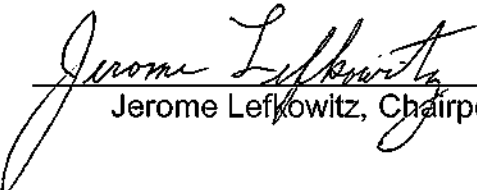
IT IS HEREBY CERTIFIED that the Southampton Town Superior Officers Association, Inc. has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective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

Included: All Sergeants, Detective Sergeants, Lieutenants and Captains of the Town of Southampton Police Department.

Excluded: All other Police Department personnel.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Southampton Town Superior Officers 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: August 10, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5913**

**SPRINGS UNION FREE SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

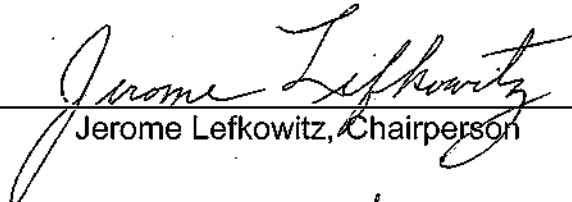
IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: All full-time and part-time Bus Drivers assigned to regular routes.

Excluded: Transportation Supervisor, per-diem Bus Drivers and 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: August 10, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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

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In the Matter of

**TRI-VALLEY ESSENTIAL SUPPORT STAFF  
ASSOCIATION, NYSUT/AFT/NEA/AFL-CIO,**

Petitioner,

-and-

**CASE NO. C-5957**

**TRI-VALLEY CENTRAL SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the Tri-Valley Essential Support Staff 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.

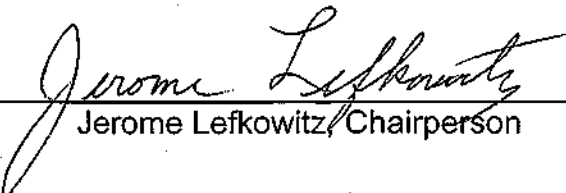



Included: Teacher Aide, Account Clerk, Buildings & Grounds Maintenance Worker I, Maintenance Helper, Custodian, Cleaner, School Monitor, Driver/Courier, Food Service Helper, Assistant Cook, Cook, Receptionist, Typist, Senior Typist, Bus Driver, LAN Technician and Systems Assistant Technician.

Excluded: Senior Custodial Worker, Account Clerk (Secretary to Assistant Superintendent for Business), Account Clerk (Accounts Payable), Occupational Therapist, Buildings & Ground Maintenance Worker II, School District Clerk, Secretary to Superintendent, Dental Hygienist, Census Taker, School Bus Dispatcher, Food Service Manager, Payroll Clerk and all "Per Diem" Substitutes.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Tri-Valley Essential Support Staff 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: August 10, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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

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In the Matter of

**TOWN OF CATLIN HIGHWAY ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-5962**

**TOWN OF CATLIN,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

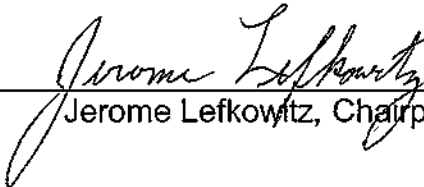
IT IS HEREBY CERTIFIED that the Town of Catlin Highway Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: Deputy Highway Superintendent and all Highway Workers.

Excluded: Highway Superintendent and seasonal employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Town of Catlin Highway 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: August 10, 2010  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairperson

  
\_\_\_\_\_  
Sheila S. Cole, Member

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

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In the Matter of

**LOCAL 338 RWDSU/UFCW,**

Petitioner,

-and-

**CASE NO. C-5966**

**MOUNT VERNON CITY SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

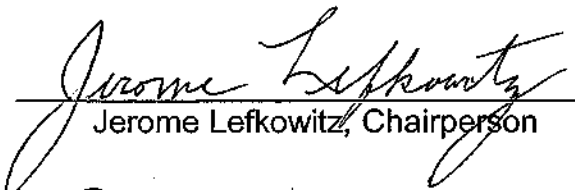
IT IS HEREBY CERTIFIED that the Local 338 RWDSU/UFCW has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.


Included: All full-time and regular part-time school lunchroom monitors employed by the Employer.

Excluded: All other employees, including professional employees, office clerical employees, guards and supervisors.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 338 RWDSU/UFCW. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 10, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, MONROE  
COUNTY LOCAL 828, MONROE COUNTY PART-TIME  
EMPLOYEES UNIT 7401,**

Charging Party,

**CASE NO. U-29194**

- and -

**COUNTY OF MONROE,**

Respondent.

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

**HARRIS BEACH PLLC (PETER J. SPINELLI and KARLEE S. BOLAÑOS of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the County of Monroe (County) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), Monroe County Local 828, Monroe County Part-Time Employees Unit 7401 finding that the County violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it conducted a mail-ballot poll of County part-time unit employees with respect to their interest in continuing to be represented by CSEA.<sup>1</sup> The

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<sup>1</sup> At the request of the County, the Board heard oral argument on June 1, 2010 with respect to the County's exceptions.

ALJ determined that the County's actions in conducting the poll interfered with, restrained and coerced part-time unit employees in the exercise of their protected rights in violation of §209-a.1(a) of the Act.<sup>2</sup>

On August 29, 2009, Albany County Supreme Court Justice Henry F. Zwack issued an order and judgment, pursuant to §209-a.5(d) of the Act, enjoining and restraining the County from continuing to solicit ballots from the part-time unit employees, from obtaining the results of the balloting, and from publishing or disseminating those results, pending a final PERB decision and order with respect to the present charge.<sup>3</sup>

#### EXCEPTIONS

The County asserts that the polling of the part-time unit employees did not violate the Act because the polling is authorized by the terms of §2.2 of the parties' collectively negotiated agreement (agreement), the County had a good faith rationale for conducting the poll to determine whether a secret-ballot election was appropriate under §2.2 of the agreement, and the poll was conducted in a manner consistent with the Act. The County also contends that the ALJ erred by analyzing the lawfulness of the poll under PERB's Rules of Procedure (Rules), by concluding that the County's purpose in conducting the poll was to encourage unit employees to file a decertification petition, by failing to find that the County had a reasonable basis for conducting the poll, and in

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<sup>2</sup> 42 PERB ¶4547 (2009).

<sup>3</sup> *New York State Pub Empl Rel Bd v County of Monroe*, 42 PERB ¶7007 (Albany County Sup Ct 2009).

making various findings of fact, including her credibility determinations.<sup>4</sup> Finally, the County raises two procedural issues: a) CSEA lacks standing to file the charge; b) the charge is deficient because it does not allege that the County is the employer. CSEA supports the ALJ's decision.<sup>5</sup>

Based upon our review of the record, consideration of the parties' written and oral arguments, and the application of relevant precedent, we affirm the ALJ's decision.

#### FACTS

On December 1, 2004, the Board certified CSEA as the exclusive representative for a unit composed of County part-time employees in various titles (part-time unit).<sup>6</sup>

CSEA is also the certified or recognized collective representative for a unit of County full-time employees (full-time unit).

The County and CSEA are parties to an agreement for the part-time unit for the period June 1, 2006-December 31, 2008, which expressly references PERB's

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<sup>4</sup> During oral argument, the County's counsel summarized its exceptions as presenting two essential questions for Board determination: a) whether the Act prohibits an employer and an employee organization from agreeing upon an alternative procedure distinct from the decertification procedures under the Rules, permitting the employer to challenge the majority status of the employee organization; and b) whether the County's poll complied with the applicable standards under the Act.

<sup>5</sup> CSEA has not filed cross-exceptions to the ALJ's dismissal of its allegations that the County's conduct violated §§209-a.1(b), (c) and (d) of the Act. Therefore, CSEA has waived Board review of those legal issues, including whether the County's poll constitutes improper employer domination under the Act. Rules, §213.2(b)(4); *Town of Orangetown*, 40 PERB ¶13008 (2007), *confirmed*, *Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Sup Ct Albany County 2007).

<sup>6</sup> 37 PERB ¶13000.16 (2004).



certification.<sup>7</sup>

Section 2.2 of the agreement states:

The Union's representative status shall continue as long as it represents a majority of the bargaining unit employees, provided that if the County receives evidence that thirty percent or more of the unit employees are questioning this status, the parties will conduct a secret ballot election conducted by PERB to determine representation status.

Pursuant to §9.3 of the agreement, unless one of the parties sends a written notice between 90 and 120 days prior to the expiration of the agreement, for a change or the termination of the agreement, the agreement is renewed automatically for one additional year.

In June 2008, the County and CSEA commenced expedited negotiations for a successor agreement for the full-time unit. During those negotiations, the County was represented by Director of Human Resources Brayton M. Connard (Connard) and its counsel Peter J. Spinelli (Spinelli); CSEA was represented by Labor Relations Specialist Debbie Lee (Lee). It is undisputed that no County employees in the CSEA full-time unit participated in the negotiations.<sup>8</sup> Those negotiations resulted in a tentative agreement on October 7, 2008 that was subject to approval by CSEA's full-time unit negotiations committee, and ratification by CSEA members in that unit.

On December 16, 2008, Lee informed Spinelli that the full-time unit negotiations committee had rejected the tentative agreement. In addition, Spinelli learned that Lee retired as a CSEA employee, and that CSEA Labor Relations Specialist Robert Leonard

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<sup>7</sup> Exhibit A, Article 2, p. 1.

<sup>8</sup> Joint Exhibit 1, Affidavit of Spinelli, ¶¶5-6.

(Leonard) would be replacing her as chief CSEA negotiator.<sup>9</sup> Subsequent negotiations between the parties regarding the full-time unit proved unsuccessful, and CSEA filed a declaration of impasse to which the County objected.<sup>10</sup>

On March 24, 2009, Leonard sent an email to Connard and Spinelli requesting the commencement of negotiations for the part-time unit. The following day, Spinelli responded with an email stating:

Yesterday we offered the Full-Time unit two dates in that week: April 30 and May 1. Whichever one you don't select for Full-Time, the County is willing to offer for the commencement of Part-time negotiations (same time - 2:00 to 5:00 p.m.)<sup>11</sup>

The parties agreed to commence negotiations for the part-time unit on May 1, 2009 at 2:00 p.m at CSEA's Rochester satellite office. Prior to May 1, 2009, Connard was aware that the CSEA part-time unit had a negotiations team.<sup>12</sup> On the morning of May 1, 2009, Spinelli telephoned Connard to find out whether CSEA had submitted a written notice for negotiations within the timeframe set forth in §9.3 of the agreement. During their conversation, Connard stated that he did not recall such a notice, and that he did not have sufficient time to review his records prior to the scheduled negotiations session to confirm his recollection.<sup>13</sup>

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<sup>9</sup> Joint Exhibit 1, Affidavit of Spinelli, ¶7, Exhibit D.

<sup>10</sup> Joint Exhibit 1, Affidavit of Spinelli, ¶¶8-10.

<sup>11</sup> Joint Exhibit 2.

<sup>12</sup> Transcript, p. 70.

<sup>13</sup> Transcript, p. 54.

CSEA was represented at the May 1, 2009 negotiations session by Leonard, CSEA Monroe County Local 828 president Donna Miller (Miller), and County part-time employee Donald Wallace (Wallace). The County representatives included Connard, Spinelli and Karlee S. Bolaños (Bolaños), another attorney for the County.

During the session, Leonard identified the part-time unit employees who were on the CSEA negotiations committee, and requested that the County grant release time for them to attend future negotiations sessions.<sup>14</sup> He also stated that Mary Gallina (Gallina) was no longer CSEA part-time unit president. Although Gallina separated from County employment in March 2009, Leonard thought that she was still on a leave of absence due to a long-term illness.<sup>15</sup>

Leonard informed County representatives that CSEA had placed the part-time unit in administratorship, with Miller as the administrator.<sup>16</sup> According to Bolaños, Leonard and Miller explained that an administratorship is an internal CSEA procedure under its bylaws.<sup>17</sup> The explanation was provided because County representatives

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<sup>14</sup> Transcript, pp. 16-18, 21-22, 31, 45, 92, 99. According to Bolaños's negotiation notes, Leonard identified, by name and department, a total of eight part-time unit employees on the committee in addition to Leonard and Miller. In addition, her notes reflect that release time was requested. Respondent Exhibit 2.

<sup>15</sup> Transcript, pp. 9, 31.

<sup>16</sup> Transcript, pp. 16-17, 31, 54-56, 88, 90, 99, 116.

<sup>17</sup> During the hearing, witnesses differed as to whether Leonard stated that the part-time unit did not have officers. Nevertheless, CSEA did not present any evidence that the part-time unit had incumbent officers at the time of the negotiations session, and Leonard conceded on cross-examination that, if the part-time unit had officers, it would not have been in administratorship. Transcript, p. 32.

were unfamiliar with the term.<sup>18</sup>

In her decision, the ALJ resolved conflicting testimony among the witnesses with respect to certain disputed facts. The ALJ credited Miller's testimony that County representatives were told that part-time unit elections were scheduled. The ALJ also credited Bolaños's testimony that Leonard had stated that he was trying to encourage part-time unit employees to become unit officers.<sup>19</sup>

During the meeting, Spinelli asked Leonard whether CSEA had sent a timely notice for negotiations pursuant §9.3 of the agreement, and insisted that CSEA would have to request a County waiver if a timely notice had not been sent. Leonard stated that he would need additional time to determine whether his predecessor, former CSEA Labor Relations Specialist Lee, had sent the notice.<sup>20</sup> Following a caucus, Leonard returned and informed the County representatives that he had spoken with Lee by telephone, and she had told him that the notice had been sent.<sup>21</sup> In his negotiation notes, Connard included a reminder to himself to review the County's records after returning to his office, to determine whether a notice had been received.<sup>22</sup>

Although there is conflicting evidence as to whether Leonard requested a waiver

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<sup>18</sup> Transcript, pp. 90-91.

<sup>19</sup> 42 PERB ¶4547 at 4682; Transcript, pp. 92, 116.

<sup>20</sup> Transcript pp. 20, 22.

<sup>21</sup> Transcript, pp. 44, 60.

<sup>22</sup> Respondent Exhibit 1; Transcript p. 60. During his testimony, Leonard acknowledged his subsequent discovery that the notice pursuant to §9.3 of the agreement had not been sent. Transcript, p. 44.

from the County of the notice requirement or suggested that CSEA may request a waiver, it is not disputed that through an exchange of emails the parties agreed to continue negotiations for a successor agreement.<sup>23</sup> The agreement to continue negotiations occurred more than two weeks prior to the County initiating its poll of the unit membership.

On May 19, 2009, Leonard received telephonic and email messages from Connard informing him that the County was conducting a poll of the unit members. On the same day, the County mailed to each part-time unit employee a packet of materials that included a cover letter from the County, a survey information form and confidential survey ballot, a set of directions, and envelopes for mailing the ballots to an accounting firm.<sup>24</sup> The cover letter stated, *inter alia*, that: CSEA began representing the unit in 2005 following a card check; unit members are required to pay dues; CSEA delayed requesting negotiations for a successor agreement until after the prior agreement expired; the part-time unit has no officers, is in "administratorship" with no elections scheduled; and under the agreement if the County receives evidence that 30 percent or more of the unit employees question CSEA's status, "a secret ballot election will be held to determine if CSEA should remain your union representative."

The enclosed ballot form asked the unit members to answer the following question:

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<sup>23</sup> Joint Exhibit 1, Affidavit of Spinelli, Exhibit F.

<sup>24</sup> Exhibits D, E, F and G. The content of the County's cover letter and set of directions are fully set forth in the ALJ's decision. 42 PERB ¶4547 at 4676-4678.

**DO YOU WISH TO BE REPRESENTED BY THE CIVIL SERVICE  
EMPLOYEES ASSOCIATION (CSEA)?**

NO

YES

**DISCUSSION**

We begin our discussion with the two procedural issues raised by the County: CSEA's standing to file and pursue the charge and the alleged deficiency in the charge.

Based upon our certification of CSEA as the exclusive representative for the part-time unit, along with the terms of the parties' agreement, we reject the County's argument that CSEA lacks standing. The agreement's preamble identifies "the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Monroe County Part-Time Employees Unit and Local 828" as a single "Union."<sup>25</sup> The agreement does not include a recognition clause modifying our certification or a negotiated provision treating the identified Unit and Local as anything other than internal subdivisions within CSEA's structure. The complete lack of merit to the County's argument is established by its answer, which expressly admits to CSEA's description of the Monroe County Local 828 and the Monroe County Part-Time Employees Unit 7401 as CSEA subdivisions.<sup>26</sup>

We find an equivalent lack of merit to the County's argument that CSEA's charge should be dismissed on the grounds that CSEA did not allege in the charge that the County is the public employer. Although the content of a charge filed under §204.1(b)

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<sup>25</sup> Exhibit A, Article 1, p.1.

<sup>26</sup> ALJ Exhibit 1, Details of Charge, ¶2; ALJ Exhibit 2, ¶5(b). The ballot drafted by the County also references "the Civil Service Employees Association (CSEA)," thereby undercutting its standing claim.

of the Rules is subject to a liberal and reasonable construction,<sup>27</sup> a liberal construction of CSEA's pleading is not necessary to dispose of the County's argument. The County is expressly named as the public employer in the first paragraph of CSEA's details of charge.<sup>28</sup>

Next, we turn to the County's assertion that the ALJ erred in analyzing the lawfulness of the poll under PERB's decertification procedures set forth in our Rules. According to the County, §2.2 of the agreement constitutes a negotiated alternative procedure for challenging CSEA's majority status thereby waiving the limitations established by the decertification procedures of the Rules and precedent. In addition, it claims that §2.2 constitutes a source of right permitting the polling of unit members.<sup>29</sup>

In *New York City Transit Authority*,<sup>30</sup> we emphasized that we will apply traditional principles of contract interpretation where, as here, interpretation of an agreement is necessary for the resolution of the merits of an improper practice charge. In interpreting negotiated provisions, our aim is to discern the intent of the parties.

Pursuant to §201.3(d) of the Rules, an employer may file a decertification petition, during the month before the expiration of the period of unchallenged representation status, to challenge the majority status of a certified employee organization in an existing

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<sup>27</sup> *Marlboro Faculty Assoc (Schanzenbach)*, 29 PERB ¶3007 (1996).

<sup>28</sup> ALJ Exhibit 1, Details of Charge, ¶1.

<sup>29</sup> Based upon the County's central reliance on §2.2 of the agreement, we reject its argument that the ALJ erred in interpreting the provision. Brief in Support of Monroe County's Exceptions, p. 14.

<sup>30</sup> 41 PERB ¶3014 (2008). See also, *County of Livingston*, 30 PERB ¶3046 (1997).

negotiating unit, only if the employer "has a demonstrable, good-faith belief that the employee organization is defunct." An employer does not have standing, however, to file a decertification petition during the applicable window period following the expiration of an agreement.<sup>31</sup>

In the present case, §2.2 of the agreement does not contain clear, unmistakable and unambiguous language demonstrating an intention by the parties to waive, replace or supplement the decertification procedures under §201.3 of our Rules.<sup>32</sup> Instead, the agreement expressly states that PERB will conduct the secret ballot election to determine CSEA's representation status. In interpreting §2.2, we presume that at the time the agreement was negotiated, both parties were fully cognizant of the representation procedures set forth in our Rules, as well as our case law.<sup>33</sup>

In *County of Orange and Sheriff of Orange County*, we determined that:

[T]he policies of the Act are best served by requiring that representation disputes be channeled through the procedures available under our Rules rather than left to an employer's unilateral action. We believe that in this way instability and uncertainty in the parties' labor relations will be eliminated or minimized and the rights of all parties can best be protected.<sup>34</sup>

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<sup>31</sup> Rules, §201.3(e); *Greece Cent Sch Dist*, 18 PERB ¶13033 (1985).

<sup>32</sup> *CSEA v Newman*, 88 AD2d 685, 15 PERB ¶17011 (3d Dept 1982), *app dismissed*, 57 NY2d 775, 15 PERB ¶17020 (1982), *affd*, 61 NY2d 1001, 17 PERB ¶17007 (1984) (subsequent history omitted). *See also*, *City of Yonkers*, 40 PERB ¶13001 (2007); *MABSTOA*, 40 PERB ¶13023 (2007); *County of Columbia*, 41 PERB ¶13023 (2008).

<sup>33</sup> *See*, *County of Orange*, 14 PERB ¶13060 (1981); *Greece Cent Sch Dist*, *supra* note 31; *County of Orange and Sheriff of Orange*, 25 PERB ¶13004 (1992).

<sup>34</sup> 25 PERB ¶13004, at 3016.



In that decision, we also emphasized that the parties are not prejudiced by requiring them to abide by our representation procedures to “effect a change in an established bargaining relationship, whether it be the composition of the unit or the identity of the bargaining agent.”<sup>35</sup>

Based upon our precedent and the lack of clear, unmistakable and unambiguous language in the agreement, we conclude that §2.2 was not intended by the parties to waive, replace or supplement our decertification procedures, which require the filing of a timely representation petition under the terms set forth in §201.3 of the Rules to decertify an incumbent employee organization.<sup>36</sup>

We also reject the County’s argument that §2.2 of the agreement is a colorable source of right or a legitimate basis for conducting the poll. Notably, the provision is silent with respect to the polling of unit members, and it does not contain any words that can be reasonably construed to permit the County to affirmatively solicit or survey the unit for information regarding the status of CSEA as the incumbent employee organization. In drafting §2.2, the parties chose the passive phrase “the County receives evidence,” which contradicts the County’s assertion of an affirmative contract right to solicit such evidence.<sup>37</sup> We conclude, therefore, that the County’s assertion that

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<sup>35</sup> *Supra* note 34.

<sup>36</sup> Similarly, the National Labor Relations Board conducts representation elections in the private sector only upon the filing of a representation petition. *See*, 29 USC §159(c)(1) (“Whenever a *petition shall have been filed*, in accordance with such regulations as may be prescribed by the Board...”) (emphasis added); *See also*, 29 CFR §102.60, *et seq.*

<sup>37</sup> *See*, Black’s Law Dictionary, Sixth Edition definition of “receive”: “To take into possession and control; accept custody of, collect.”

the poll was conducted consistent with §2.2 of the agreement is not credible. In addition, §2.2 is a prohibited subject of negotiations because it purports to impose a contractual obligation on PERB to conduct an election that is contrary to our Rules.

As a result of our conclusion that §2.2 does not constitute a clear and unambiguous waiver of our Rules, or a colorable source of right for conducting the poll, we do not have to reach the issue whether an agreement containing an explicit waiver or grant of a right to poll the unit on the question of continued employee support for an incumbent employee organization violates the policies of the Act.

Even if we were to find the County's purported reliance on §2.2 to be credible, the record does not support the County's contention that it had a good faith and reasonable basis for conducting the poll. The poll was initiated two weeks after the commencement of negotiations between the parties, and following the County's agreement to continue those negotiations despite its claim that CSEA had not sent the requisite §9.3 notice. Furthermore, the County's reliance on how CSEA administers its internal affairs is not a legitimate basis for conducting the poll under the Act. The fact that CSEA's subdivision was in administratorship under CSEA's bylaws, and without officers, is irrelevant to CSEA's representation status.<sup>38</sup> Similarly, the presence of only one part-time unit member at the negotiations session did not reasonably raise an issue of CSEA's status. The evidence reveals that CSEA provided the County a list of part-

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<sup>38</sup> Contrary to the County's exceptions, we find no basis in the record for disturbing the ALJ's crediting of Miller's testimony that the County was told at the meeting that unit elections were scheduled, and the ALJ's crediting of the testimony of Bolaños that Leonard stated that he was trying to attract part-time unit employees to become unit officers. Generally, such credibility determinations are entitled to substantial deference by the Board. *Mount Morris Cent Sch Dist*, 41 PERB ¶13020 (2008).

time unit employees on its negotiations team, and requested leave for them to attend future sessions.<sup>39</sup>

Finally, we consider the County's exception challenging the ALJ's conclusion that its actions violate §209-a.1(a) of the Act.

Based upon our review of the record, we conclude that the County's conduct in this case of soliciting, polling and surveying of unit members regarding whether they wish to continue to be represented by CSEA constitutes conduct inherently destructive of the rights of organization granted by §202 of the Act. Furthermore, the record reveals no evidence that the County had a legitimate purpose under the Act and our Rules to engage in such conduct. Therefore, we affirm the ALJ's finding that the County violated §209-a.1(a) of the Act.<sup>40</sup>

Based upon the foregoing, we find that the County violated §209- a.1(a) of the Act, and affirm the decision of the ALJ.

IT IS THEREFORE ORDERED that the County:

1. Cease and desist from interfering with, restraining or coercing County employees in CSEA's part-time unit by conducting a poll, or directing a third party to conduct a poll, to ascertain support for CSEA among unit members;

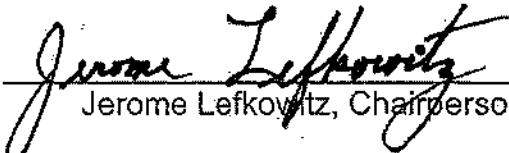
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<sup>39</sup> We further note that the County engaged in expedited negotiations with CSEA in 2008 for the full-time unit without any full-time unit employees participating.

<sup>40</sup> The County's reliance on *Town of Clay*, 6 PERB ¶¶3072 (1973), *affd in relevant part and remanded sub nom. Town of Clay v Pub Empl Rel Bd*, 45 AD2d 292, 7 PERB ¶¶7012 (4<sup>th</sup> Dept 1974), *decision on remand*, 7 PERB ¶¶3059 (1974), *modified and affd*, 51 AD2d 200, 9 PERB ¶¶7001 (4<sup>th</sup> Dept 1976) is misplaced. Those cases involved employer questioning of employees in response to a demand for recognition by an employee organization, where a survey is arguably relevant to an employer determining whether the employee organization, in fact, has majority support.

2. Destroy the results of the poll dated May 19, 2009, and take all steps reasonably necessary to ensure such destruction;
3. Not obtain the results of the poll nor publish or disseminate the results in any manner;
4. Notify CSEA in writing after the results of the poll have been destroyed;
5. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: August 10, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, 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 part-time employees of the County of Monroe represented by the Civil Service Employees Association, Inc., Local 1000 AFSCME, AFL-CIO (CSEA), that the County of Monroe will:

1. Not interfere with, restrain or coerce County employees in CSEA's part-time unit by conducting a poll, or directing a third party to conduct a poll, to ascertain support for CSEA among unit members;
2. Destroy the results of the poll dated May 19, 2009, and take all steps reasonably necessary to ensure such destruction;
3. Not obtain or seek to obtain the results of the poll nor publish or disseminate the results in any manner;
4. Notify CSEA in writing after the results of the poll have been destroyed.

Dated .....

By .....  
(Representative) (Title)

County of Monroe

.....  
*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**

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In the Matter of

**AHMED MUSTAFA ELGALAD,**

Charging Party,

**CASE NO. U-28671**

- and -

**UNITED FEDERATION OF TEACHERS, LOCAL 2,  
AFT, AFL-CIO,**

Respondent,

- and -

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

Employer.

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**AHMED MUSTAFA ELGALAD, *pro se***

**JAMES R. SANDNER, GENERAL COUNSEL (YVONNE M. MARIETTE of  
counsel), for Respondent**

**DAVID BRODSKY, ESQ., OFFICE OF LABOR RELATIONS (KELLIE TERESE  
WALKER of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Ahmed Mustafa Elgalad (Elgalad), pursuant to §213.2(a) of PERB's Rules of Procedure (Rules), to a decision made by an Administrative Law Judge (ALJ). The ALJ dismissed the improper practice charge filed by Elgalad against the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) alleging that UFT violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act). The Board of Education of the City School District of the City of

New York (District) is a statutory party in the underlying charge pursuant to §§205.5(d) and 209-a(3) of the Act.

#### PROCEDURAL BACKGROUND

On September 15, 2008, Elgalad filed the charge alleging that UFT violated the Act when it refused to take a grievance to step three of the contractual grievance procedure, and failed to respond to his letters regarding the same matter.<sup>1</sup>

On March 26, 2010, the ALJ dismissed the charge, following a hearing, based upon the failure of Elgalad to present sufficient proof, and because the charge is untimely. On March 27, 2010, Elgalad received the ALJ's decision, and on April 16, 2010, he filed his exceptions. Because his exceptions were not accompanied by proof of service on UFT and the District, as required by §213.2(a) of the Rules, Elgalad was requested to submit such proof to the Board. In response, Elgalad filed a letter dated May 25, 2010, admitting that he had not served the exceptions upon UFT and the District because he was unaware of that obligation under the Rules. In addition, he requested that the Board grant him an extension of time to serve the other parties. UFT opposed Elgalad's request for an extension but the District consented to the request.

By letter dated June 11, 2010, Elgalad's request for an extension of time was denied by the Board after the time for the filing of exceptions had expired because he failed to demonstrate extraordinary circumstances warranting an extension of the applicable timeframe.

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<sup>1</sup> In his grievance, Elgalad asserted that he had a contractual right to a full-time physical education teaching position commencing in September 2007 because he had worked at Stuyvesant High School from March 2007 to June 21, 2007.

DISCUSSION

Pursuant to §213.2(a) of the Rules, exceptions must be filed with the Board within 15 working days after the receipt of a decision with proof of service of the exceptions on all other parties. The Board has strictly applied these requirements under the Rules, and the failure of a party to satisfy both requirements is grounds for denying the exceptions.<sup>2</sup>

In the present case, Elgalad did not serve UFT and the District with the exceptions as required by the Rules and, therefore, did not file proof of service with the Board. His misreading of the clear and explicit service requirement under the Rules, the relevant part of which accompanied the ALJ's decision, does not satisfy the high standard necessary for demonstrating extraordinary circumstances to warrant an extension of time for him to comply with his obligations under §213 of the Rules.<sup>3</sup>

Elgalad's failure to timely serve his exceptions upon the other parties necessitates the denial of his exceptions pursuant to both §213.2(a) of the Rules and our precedent strictly applying the service requirement. In reaching our decision, we note that in one prior decision, *County of Clinton*,<sup>4</sup> we did entertain exceptions despite a party's failure to serve copies on the other parties on the ground that the other parties

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<sup>2</sup> *Catskill Regional OTB*, 14 PERB ¶3075 (1981); *CSEA (Juszczak)*, 22 PERB ¶3020 (1989); *City of Watervliet*, 30 PERB ¶3024 (1997); *Town/City of Poughkeepsie Water Treatment Faculty*, 35 PERB ¶3037 (2002); *Honeoye Falls-Lima Cent Sch Dist (Malcolm)*, 41 PERB ¶3015 (2008).

<sup>3</sup> See, *NYSCOPBA (Hunter)*, 42 PERB ¶3038 (2009) (the misreading of the notice accompanying the ALJ's decision did not demonstrate extraordinary circumstances warranting an extension of time for a party to request an extension of time to file exceptions under §213.4 of the Rules).

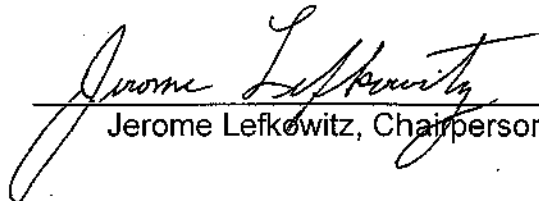
<sup>4</sup> 13 PERB ¶3021 (1980).

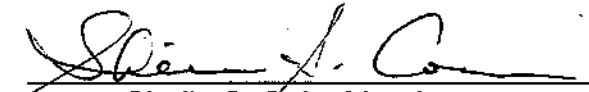


were not prejudiced by the failure of service.<sup>5</sup> However, *County of Clinton* constitutes an anomaly in our case law and has been implicitly overruled by our subsequent decisions strictly applying the service requirement and denying exceptions that were not timely served consistent with §213.2(a) of the Rules.

IT IS, THEREFORE, ORDERED that Elgalad's exceptions are denied.

DATED: August 10, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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<sup>5</sup> Elgalad contends, as did the petitioner in *County of Clinton*, that he did not comprehend the language of §213.2(a) of the Rules, and both sent three copies of the exceptions to the Board, which they believed were to be distributed to the other parties by the Board.

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

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In the Matter of

**RONALD LEFEVRE,**

Charging Party,

**CASE NO. U-29858**

- and -

**AMALGAMATED TRANSIT UNION, LOCAL 1056  
and NEW YORK CITY TRANSIT AUTHORITY,**

Respondents.

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**ABEL L. PIERRE, ESQ., for Charging Party**

**GLADSTEIN, REIF & MEGINNISS, LLP (BETH M. MARGOLIS of counsel), for  
Respondent Amalgamated Transit Union, Local 1056**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Ronald Lefevre (Lefevre) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, an amended improper practice charge that alleged, *inter alia*, that Amalgamated Transit Union, Local 1056 (ATU) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) based upon alleged deficiencies in the post-hearing brief submitted by ATU on behalf of Lefevre at the conclusion of a disciplinary arbitration between New York City Transit Authority (NYCTA) and ATU.<sup>1</sup>

**EXCEPTIONS**

In his exceptions, Lefevre contends that the Director erred in dismissing the

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<sup>1</sup> 43 PERB ¶4541 (2010).

amended charge because ATU's post-hearing brief to the arbitrator was insufficiently "comprehensive" to persuade the disciplinary arbitrator to impose a penalty short of termination.

Based upon our review of the record and consideration of Lefevre's exceptions, we affirm the Director's dismissal of the amended charge.

#### FACTS

On December 10, 2009, an arbitrator conducted a hearing on a grievance filed by Lefevre challenging misconduct charges brought by NYCTA that accused him of utilizing a cellular phone while operating a NYCTA bus on July 31, and October 31, 2009.

NYCTA presented witnesses and documentary evidence at the arbitration in support of its claim that Lefevre was guilty of those charges, and that he should be terminated. As part of its case, NYCTA cited three prior incidents of Lefevre utilizing a cellular phone while driving during his workday, for which he was penalized.

During the arbitration, ATU was represented by an attorney, who called Lefevre to testify in his own defense. Following the arbitration, ATU's attorney submitted a brief to the arbitrator. In its brief, ATU argued that NYCTA had failed to prove that Lefevre was guilty of the charges, and urged the arbitrator to credit Lefevre's testimony over the testimony of NYCTA's witnesses. In the alternative, ATU argued that dismissal was too harsh a penalty based upon Lefevre's seven years of service, the principles of progressive discipline, and NYCTA's delays in processing the disciplinary charges. Finally, ATU disputed NYCTA's assertion that Lefevre had three prior incidents

involving the same misconduct, and it challenged NYCTA's pre-charge suspension of Lefevre.

On January 8, 2010, the arbitrator issued his decision and award finding Lefevre guilty of the charges, and concluding that dismissal was the appropriate penalty. In reaching his decision, the arbitrator concluded that Lefevre's testimony was not credible, and ATU's arguments against termination unpersuasive. In sustaining the penalty, the arbitrator ruled that utilization of a cellular phone while driving a vehicle constitutes serious misconduct, and Lefevre's dismissal was appropriate under the doctrine of progressive discipline because he had been penalized three previous times for the same infraction in the prior 21 months.

#### DISCUSSION

In order to state a claim of a breach of the duty of fair representation under the Act, a charging party must allege sufficient facts which, if proven, would demonstrate that the employee organization engaged in conduct that was arbitrary, discriminatory or founded in bad faith.<sup>2</sup>

It is well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act.<sup>3</sup> In the present case, Lefevre's apparent dissatisfaction with tactical decisions made by ATU's attorney in preparing the brief does not state a claim of a breach of the duty of fair representation.

Although Lefevre asserts that the brief was not comprehensive enough, he fails to

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<sup>2</sup> *Nassau Comm Coll Fed of Teachers (Staskowski)*, 42 PERB ¶13007 (2009).

<sup>3</sup> *DC 37 (Maltsev)*, 41 PERB ¶13022 (2008).

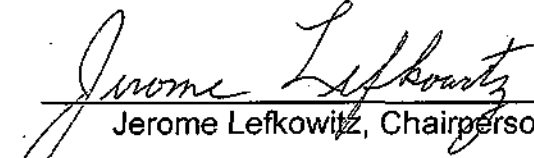
specifically articulate what was lacking. Furthermore, a review of the brief, which is attached to Lefevre's amended charge, demonstrates a high level of competence that more than satisfies the applicable standards of fair representation by an employee organization under the Act.<sup>4</sup>

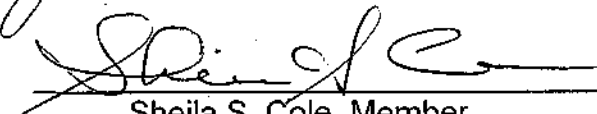
For the reasons set forth above, we deny Lefevre's exceptions and affirm the decision of the Director.

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

SO ORDERED.

DATED: August 10, 2010  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairperson

  
\_\_\_\_\_  
Sheila S. Cole, Member

<sup>4</sup> TWU (Jain), 39 PERB ¶3019 (2006).