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State of New York Public Employment Relations Board Decisions from December 24, 2010

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 24, 2010

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**DAMEON CLAY, REGINALD GREENE
AND TOKINMA KILLINS,**

Petitioners,

-and-

CASE NO. C-5975

KIPP AMP ACADEMY CHARTER SCHOOL,

Employer,

-and-

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

Intervenor/Incumbent.

**VEDDER PRICE, PC (LYLE S. ZUCKERMAN, ESQ., of counsel), for
Petitioners**

**KEHL, KATZIVE & SIMON, LLP (SHELLY SANDERS KEHL, ESQ., of
counsel), for Employer**

**MEYER, SOUZZI, ENGLISH & KLEIN, PC (HANAN KOLKO, ESQ., of
counsel), for Intervenor/Incumbent**

BOARD DECISION AND ORDER

On May 11, 2010, Dameon Clay, Reginald Greene and Tokinma Killins (petitioners) filed a timely petition for decertification of United Federation of Teachers, Local 2, AFT, AFL-CIO (intervenor), the current negotiating representative for employees in the following unit:

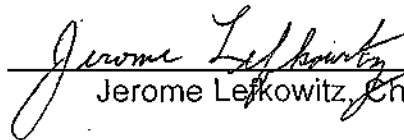
Included: Teachers, Learning Specialists, Social Workers, Counselors,
Deans and School Operations Manager.

Excluded: All other employees.

Upon consent of the parties, a mail-ballot election was held on November 22, 2010. The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.

THEREFORE, IT IS ORDERED that the intervenor be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: December 24, 2010
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS & CHAUFFEURS UNION LOCAL
NO. 456,

Petitioner,

-and-

CASE NO. C-5952

GREENBURGH-GRAHAM 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,

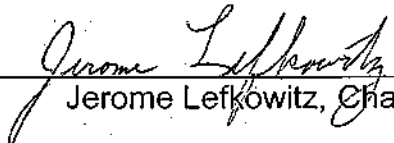
IT IS HEREBY CERTIFIED that the Teamsters & Chauffeurs Union Local No. 456 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Office Assistant, Office Assistant (Automated Systems), Receptionist, Typist, Administrative Assistant, Secretary to School Principal.

Excluded: All other titles.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters & Chauffeurs Union Local No. 456. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 24, 2010
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUTCHESS COUNTY STAFF ASSOCIATION,
NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5915

COUNTY OF DUTCHESS,

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 Dutchess County 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: Assistant County Attorney, Senior Assistant County Attorney, Assistant County Attorney - Department of Social Services, Senior Assistant County Attorney - Department of Social Services, Assistant Public Defender, Senior Assistant Public Defender.

Excluded: All other employees, including those individuals holding either the Assistant County Attorney or Senior Assistant County Attorney title who perform grievance and/or personnel work on behalf of the County.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Dutchess County 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: December 24, 2010
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROBERT FALCO,

Petitioner,

-and-

CASE NO. C-5994

FRANKLIN SQUARE WATER DISTRICT,

Employer,

-and-

**LOCAL 175, UNITED PLANT & PRODUCTION
WORKERS, IUJAT,**

Intervenor/Incumbent.

ROBERT FALCO, for Petitioner

**BEE READY FISHBEIN HATTER & DONOVAN LLP (WILLIAM C. DEWITT,
ESQ., of Counsel) for Employer**

CHAIKIN & CHAIKIN (ERICK CHAIKIN, ESQ, of Counsel), for Intervenor

BOARD DECISION AND ORDER

On July 12, 2010, Robert Falco (petitioner) filed a timely petition for decertification of the Local 175, United Plant & Production Workers, IUJAT (intervenor), the current negotiating representative for employees in the following unit:

Included: All Plant Operators, Water Servicers, Water Service Trainee, Plant Attendant and Account Clerks.


Excluded: All other employees.

Upon consent of the parties, a Mail ballot election was held on November 29, 2010.

The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.

THEREFORE, IT IS ORDERED that the intervenor be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: December 24, 2010
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

- and -

CASE NO. C-5982

TOWN OF GREENPORT,

Employer,

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO (TOWN OF
GREENPORT UNIT, COLUMBIA COUNTY LOCAL 811),**

Intervenor/Incumbent.

KATHY A. WRIGHT, for Petitioner

SONYA S. VAN BORTEL, ESQ., for Employer

MIGUEL ORTIZ, ESQ., for Intervenor

BOARD DECISION AND ORDER

On May 28, 2010, United Public Service Employees Union (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Greenport (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All maintenance employees in the Highway and Water/Wastewater Departments, in the following titles: Foreman,

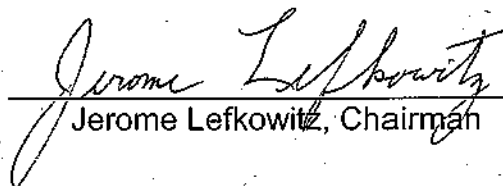
Equipment Operator, Skilled Laborer, Laborer, Wastewater/Water Treatment Plant Operator, Wastewater Treatment Plant Operator, Water Treatment Plant Operator and Maintenance Technician.


Excluded: Laborer: summer/temporary, Equipment Operator-summer/temporary and all other employees.

Pursuant to that agreement, a secret-ballot election was held on November 1, 2010, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: December 24, 2010
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 1149,

Petitioner,

-and-

CASE NO. C-6001

TOWN OF FLEMING,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

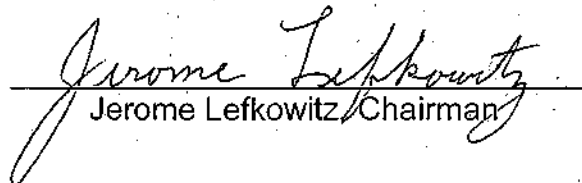
IT IS HEREBY CERTIFIED that the Teamsters Local 1149 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time Motor Equipment Operators.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 1149. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 24, 2010
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

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

In the Matter of

**DIOCESAN ELEMENTARY TEACHERS
ASSOCIATION,**

Petitioner,

-and-

CASE NO. CE-6003

SAINT FRANCIS OF ASSISI 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 New York State Employment Relations Act, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the New York State Employment Relations Act,


IT IS HEREBY CERTIFIED that the Diocesan Elementary Teachers Association has been designated and selected by a majority of the employees of the above-named private 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 lay teachers.

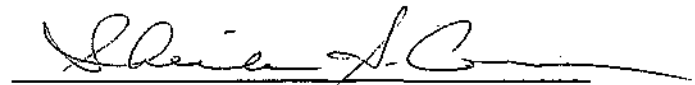
Excluded: Teacher aides and all others.

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

DATED: December 24, 2010
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

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

In the Matter of

**NEW YORK STATE LAW ENFORCEMENT
OFFICERS UNION, DISTRICT COUNCIL 82,
AFSCME, AFL-CIO,**

Charging Party,

CASE NO. U-27493

- and -

STATE OF NEW YORK,

Respondent.

**ENNIO J. CORSI, GENERAL COUNSEL (KEVIN S. CASEY of counsel), for
Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (KEVIN M.
GROSSMAN of counsel), for Respondent.**

BOARD DECISION AND ORDER

This case comes to us on exceptions by the State of New York (State) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82) concluding that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by refusing to negotiate in good faith with Council 82 concerning compensation for employees in the Agency Law Enforcement Services (ALES) unit for the period commencing on April 1, 2005.

FACTS

The relevant facts are not in dispute, and are set forth in the parties' stipulation of

facts.¹ They are repeated here only as necessary to address the State's exceptions.

The State and Council 82 commenced negotiations in February 2003 for a first agreement for the ALES unit. In December 2003, Council 82 filed a declaration of impasse and the parties participated in mediation that ultimately proved unsuccessful.

Council 82 filed a petition for compulsory interest arbitration in March 2005 for those employees in the ALES unit eligible for that dispute resolution mechanism. An interest arbitration award was issued in June 2006 for those unit members on issues "directly related to compensation" for the period April 1, 2003-March 31, 2005.

In March 2006, Council 82 filed a request for fact-finding with PERB, which it later withdrew after the parties reached a memorandum of understanding (MOU) concerning compensatory issues for the employees in Forest Ranger I and II titles in the ALES unit who were then not eligible for interest arbitration under the Act. Council 82 advised PERB that it was withdrawing the request for fact-finding because the interest arbitration award and MOU rendered fact-finding moot.

On or about December 8, 2006, Council 82 wrote to the State requesting commencement of negotiations for the ALES unit on subjects directly related to compensation for the period beginning April 1, 2005. One week later, the State notified PERB that it disagreed with Council 82's assessment that the interest arbitration award and the MOU rendered fact-finding moot.

On or about February 21, 2007, Council 82 again demanded that negotiations begin on subjects directly related to compensation for the period commencing April 1,

¹ The full stipulation is set forth in the ALJ's decision. 43 PERB ¶4537, at 4666-4668 (2010).

2005. In addition, it requested that the State withdraw its issues from fact-finding, as Council 82 had already done, with respect to non-compensatory issues for the April 1, 2003-March 31, 2005 period.

On or about March 6, 2007, the State rejected Council 82's demand that it withdraw its noncompensatory issues for the period that expired on March 31, 2005. It also rejected Council 82's demand to open negotiations directly related to compensation for the period commencing April 1, 2005 on the grounds that such negotiations were not ripe until the noncompensatory issues pending at fact-finding were resolved.

EXCEPTIONS

In her decision, the ALJ concluded that "the State violated §209-a.1(d) of the Act when it conditioned negotiations on compensable issues upon completion of negotiations on an initial agreement."² She also stated: "The State's conduct, in any event, suggests something less than a sincere desire to reach agreement."³ The State's exceptions challenge both propositions.

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

DISCUSSION

1. As to the ALJ's Conclusion

For over a decade, the Act has been amended multiple times by the Legislature to provide for a two-track final negotiation impasse resolution procedure for law

² *Supra*, note 1, at 4669.

³ *Id.*

enforcement employees in various negotiation units.⁴ Pursuant to these amendments, negotiation impasses relating to compensatory issues are subject to resolution through interest arbitration while noncompensatory issues remain subject to the Act's preexisting track that includes fact-finding,⁵ and reaches its potential terminus in a legislative imposition.⁶ In 2003 and 2006, the Legislature chose to amend §§209.2 and 209.4(f) of the Act to add employees in the ALES unit to the group of employees entitled to this bifurcated system for final resolution of negotiation disputes under the Act.⁷ Although the bifurcated impasse resolution procedures under the Act make it likely that the negotiation issues on their respective tracks will be resolved in different timeframes, the Legislature has not mandated synchronization. Nevertheless, §209.2 of the Act permits parties with a bifurcated procedure to agree to have both compensatory and noncompensatory issues resolved through interest arbitration.

In its brief in support of its exceptions, the State argues that the Board should hold that where an impasse is subject to such a bifurcated dispute resolution procedure, a party does not violate the Act by insisting that the pending nonarbitrable issues be finally resolved before a party is obligated to engage in negotiations for

⁴ See, L 1995, c 432, L 2001, c 586, L 2001, c 587, L 2002, c 220, L 2002, c 232, L 2003, c 641, L 2003, c 696, L 2004, c 63, L 2005, c 737, L 2006, c 694, L 2008, c 234; §§209.4(e), (f), (g), (h) and (i) of the Act. See also, *Town of Wallkill*, 42 PERB ¶3017 (2009). However, there are differences in how each of these sections of the Act defines the topics that are subject to interest arbitration or fact-finding and legislative imposition. See, *County of Suffolk and Suffolk County Sheriff*, 40 PERB ¶3022 (2007).

⁵ Section 209.3(c) of the Act.

⁶ Section 209.3(e) of the Act.

⁷ L 2003, c 641, L 2006, c 694.

compensatory issues for a successive period. The alternative could not, it asserts, have been the intention of the Legislature because it would unduly delay the resolution of the pending noncompensatory issues.

We reject the State's arguments with respect to the consequences of bifurcation of the impasse resolution procedures under the Act.

In 1974, the Legislature eliminated the applicability of a single impasse resolution procedure to all negotiations under the Act when it made interest arbitration available for impasses involving police officers and firefighters⁸ and eliminated any final resolution process for impasses involving school district employees.⁹ The latter amendment, which may increase the likelihood of more protracted negotiations than the Act's original final impasse procedure, was enacted upon the unanimous recommendation contained in a report to Governor Malcolm Wilson by a Taylor Law Task Force.¹⁰ The Taylor Law Task Force, which was appointed by Governor Wilson, was composed of the Governor's Counsel, Counsels to the Assembly Speaker and the Senate Majority Leader, PERB Chairman Robert D. Helsby, State Education Department Deputy Commissioner and Counsel Robert D. Stone, along with representatives of the school boards and school teachers.

The following year, the Committee on Labor and Social Security Legislation of the Association of the Bar of the City of New York (New York City Bar Association)

⁸ L 1974, c 724 and c 725.

⁹ L 1974, c 443.

¹⁰ Taylor Law Task Force Report to Governor Malcolm Wilson at p. 5 (1974) available at <http://www.perb.state.ny.us/pdf/1974TLTF.PDF>.

issued a report on these 1974 amendments of the Taylor Law. In commenting upon the change relating to school districts, the New York City Bar Association Committee wrote:

The pressures on the parties to reach agreement caused by the maintenance of the *status quo* creates, to our knowledge, an environment for settlement not duplicated elsewhere. All other schemes for resolving stalemates in public-sector bargaining rely on some one or combination of the following: strikes, arbitration or unilateral action by the public employer. This Taylor Law scheme relies instead on the double-edged pressures of no change except agreed-upon change.¹¹

Eight years after enactment of the 1974 amendment to the Act relating to school districts, Governor Hugh L. Carey signed into law, legislation¹² expanding the principle articulated by the New York City Bar Association Committee as "no change except agreed-upon change" beyond school district impasses to impasses involving all public employers. The 1982 amendments added §209-a.1(e) to the Act, which explicitly make it an improper practice for an employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated" unless the employee organization has engaged in a strike during the negotiations or prior to the resolution of the negotiations.

This history of the Act demonstrates legislative acceptance of the distinct and separate timetables that can result from the two-track impasse resolution processes.

We agree with the State that bifurcation of impasse procedures may complicate

¹¹ The Record of the Association of the Board of the City of New York, Vol. 30, No. 8 at p. 584 (Nov. 1975).

¹² L 1982, c 868, L 1982, c 921. See, *Niagara County Legislature and Niagara County*, 16 PERB ¶13071 (1983), *vacated*, *Niagara County v. Newman*, 122 Misc2d 749, 17 PERB ¶17003 (Sup Ct Niagara County 1984) *reversed*, 104 AD2d 1, 17 PERB ¶17021 (4th Dept 1984).

reaching final resolution of nonarbitrable subjects because it can inhibit the common trade-offs between compensatory and noncompensatory subjects. However, the State's proposed solution would facilitate the imposition of an indefinite freeze on resolution of compensatory issues even after the expiration of the period of an interest arbitration award. A better course may be for the State and Council 82 to utilize their statutory right under §209.2 of the Act and voluntarily agree to have all issues determined at interest arbitration. While such a course of action is not mandatory, it is the only legislatively designed solution to resolve the obvious complication cited by the State.

In any event, we affirm the ALJ's conclusion that:

When the State refused to bargain matters directly related to compensation pursuant to Council 82's February 21, 2007 demand, insisting instead upon completion of negotiations for an initial contract, it improperly conditioned negotiations and violated the Act.¹³

2. As to the ALJ's Statement

We find merit in the State's second exception, which challenges the ALJ's statement that its conduct reflects poorly upon the sincerity of its desire to reach an agreement. The basis of our own rejection of the ALJ's statement is found in the July 3, 2001 memorandum from the Governor's Office of Employee Relations (GOER) to the Governor's Counsel recommending disapproval of a prior bill to bifurcate the final resolution procedure of compensatory and noncompensatory issues for state correction officers. In its memorandum, GOER reasoned that the bill

has the potential to prolong negotiations with the affected bargaining units because it establishes a dual track

¹³ *Supra*, note 1 at 4668.

negotiation process. Under this bill, issues dealing with compensation move from negotiation to mediation to binding arbitration. However, non-economic issues move from negotiation to mediation to fact finding to legislative hearing for ultimate resolution. This procedure will ultimately slow the process as has been the case with the trooper unit. This unit is currently covered by a binding arbitration law that is similar to that contained in this measure. *What is not clear under that law and under this bill is if the parties can or must begin negotiations on a new agreement. If negotiations are still in progress on one of the above tracks, it has been the position of this Office that no such negotiations are mandated until the negotiations on both tracks have been completed. Any legislation to extend binding arbitration must address these problems.*¹⁴ (emphasis added).

Notwithstanding GOER's opposition, Governor George E. Pataki signed the bill into law, and he approved subsequent amendments to the Act containing the same or similar language found to be ambiguous and objectionable by GOER. There having been no prior opportunity for GOER to seek an authoritative ruling on the meaning of the at-issue provision, the State's desire for clarification of that provision is as likely to be its reason for rejecting Council 82's demand to commence negotiations for the successor period regarding compensation as its desire to reach an agreement. However, Council 82's charge alleges a refusal to negotiate in good faith, and such a refusal, as correctly found by the ALJ, violates §209-a.1(d) of the Act regardless of the employer's motivation.¹⁵ Whether or not the State had a sincere desire to reach agreement is irrelevant to the disposition of the charge herein. Accordingly, we modify the ALJ's decision.

¹⁴ L 2001, c 586, Bill Jacket, p. 19, Memorandum from GOER General Counsel Walter Pellegrini, dated July 3, 2001.

¹⁵ Unlike §209-a.1(a) and (c) of the Act, this provision does not make improper motivation an element of such a violation.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York in the unit represented by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82) that the State of New York will forthwith negotiate with Council 82 matters directly related to compensation for members of the Agency Law Enforcement Services unit for the period commencing April 1, 2005.

Dated

By
on behalf of State of New York

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.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York in the unit represented by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82) that the State of New York will forthwith negotiate with Council 82 matters directly related to compensation for members of the Agency Law Enforcement Services unit for the period commencing April 1, 2005.

Dated

By
on behalf of State of New York

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

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

In the Matter of

ROBERT SETLOCK, JR.,

Charging Party,

CASE NO. U-27139

- and -

**STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL
SERVICES – ALBION CORRECTIONAL FACILITY),**

Respondent.

**SANDERS & SANDERS (HARVEY P. SANDERS of counsel),
for Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL
(TERESA A. PRESCOTT of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Robert Setlock, Jr. (Setlock) to a decision of an Administrative Law Judge (ALJ), which dismissed an improper practice charge, as amended, alleging that the State of New York (Department of Correctional Services – Albion Correctional Facility) (State) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it terminated him from a probationary Teacher II position based upon an improperly motivated recommendation by his immediate supervisor in retaliation for his filing a grievance.

In her decision,¹ the ALJ concluded that Setlock failed to demonstrate by a preponderance of the evidence that the supervisor's recommendation was improperly motivated in violation of §§209-a.1(a) and (c) of the Act because the evidence demonstrated that the supervisor was unaware of Setlock's grievance. In the alternative, the ALJ found that the State had demonstrated nondiscriminatory reasons for the adverse employment action, which Setlock failed to rebut.

EXCEPTIONS

Setlock contends that the ALJ erred in concluding that his supervisor was unaware of his grievance when she recommended his termination. In addition, Setlock asserts that the evidence demonstrates that his supervisor did not have a legitimate nondiscriminatory basis for her adverse treatment of him, including her recommendation that he be terminated.

The State supports the ALJ's decision, and it seeks dismissal of the exceptions on an alternative procedural basis: the exceptions allegedly do not comply with §213.2 of our Rules of Procedure (Rules).

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

FACTS

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

Setlock commenced employment as a Teacher II at the Albion Correctional

¹ 42 PERB ¶4587 (2009).

Facility on April 11, 2005. At all relevant times, he was a probationary employee in the Professional Scientific and Technical Services Unit represented by the Public Employees Federation, AFL-CIO (PEF). Consistent with Civil Service regulations, his supervisors were required to carefully observe his behavior and work performance, and periodically advise him of his status and progress.²

On August 8, 2005 and October 13, 2005, Setlock received probationary evaluation reports recommending that his probationary status be continued. The latter evaluation report was prepared by Education Supervisor Barbara Gautieri (Gautieri), who became Setlock's immediate supervisor in September 2005. The report stated that Setlock was highly motivated and that he was "well on his way to becoming an excellent" teacher.

On November 16, 2005, Gautieri met with Setlock to discuss his continued noncompliance with a State dress code prohibiting the wearing of sneakers and other forms of athletic shoes at work, which had been the subject of an earlier staff meeting. During Gautieri's meeting with Setlock, she ordered him to leave the facility and to return only after he had a pair of shoes to wear that satisfied the dress code requirements. In compliance with Gautieri's order, Setlock purchased a pair of boots that day, and then returned to the facility. Gautieri reported Setlock's conduct regarding the dress code violation to her supervisor, Deputy Superintendent for Programs Leslie McNamara (McNamara).

² See, 4 NYCRR §4.5(b)(5)(iii).

On or about December 14, 2005, Setlock sent a non-contract grievance to a PEF Field Representative in its Rochester office seeking to challenge Gautieri's November 16, 2005 directive. The PEF representative mailed the grievance to Albion Correctional Facility Superintendent Robert Kirkpatrick (Kirkpatrick) with a request that a meeting be scheduled with PEF facility representative Donna Baker (Baker). Superintendent Kirkpatrick referred the grievance to Deputy Superintendent McNamara. In contrast to the usual procedure in McNamara's office, the grievance was not date-stamped or assigned a number when it was received. At some point, PEF representative Baker received Setlock's grievance and placed it in a PEF file. It is undisputed that the grievance was not processed by PEF, it was not distributed by McNamara, and a grievance meeting was never scheduled or held. However, McNamara and Baker did speak informally about the grievance. From that conversation, McNamara understood that the grievance had been resolved with Setlock agreeing to abide by the dress code. During the hearing, Gautieri testified that she was unaware of Setlock's grievance until he filed the present improper practice charge. McNamara testified that she did not recall ever speaking with Gautieri about the grievance.

Beginning on December 8, 2005, and continuing in January and February 2006, Gautieri counseled Setlock orally and in writing with respect to deficiencies in his job performance including his failure to abide by supervisory instructions.

On March 20 and April 25, 2006, Setlock received probationary evaluation reports prepared by Gautieri recommending that his probationary status be continued. Both evaluation reports contained specific criticisms of Setlock's work performance and

identified areas of concern. On April 5, 2006, Setlock sent Deputy Superintendent McNamara an eight-page memorandum aimed at rebutting the content of the March 20, 2006 evaluation report. The third page of Setlock's memorandum contained a short reference to his grievance and a conclusory assertion that his grievance precipitated a change in Gautieri's treatment of him.³ It is undisputed that this rebuttal memorandum was placed in his personnel history folder, and there is no evidence in the record that Gautieri received the memorandum or was aware of its content.

On May 9 and 22, 2006, Setlock received probationary evaluation reports prepared by Gautieri. The May 22 evaluation report strongly recommended his termination. In response to the evaluation proposing his termination, Setlock submitted two undated memoranda to Deputy Superintendants McNamara and Durfee for placement in his personnel history folder. In his first memorandum, Setlock claimed that Gautieri's treatment of him changed following her November 2005 directive requiring that he comply with the State's dress code. At a meeting with McNamara and Gautieri on June 13, 2006, Setlock was notified of his termination. Following his termination, Setlock filed a claim for unemployment, which was contested by the State.

DISCUSSION

³ Charging Party Exhibit 14, p.3. Setlock also sent to Deputy Superintendants McNamara and Durfee an undated rebuttal memorandum to the April 25 evaluation report requesting that it be placed in his personnel history folder. In his memorandum, Setlock did not allege that the evaluation report was improperly motivated. Charging Party Exhibit 16.

As a preliminary matter, we examine the State's arguments seeking the summary dismissal of Setlock's exceptions on procedural grounds: the exceptions and brief were filed as one document in violation of §213.2(a) of the Rules, and the exceptions do not satisfy the specificity requirements of §213.2(b) of the Rules.

Consistent with §213.2(a), a brief containing arguments in support of a party's exceptions is to be filed as a separate document from the pleading containing the exceptions. In addition, §213.2(b) of the Rules mandates that a party specify the nature and bases of its exceptions. The purpose of these Rules is to ensure that the Board, and the responding party, can readily distinguish between the grounds for a party's exceptions and its arguments in support of the exceptions.

Although Setlock filed a single document containing both his exceptions and arguments, they are reasonably distinguishable and, therefore, the procedural infirmity cited by the State is not a basis for summary dismissal of the exceptions.⁴ In addition, we reject the State's contention that Setlock's exceptions do not satisfy the requirements of §213.2(b) of the Rules. In fact, his exceptions reasonably set forth the questions raised, identify the parts of the ALJ's decision challenged, contain citations to the record, and set forth the grounds for the exceptions.

Next, we turn to Setlock's exception challenging the ALJ's factual conclusion that Gautieri was unaware of his grievance prior to her recommending his termination.

The theory of Setlock's claim under §§209-a.1(a) and (c) of the Act is limited to

⁴ *Town of Ramapo*, 32 PERB ¶13072 (1999); *Uniondale Union Free Sch Dist*, 27 PERB ¶13077 (1994).

the assertion that Gautieri recommended his termination in retaliation for his grievance, which lead to his termination.⁵ Setlock has the burden of proving by a preponderance of evidence that: a) he engaged in protected activity under the Act; b) Gautieri was aware of his protected activity; and c) she would not have recommended his termination "but for" the protected activity.⁶

Following our review of the evidence in the record in the present case, we affirm the ALJ's conclusion that Setlock failed to demonstrate Gautieri's knowledge of his grievance.⁷

In presenting his case, Setlock made a tactical decision to call Gautieri and McNamara as witnesses, and to question them about Gautieri's knowledge of his grievance. Gautieri testified that she was unaware of the grievance until after his termination, when she learned that he had filed the present charge. McNamara testified

⁵ See, *County of Westchester*, 32 PERB ¶3018 (1999), *reversed, in part, CSEA v New York State Pub Empl Rel Bd*, 32 PERB ¶7011 (Sup Ct, Albany County 1999), *affd*, 276 AD2d 967, 33 PERB ¶7018 (3d Dept 2000) *lv denied*, 96 NY2d 704, 34 PERB ¶7008 (2001), *on remittitur, County of Westchester*, 34 PERB ¶3013 (2001). We note that Setlock does not claim that McNamara was improperly motivated although McNamara clearly had knowledge of Setlock's grievance and participated in the decision to terminate.

⁶ *Elwood Union Free Sch Dist*, 43 PERB ¶3012 (2010); *United Fedn of Teachers, Local 2, AFT, AFL-CIO (Jenkins)*, 41 PERB ¶3007 (2008), *confirmed sub nom. Jenkins v New York State Pub Empl Rel Bd*, 41 PERB ¶7007 (Sup Ct, New York County 2008) *affd*, 67 AD3d 567, 42 PERB ¶7008 (1st Dept 2009); *State of New York (Division of Parole)*, 41 PERB ¶3033 (2008).

⁷ *City of Corning*, 17 PERB ¶3022 (1984), *confirmed sub nom. Stull v New York State Pub Empl Rel Bd*, 116 AD2d 1042, 19 PERB ¶7004 (4th Dep't 1986).

that she did not recall ever speaking to Gautieri about the grievance.⁸ We conclude that Setlock is bound by the direct evidence he elicited demonstrating that Gautieri was unaware of the grievance.⁹

We are unpersuaded by Setlock's speculative assertions that Gautieri "clearly knew" of the grievance prior to her recommending the termination.¹⁰ The mere fact that McNamara spoke with a PEF representative about the grievance at the time it was filed does not demonstrate that McNamara also spoke with Gautieri about the grievance during their interactions.¹¹ The dormancy of Setlock's grievance after it was received by McNamara's office, supports the direct evidence presented by Setlock that Gautieri was ignorant of the grievance. While one witness testified that Gautieri stated that Setlock had "grieved me" when Gautieri was preparing for a hearing on Setlock's unemployment claim, we affirm the ALJ's finding that the "grieve me" statement referred to the unemployment claim and not the December 2005 non-contract grievance.

Based upon Setlock's failure to prove an essential element of his claim, we affirm the decision of the ALJ dismissing his charge. Therefore, we need not address Setlock's exception to the ALJ's alternative conclusion that the State demonstrated

⁸ Transcript, pp. 142, 201-202, 242.

⁹ *Ruiz v Bd of Educ of the City Sch Dist of the City of New York*, 43 PERB ¶13022 (2010).

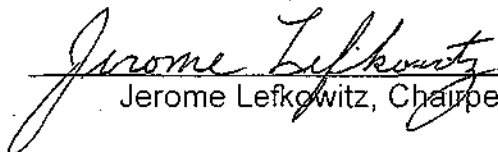
¹⁰ Charging Party's Exceptions, p. 3.

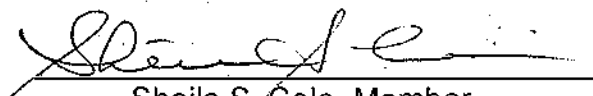
¹¹ Similarly, although a PEF shop steward spoke with McNamara on behalf of Setlock following Gautieri's November 16, 2005 directive with respect to the dress code, there is no evidence in the record that Gautieri was aware of the shop steward's communication with McNamara. Transcript, pp. 304-308.

nondiscriminatory reasons for Setlock's termination, which he failed to rebut.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: December 24, 2010
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

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

In the Matter of

RONALD GRASSEL,

Charging Party,

-and-

CASE NO. U-30052

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

Respondent.

RONALD GRASSEL, *pro se*

BOARD DECISION AND ORDER

This matter comes to the Board on a motion by Ronald Grassel (Grassel) for leave to file exceptions pursuant to §212.4(h) of the Rules of Procedure (Rules) to a pre-conference ruling by an Administrative Law Judge (ALJ)¹ extending the time for the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) to file an answer to Grassel's charge alleging that it violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act).

PROCEDURAL BACKGROUND

This is the second motion filed by Grassel in the past five months seeking leave to file exceptions during the processing of the above-captioned charge. On November 9, 2010, we denied his prior motion seeking leave to challenge an interim

¹ Although Grassel has labeled his pleading as exceptions, we are treating it as a motion for leave to file exceptions because it seeks interlocutory review of an interim ruling by an ALJ.

determination by the Director of Public Employment Practices and Representation (Director) declining to process his allegations against the Board of Education of the City School District of the City of New York (District).² During the pendency of that motion the ALJ cancelled the scheduled conference and extended the UFT's time to file an answer to Grassel's charge until ten (10) calendar days after receipt of the notice of the rescheduled conference.

DISCUSSION

We will grant leave to file interlocutory exceptions to non-final rulings and decisions only when a moving party demonstrates extraordinary circumstances.³ This high standard is predicated, in part, on the importance of avoiding unnecessary delays during the processing of charges.⁴

In support of his current motion, Grassel has failed to demonstrate the existence of extraordinary circumstances warranting the grant of leave to file exceptions. An ALJ's grant of an extension of time for a respondent to file an answer does not constitute extraordinary circumstances. Contrary to Grassel's argument, our Rules of Procedure (Rules) do not deprive an ALJ of the discretion

² 43 PERB ¶3034 (2010).

³ *United Fedn of Teachers, Local 2, AFT, AFL-CIO (Grassel)*, 32 PERB ¶3071 (1999) (subsequent history omitted).

⁴ *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 41 PERB ¶3031 (2008) (subsequent history omitted).

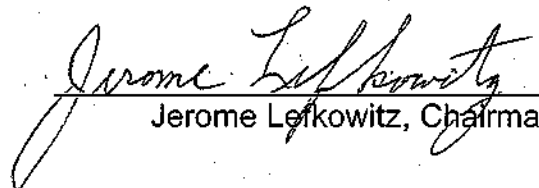
to grant such an extension, especially when there is no proof of prejudice to the charging party.⁵

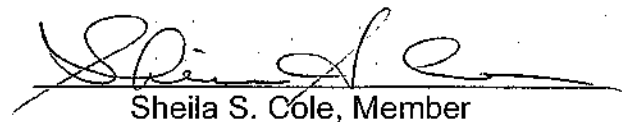
Grassel's repetitious motions burden the administrative process with unnecessary costs and delays. We reiterate that Grassel may face appropriate sanctions in the future, under §212(j) of our Rules, if he continues his practice of filing vexatious motions and pleadings.⁶

Based upon the foregoing, the motion by Grassel for leave to file exceptions is denied.

SO ORDERED.

DATED: December 24, 2010
Albany, New York


Jerome Leikowitz, Chairman


Sheila S. Cole, Member

⁵ See, *United Fedn of Teachers, Local 2, AFT, AFL-CIO and the Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 23 PERB ¶3042 (1990).

⁶ See, *United Fedn of Teachers, Local 2, AFT, AFL-CIO (Grassel)*, 43 PERB ¶3033 (2010); *In Re Halley*, 30 PERB ¶3023 (1997).