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10-30-2009

## State of New York Public Employment Relations Board Decisions from October 30, 2009

New York State Public Employment Relations Board

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# State of New York Public Employment Relations Board Decisions from October 30, 2009

**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

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

Petitioner,

-and-

**CASE NO. C-5887**

**ROCKLAND COUNTY BOCES,**

Employer,

-and-

**BOCES TEACHER AIDES ASSOCIATION,  
NYSUT/AFT/NEA, AFL-CIO,**

Intervenor.

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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 BOCES Teachers Aides 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 Aides.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the BOCES Teacher Aides 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: October 30, 2009  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

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

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In the Matter of

**TEAMSTERS LOCAL 118, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,**

Petitioner,

- and -

**CASE NO. C-5874**

**TOWN OF SWEDEN,**

Employer.

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**ROBERT MCCAURTHY, ESQ., for Petitioner**

**DAVID W. LIPPITT, ESQ, for Employer**

**BOARD DECISION AND ORDER**

On February 25, 2009, the Teamsters Local 118, International Brotherhood of Teamsters (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 Sweden (employer).

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

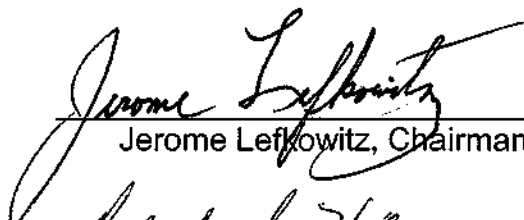
**Included:** All full-time employees working for the Town of Sweden within the following job titles: Working Foreman, Heavy Equipment Operator, Motor Equipment Operator, Laborer and Automotive Mechanic.

**Excluded:** All other employees or positions.

Pursuant to that agreement, a secret-ballot election was held on September 11, 2009, 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: October 30, 2009  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

  
\_\_\_\_\_  
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, RIVERHEAD  
TOWN BARGAINING UNIT, SUFFOLK LOCAL 852,**

Charging Party,

**CASE NO. U-26552**

-and-

**TOWN OF RIVERHEAD,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN  
of counsel), for Charging Party**

**LAMB & BARNOSKY (RICHARD K. ZUCKERMAN AND ALYSON  
MATHEWS of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Riverhead Town Bargaining Unit, Suffolk Local 852 (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the Town of Riverhead (Town) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred certain unit duties of providing care for and interacting with dogs in the Town's animal shelter to volunteers and when it unilaterally transferred other unit duties in the animal shelter to police personnel.

Following a three-day hearing, the ALJ issued a decision dismissing the charge.<sup>1</sup> The ALJ concluded that the Town had a long-term uninterrupted past practice of utilizing volunteers to interact with dogs in the animal shelter and to assist in canine adoption.<sup>2</sup> In addition, the ALJ determined that the transfer of the other duties to police personnel constitutes a change in qualifications, and that the Town's interests in transferring the duties outweigh the interests of the unit employees.

#### EXCEPTIONS

CSEA asserts, in its exceptions, that the ALJ erred in finding that the Town had an uninterrupted practice of utilizing volunteers for interacting with dogs in the animal shelter and in assisting with canine adoption. According to CSEA, there was a 13-month interruption in the Town's practice prior to the resumption of the use of volunteers in the animal shelter in 2006. In addition, CSEA excepts to the ALJ's conclusion that the transfer of unit work from civilians to police personnel requires the application of a balancing test between the respective interests of the parties and that the Town's interests outweigh those of the unit. The Town supports the ALJ's decision.

#### FACTS

CSEA is the recognized representative of a unit of Town employees including individuals holding the titles of Animal Control Officer I, Animal Control Officer II and Kennel Attendant, who work in the Town's animal shelter.

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<sup>1</sup> 41 PERB ¶4534 (2008).

<sup>2</sup> Although volunteers at the shelter also perform tasks related to felines, CSEA's charge is limited to challenging the Town's alleged change in the use of volunteers for the care and adoption of dogs.



The duties of Kennel Attendant include maintaining the animal shelter and interacting with dogs housed at the shelter for the purpose of enhancing the probability of adoption over an alternative fate through euthanasia. Such interactions include feeding, walking, playing and brushing the dogs. In addition, a Kennel Attendant is responsible for assisting with canine adoptions.

Animal Control Officers I and II are responsible for, *inter alia*, enforcing the Town's animal control ordinances and regulations, patrolling the Town, issuing warnings and summons for animal control violations, and investigating complaints about stray animals and animal bites.

In addition, the Animal Control Officer II is responsible for the administration of the shelter. These administrative duties include: preparing the budget; paying the bills; selecting the veterinarian; requesting equipment; and determining which dogs to euthanize. Animal Control Officer II Louis Coronesi (Coronesi) performed these administrative duties exclusively for four years prior to January, 2006, when the Town transferred the supervision of the shelter from the sanitation department to the police department. As a result of the reassignment of those duties, unit positions have not been abolished, and the compensation and benefits of unit employees have remained the same.

In 1996, the Town Board enacted a resolution creating the Riverhead Shelter Advisory Group, which included private citizens wanting to assist in the care of animals housed in the shelter and facilitating their adoption.<sup>3</sup> For the period commencing with the passage of the 1996 resolution through December 2004, volunteers worked in the

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<sup>3</sup> Respondent Exhibit 1.

shelter alongside Kennel Assistants. During this eight year period, volunteers at the shelter have included members of animal rights organizations, private citizens and school children. Volunteers fed, walked, trained, played with and brushed the dogs. Volunteers performed other tasks, as well, aimed at assisting with canine adoptions. Those additional tasks included taking photographs of dogs and posting them on the internet to advertise their availability for adoption.

In 2002, the Town issued a form listing ten written rules of prohibited conduct by volunteers working at the animal shelter. Each volunteer was required to sign the form and comply with the rules. If a volunteer refused to sign the form or repeatedly violated the rules, he or she would be barred from continuing to participate in the shelter volunteer program.<sup>4</sup> In December 2004, the Town banished long-time volunteer Linda Mosca (Mosca) from continuing to be a volunteer at the animal shelter as the result of her violations of the rules.<sup>5</sup> Other long-term volunteers, Connie Farr and Susan Eaton, were not subjected to a similar Town ban and they continued to visit the shelter in 2005 to interact with the dogs and to assist with adoptions.

In April 2005, the Town Board passed a new resolution and reappointed the Riverhead Animal Control Advisory Committee (Advisory Committee), which included Town Board member Rose Sanders, Animal Control Officer John Reeve and members of the public. The resolution authorized the Advisory Committee to advise the Town Board on various issues including procedures for adoption and euthanasia.<sup>6</sup> The

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<sup>4</sup> Respondent Exhibit 6.

<sup>5</sup> Apparently, a prior ban imposed on Ms. Mosca in 2002 had been lifted by the Town.

<sup>6</sup> Respondent Exhibit 2.

following month, the Advisory Committee met to discuss the Town's euthanasia policy and the applicable rules for volunteers at the animal shelter.<sup>7</sup> After receiving comments from Coronese, proposed amendments to the shelter's policies and procedures, including those applicable to volunteers, were circulated.<sup>8</sup> In November 2005, the Town Board enacted a resolution modifying various animal shelter policies. Among those changes were modifications to the rules for animal shelter volunteers, a new volunteer application form and a new volunteer agreement.<sup>9</sup> The duties performed by volunteers at the animal shelter have not changed following the Town's implementation of the 2005 policy changes.

#### DISCUSSION

Under the framework established in *Niagara Frontier Transportation Authority (Niagara Frontier)*,<sup>10</sup> there are two essential questions that must be determined when deciding whether the transfer of unit work violates §209-a.1(d) of the Act: a) was the work at-issue exclusively performed by unit employees for a sufficient period of time to have become binding; and b) was the work assigned to non-unit personnel substantially similar to that exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there is a significant change in job qualifications. When there is a significant change in job qualifications,

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<sup>7</sup> Respondent Exhibit 7.

<sup>8</sup> Respondent Exhibit 8.

<sup>9</sup> Joint Exhibit 2.

<sup>10</sup> 18 PERB ¶3083 (1985).

however, we must balance the respective interests of the public employer and the unit employees to determine whether §209-a.1(d) of the Act has been violated.<sup>11</sup>

The application of past practice analysis for determining whether the work has been performed exclusively by bargaining unit members in transfer of unit work cases was reaffirmed in *Manhasset Union Free School District*.<sup>12</sup> The applicable test for finding an enforceable past practice under the Act is whether the "practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."<sup>13</sup>

In the present case, we reject CSEA's contention that it presented sufficient evidence to reestablish exclusivity over the care and adoption of dogs in the animal shelter during the December 2004-January 2006 period when Mosca was banned from the shelter. In support of its argument, CSEA relies on *City of Rochester*,<sup>14</sup> where we found a violation of §209-a.1(d) of the Act when an employer unilaterally transferred work to nonunit personnel despite a 13-month past practice of exclusively assigning police officers to perform that work.

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<sup>11</sup> *Niagara Frontier Transp Auth, supra*, note 10. *County of Westchester*, 42 PERB ¶3025 (2009).

<sup>12</sup> 41 PERB ¶3005 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶3016 (2009).

<sup>13</sup> *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012, at 3046-3047(2007) (quoting from *County of Nassau*, 24 PERB ¶3029 [1991]), *on remand*, 42 PERB ¶4527 (2009).

<sup>14</sup> 21 PERB ¶3040 (1988), *confd, City of Rochester v New York State Pub Empl Rel Bd*, 155 AD2d 1003, 22 PERB ¶7035 (4th Dept 1989).

Based upon the facts and circumstances in the present case, we conclude that CSEA failed to demonstrate an unequivocal Town practice during the period of December 2004-January 2006 to create a reasonable expectation among unit employees that volunteers would no longer be permitted to perform the at-issue work in the animal shelter. The evidence establishes that during the relevant period, the Town did not take any measures to prohibit or limit volunteers, other than Mosca, from interacting with the dogs in the shelter or assisting with adoptions. The Town's relatively informal rules and procedures for volunteers remained in effect at all times during that period. In addition, the evidence establishes a clear Town intention, known to unit members, to continue the eight-year practice of permitting volunteers to work at the animal shelter but under more restrictive regulations.

We are also not persuaded by CSEA's contention that the visits by Farr and Eaton to the animal shelter, following Mosca's banishment, were in their role as consumers rather than volunteers. This purported distinction is belied by the informality of the Town's volunteer policy and the fact that the activities of Farr and Eaton during the applicable period continued to include interacting with the dogs and assisting in adoptions.

Finally, we turn to CSEA's exceptions with respect to the reassignment of the administrative duties of the Animal Control Officer II to police officers.

In *City of Newburgh*,<sup>15</sup> we held that the transfer of unit work performed by animal control officers to police officers constitutes a *per se* significant change in qualifications

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<sup>15</sup> 31 PERB ¶3017 (1998), *on remand*, 31 PERB ¶4621 (1998), *affd*, 32 PERB ¶3015 (1999), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 273 AD2d 626, 33 PERB ¶7009 (3d Dept 2000).


and, therefore, results in a change in the nature and level of services.<sup>16</sup> Therefore, contrary to CSEA's argument, the balancing test mandated by *Niagara Frontier Transportation Authority*<sup>17</sup> is applicable.


Following our review of the record, we affirm the ALJ's conclusion that interests of the Town in transferring the administrative duties outweigh those of CSEA unit members. The Town's managerial decision to place the animal shelter under the jurisdiction of the police department resulted in the reassignment of various duties, previously performed by the Animal Control Officer II, to police personnel. The transfer of this work did not result in any loss of employment or benefits for unit members. Therefore, we conclude that the Town did not violate §209-a.1(d) of the Act when it unilaterally transferred the administrative responsibilities of the Animal Control Officer II to police personnel.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.<sup>18</sup>

IT IS, THEREFORE, ORDERED that the charge is hereby dismissed.

DATED: October 30, 2009  
Albany, New York

  
\_\_\_\_\_  
Robert S. Hite, Member

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

<sup>16</sup> See also, *Fairview Fire Dist*, 29 PERB ¶13042 (1996). Based upon the arguments presented by CSEA in this case, we have no reason to deviate from or reconsider our prior holdings.

<sup>17</sup> *Supra*, note 10.

<sup>18</sup> Chairman Lefkowitz took no part.

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner/Intervenor,

- and -

**CASE NO. C-5760**

**SACHEM CENTRAL SCHOOL DISTRICT,**

Employer.

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**RICHARD M. GREENSPAN, P.C. (ERIC J. LARUFFA of counsel), for  
Petitioner/Intervenor**

**INGERMAN SMITH, L.L.P. (JONATHAN HEIDELBERGER of counsel), for  
Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Sachem Central School District (District) to a decision of an Administrative Law Judge (ALJ) on a petition filed by United Public Service Employees Union (UPSEU), as amended, placing the title of School Communication Aide (SCA) into the UPSEU Clerical Unit (Clerical Unit).<sup>1</sup>

**EXCEPTIONS**

In its exceptions, the District asserts that the ALJ erred in concluding that the Clerical Unit is the most appropriate unit to place the SCA title rather than the Sachem

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<sup>1</sup>42 PERB ¶4006 (2009).

Central Teachers' Association-Teacher Aide Unit, NYSUT, AFT, AFL-CIO (Aide Unit).<sup>2</sup>

In support of its exceptions, the District claims that the ALJ misapplied applicable precedent and misconstrued the facts. UPSEU supports the ALJ's decision.

Based upon our review of the record and consideration of the respective arguments of the District and UPSEU, we reverse the decision of the ALJ.

#### FACTS

The District is composed of a dozen elementary schools, four middle schools and two high schools. There are eight existing collective bargaining units, including the Aide Unit and the Clerical Unit, which represents District employees in various titles.

Prior to September 2006, the District employed individuals holding an in-house title interchangeably referred to as Computer Aide or Technology Aide (hereinafter Technology Aide). The actual civil service classification for the position, however, was Elementary School Classroom Aide. Since 1999, employees in the in-house title were a part of the Aide Unit along with employees in the positions of School Teacher Aide and Special Education Aide. All three Aide positions are in the noncompetitive class.

The Clerical Unit is composed of all 12-month and ten-month clerical staff employed by the District including Clerk-Typists, Stenographers and ten-month Attendance Aides. All positions in the Clerical Unit are in the competitive class and, therefore, subject to a probationary period.

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<sup>2</sup> Following issuance of a notice of the pendency of the representation petition, the Teacher Aide Unit did not seek to intervene pursuant to §212 of the Rules of Procedure (Rules).



According to the testimony of Patricia Bertolone (Bertolone), there has been a conflict within the Teacher Aide Unit since the placement of Technology Aides in that unit. Bertolone testified that this conflict stemmed from differences in the job responsibilities between Technology Aides and the other Aide positions resulting in a different preference with respect to seeking seniority benefits during negotiations.

In early 2006, the District was notified by the Suffolk County Civil Service Commission (Commission) that the Technology Aide title was not appropriate for the duties being performed by employees in that title. Thereafter, the Commission reclassified the Technology Aide position to SCA, a competitive class position. The minimum qualifications for the SCA position include a high school diploma or its equivalent along with one year of experience in the operation and maintenance of computers and audio-visual equipment.

On September 7, 2006, the District abolished the Technology Aide title and created the SCA position. At the same time, each incumbent in the Technology Aide title was appointed provisionally to the SCA position pending the creation of an eligibility list. Eventually, all but one of the Technology Aides were permanently appointed as SCAs.<sup>3</sup>

It is undisputed that employees in the SCA position continue to perform the same duties they performed as Technology Aides: maintaining, operating and coordinating the use of the District's computers, smart boards, and audio-visual

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<sup>3</sup> One former Technology Aide was appointed as a Special Education Aide after failing the SCA examination.

equipment. In addition, their respective work locations have not changed: SCAs are assigned to different District schools. Some are assigned to a school library; others have offices in a library or hallway. In performing their duties, SCAs interact with teachers and students for purposes of delivering, setting up and repairing equipment, installing software, and resolving technical problems. They also work closely with a BOCES staff developer who assists teachers and students with projects. In addition, they interact with all District staff with respect to supplies for computers and other equipment.

Special Education Aides and School Teacher Aides, like SCAs, have responsibilities in the operation of computers, audio-visual equipment and assistive technological devices but only in the classroom. A minimum qualification for both SCAs and Special Education Aides is four years of high school or its equivalent.<sup>4</sup> While SCAs interact with clerical staff with respect to supplies and computer hardware problems, they are not responsible for the maintenance and operation of the particular administrative software, Pentamation, utilized by the clerical staff.<sup>5</sup>

After their appointment, the wages, benefits and working conditions of SCAs have remained similar to the remaining titles in the Aide Unit: a ten-month work year; a six and a half hour work day; a 2.5% annual salary increase; seven sick days and two personal days per year. Unlike Classroom Aides and Special Education Aides,

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<sup>4</sup> A high school diploma or its equivalent is only preferred for Special Education Aides.

<sup>5</sup> Pentamation software problems are handled by Matt Demaiio, a District official with responsibilities related to technology.

however, the annual SCA salary was initially set by the District at \$16,000 and SCAs are not entitled to the extra holidays and longevity payments negotiated in the Aides Unit's agreement.<sup>6</sup>

In general, Clerical Unit employees receive significantly better wages and benefits, such as holidays and greater personal and sick leave, than those received by SCAs.<sup>7</sup> All employees in the Clerical Unit, with the exception of the 10 Attendance Aides, work 12 months a year and 7.74 hours per day when school is in session. Attendance Aides work 191 days per year and 6.5 hours per day. They are responsible for monitoring student attendance information, contacting the homes of absent students, and creating and distributing an absentee list to the teachers.

#### DISCUSSION

When determining a unit placement petition, the most important of the criteria set forth in §207.1 of the Act is the community of interest criterion.<sup>8</sup> Among the factors to be considered in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location and whether a conflict of interest exists between the members of

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<sup>6</sup> Prior to the creation of SCA by the District, the Aide Unit requested voluntary recognition to place the new position in its unit. Respondent Exhibit 2. Subsequently, the request was withdrawn and a memorandum of agreement was reached for a successor agreement, which did not add SCA to the Aide Unit. Transcript, 172-173; Joint Exhibit 6.

<sup>7</sup> However, the value of the life insurance benefit for SCAs is substantially greater, and unlike Clerical Unit employees, SCAs do not contribute to insurance premiums.

<sup>8</sup> *Regional Transit Service, Inc.*, 39 PERB ¶13027 (2006).

the proposed unit.<sup>9</sup>

Based upon the facts and circumstances in the present case, we conclude that the ALJ erred in placing the SCAs in the Clerical Unit rather than the Aide Unit. The evidence demonstrates that SCAs, along with Teacher Aide and Special Education Aides, are responsible for the operation of computers, smart boards, and audio-visual equipment in the classroom. While we agree with the ALJ's conclusion that SCAs duties are not instructional in nature, like Teacher Aides and Special Education Aides, SCAs do perform an essential role in ensuring the proper operation and maintenance of the technologically-based pedagogical classroom tools. In performing those duties, they interact with teachers and students, as well as Teacher Aides and Special Education Aides. Unlike the general support provided by Clerical Unit employees, the role of SCAs is more directly connected to the District's pedagogical mission. Although SCAs interact with clerical staff and other District staff with respect to supplies, they are not responsible for resolving the particular software problems faced by clerical staff. Furthermore, unlike Attendance Aides, SCAs are not responsible for monitoring student attendance.

In addition, as the ALJ correctly found, the terms and conditions of employment of SCAs, which were unilaterally imposed by the District, are more similar to Teacher Aides and Special Education Aides than Clerical Unit employees. While the minimum qualifications and civil service status of SCAs differ from the remaining titles in the Aide

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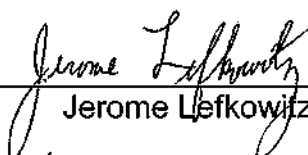
<sup>9</sup> See, *East Ramapo Cent Sch Dist*, 11 PERB ¶3075 (1978); *Somers Cent Sch Dist*, 12 PERB ¶3068 (1979); *Monroe #1 BOCES*, 39 PERB ¶3024 (2006).

Unit, we do not find such differences, under the facts in the present case, to be sufficient to warrant the placement of SCAs into the Clerical Unit.<sup>10</sup>

Finally, we consider the question whether there is a reasonable likelihood of conflicts if SCAs are placed in the Aide Unit. The record reveals that Technology Aides were in the Aide Unit for at least seven years. During this period, a Technology Aide, Bertolone, was a member of the negotiations team during at least one round of bargaining. While Bertolone testified to differences before and during the period when Technology Aides were in the Aide Unit, including differences over a particular seniority proposal, we find her testimony to be conclusory in nature and, therefore, insufficient to establish a conflict of interest warranting the placement of SCAs into the Clerical Unit.<sup>11</sup>

IT IS, THEREFORE, ORDERED that the ALJ's decision is reversed and SCAs are hereby placed into the Aides Unit.

DATED: October 30, 2009  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

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

<sup>10</sup> *Wappingers Cen Sch Dist*, 28 PERB ¶3037 (1995).

<sup>11</sup> *State of New York (Division of Parole)*, 40 PERB ¶3011 (2007).

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

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In the Matter of

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,  
LOCAL 1070,**

Petitioner,

-and-

**CASE NO. CP-1095**

**STATE OF NEW YORK – UNIFIED COURT SYSTEM,**

Employer,

-and-

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

Intervenor.

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**EDDIE M. DEMMINGS, GENERAL COUNSEL (MARY J. O'CONNELL of  
counsel), for Petitioner**

**JAMES P. WELCH, DEPUTY DIRECTOR FOR LABOR RELATIONS  
(CHRISTINA M. ULLO of counsel), for Employer**

**NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL G. ORTIZ of  
counsel), for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the State of New York – Unified Court System (UCS) to a decision by an Administrative Law Judge (ALJ) on a unit placement

and unit clarification petition filed by District Council 37, AFSCME, AFL-CIO, Local 1070 (DC 37) seeking to accrete the title of "Secretary to Judge" to its unit.<sup>1</sup> Following the submission of the case, the ALJ granted the petition by placing the Secretary to Judge title into the DC 37 negotiations unit.

#### EXCEPTIONS

In its exceptions, UCS argues that the ALJ erred:

1. In concluding that individuals holding the title of Secretary to Judge in New York City are employed by UCS rather than by the elected Supreme Court Justices who personally appoint and supervise them.
2. In finding a "community of interest" between employees holding the title of Secretary to Judge in New York City and the employees in the DC 37 negotiating unit.
3. In failing to notify the 170 individuals in the title Secretary to Judge of the pendency of the petition and to afford them an opportunity to express their preferences concerning possible representation by DC 37, and the ALJ's related error in concluding that such preferences are irrelevant to the resolution of the instant matter;
4. In finding that DC 37 and UCS might negotiate the "continuation of certain fringe benefits" that unrepresented employees holding the title of Secretary to Judge have been receiving either from UCS or from the City of New York;
5. In applying PERB's Rules of Procedure (Rules) §201.2(b), which permits a unit placement and/or clarification petition "at any time" rather than finding it untimely

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<sup>1</sup> 41 PERB ¶4005 (2008). The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) intervened before the ALJ but has not filed a response to the exceptions.

under a superseded Rule that had provided that only newly-created or substantially altered positions could be considered for unit placement and/or clarification.

### DISCUSSION<sup>2</sup>

Having reviewed the record and the positions of the parties, we affirm the ALJ's decision. Our reasons respond to the exceptions in the order in which they were presented by UCS in its brief.

It is clear from the language of the Judiciary Law, and relevant precedent, that secretaries personally appointed by Judges are employees of UCS.<sup>3</sup> Pursuant to the State Constitution, Article VI, §28(B) & (C), in 1978, the Legislature enacted legislation modifying the administration of the courts.<sup>4</sup> Pursuant to Judiciary Law §§211 and 212, the judicial administration of the courts is assigned to the Chief Judge of the Court of Appeals and responsibility for supervising the administration of the courts is assigned to the Chief Administrator of the Courts, on behalf of the Chief Judge. Subdivision 1(e) of Judiciary Law §212 specifies that the Chief Administrator shall: "[a]ct as 'chief executive officer' and exercise the functions, powers and duties of a 'public employer' under the provisions of article fourteen of the civil service law [the Taylor Law]." In addition, Judiciary Law §36 states:

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<sup>2</sup> The facts are recited in detail in the decision of the ALJ. We repeat only those facts necessary to determine the exceptions.

<sup>3</sup> Placement of the title Secretary to Judge in the DC 37 negotiating unit would not give DC 37 a right to negotiate demands concerning job security for such secretaries. *State of New York—Unified Court System*, 26 PERB ¶3039 (1993).

<sup>4</sup> L 1978, c 156.



1. Notwithstanding any other provisions of law, each justice of the supreme court may appoint and at pleasure remove one law clerk and one secretary, subject to the standards and administrative policies promulgated pursuant to section twenty-eight of article six of the constitution.
2. Should a judge or justice of the unified court system cease to hold office for any reason other than expiration of his term, his personal assistants shall continue in office until a successor is appointed or elected to fill such vacancy. Until such vacancy is filled, the chief administrator of the courts shall determine the functions to be performed by such personal assistants.

For Taylor Law purposes, there is a similarity in the administrative structure of the State Judiciary and the State Executive Branch. The Chief Judge of the Court of Appeals is the chief executive officer of the State's Judicial Branch, just as the Governor is the chief executive officer for the State's Executive Branch.<sup>5</sup> The Chief Administrator functions as the agent of the Chief Judge, to the extent that he acts as the chief executive officer of UCS for Taylor Law purposes. Similarly, the Governor's Office of Employee Relations is the agent of the Governor for purposes of fulfilling the Taylor Law responsibilities of the State of New York.<sup>6</sup>

Within the Executive Branch there are many departments, agencies, commissions and bodies, and the head of each such entity is the appointing authority with the power to appoint and terminate staff.<sup>7</sup> Nevertheless, Executive Branch negotiating units include

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<sup>5</sup> See, *Hudson Valley Dist Council of Carpenters v State of New York, Dept of Corr Servs*, 152 AD2d 105 (3d Dept 1989).

<sup>6</sup> *Id.*

<sup>7</sup> See, Civil Service Law §2.8.

employees who work for many different appointing authorities.<sup>8</sup> Similarly, while a Supreme Court Justice is the appointing authority for a Secretary to Judge, pursuant to Judiciary Law §36, UCS is the employer for those non-judicial employees for purposes of the Taylor Law.<sup>9</sup>

UCS's second exception argues that even if employees in the title of Secretary to Judge are its employees, differences between their terms and conditions of employment and those of other UCS secretaries are sufficient to preclude their placement in a single unit. We reject this argument of UCS, fully endorsing the factual and legal analysis of the ALJ.<sup>10</sup> The ALJ's decision is fully supported by our precedent dating back to *Board of Education, St. Lawrence Central School District No. 1*,<sup>11</sup> where we stated that §207.1(c) of the Taylor Law Act "requires the designation of as small a number of units as possible" consistent with the likelihood of effective negotiations, which means the absence of the

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<sup>8</sup> *State of New York*, 1 PERB ¶399.85 (1968), *reversed in part but affirmed in pertinent part*, *CSEA v Helsby*, 24 AD2d 993 (3d Dept 1969), 2 PERB ¶7005, *affd*, 32 AD2d 131, 2 PERB ¶7007 (3d Dept 1969), *affd*, 25 NY2d 842, 2 PERB ¶7013 (1969). *Cf. Montero v Lum*, 68 NY2d 253 (1986).

<sup>9</sup> *See, State of New York-Unified Court System*, *supra* note 3. In reaching the conclusion that a Secretary to Judge is an employee of UCS, we give no weight to the representation of secretaries to judges by CSEA. Prior to April 1, 1977, counties funded the operations of State Supreme Courts, including the compensation of non-judicial employees, and the counties were deemed to be the employers of such employees. This was terminated by L1976, c 966. At that time, secretaries to judges were included in the county negotiating units represented by CSEA. That is because CSEA had represented them as county employees before April 1, 1977. And when their employment was transferred to UCS, it was prevented by Judiciary Law §39.7 from seeking to alter the negotiating unit.

<sup>10</sup> *Supra* note 1, 41 PERB ¶4005 at pp. 4030-4032.

<sup>11</sup> 2 PERB ¶3043 (1969).

likelihood of a meaningful conflict of interest.<sup>12</sup> We also find, as did the ALJ, that the difference in benefits received by incumbents in the title Secretary to Judge and other secretaries among the DC 37 unit employees suggests very little likelihood of a conflict of interest.

UCS's third exception asserts that the ALJ erred in finding that, except where the majority status of an employee organization must be ascertained, employee preference need not be considered. Again, we agree with the ALJ's determination. We reject UCS's third exception because it is not supported by a legal argument or by record evidence.

UCS's brief does not reference any relevant language of the Taylor Law; neither does it cite to any Board or court precedent to support its argument. Sections 202 and 207.2 of the Taylor Law provide that employee choice is determinative as to whether a particular employee organization shall be certified but is silent as to such choice having a role in the definition of an appropriate negotiating unit. That part of the representation process is set forth in §207.1 of the Taylor Law, which prescribes three criteria none of which contemplates consideration of employee choice.<sup>13</sup> The first of these criteria is that there must be a community of interest among unit employees, which can be defeated by a conflict of interest among them as would preclude meaningful negotiations.<sup>14</sup> The second criterion is that there be a public employer that can negotiate with the certified employee organization with respect to the terms and conditions of employment of all the employees

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<sup>12</sup> *Supra* note 15, 2 PERB ¶3043 at 3333-3334.

<sup>13</sup> See, *Greater Southern Tier BOCES*, 41 PERB ¶4002, n 12 (2008), and the cases cited by the ALJ therein.

<sup>14</sup> *Board of Educ, St. Lawrence Cent Sch Dist No. 1*, *supra* note 11.

represented in such unit; we have interpreted that criterion to preclude multi-employer units.<sup>15</sup> The third criterion is that the unit be "compatible with the joint responsibilities of the public employer and the public employees to serve the public." Reiterating what we said in rejecting the second exception herein, this standard requires that there should be the fewest units of employees of a single employer as would be consistent with the first standard, the absence of a conflict of interest.<sup>16</sup>

In its fourth exception, UCS appears to have misapprehended the relevant conclusion of the ALJ. He did not find that DC 37 could negotiate the continuation of benefits provided by the New York City Management Fund (Fund). As the Fund would, under the Taylor Law, not be the employer of employees in the title of Secretary to Judge, DC 37 could not negotiate with it. However, DC 37 would be entitled to negotiate with UCS with respect to benefits. This was understood by the ALJ when he wrote that to the extent that some secretaries may lose some benefits, such losses would not have an overall negative impact upon them because of offsetting benefits that would become available to them by reason of becoming represented by DC 37. He then added that a UCS witness had testified that in the past, DC 37 had negotiated successfully with UCS to provide benefits to substitute for those provided by the Fund. Negotiation demands submitted by DC 37 to UCS for most fringe benefits<sup>17</sup> on behalf of employees who are

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<sup>15</sup> See, *County of Putnam*, 33 PERB ¶3001 (2000). Cf. *County of Orange and Sheriff of County of Orange*, 14 PERB ¶3012 (1981).

<sup>16</sup> *Board of Educ, St. Lawrence Cent Sch Dist No 1*, supra note 11.

<sup>17</sup> But not for pension-related benefits.

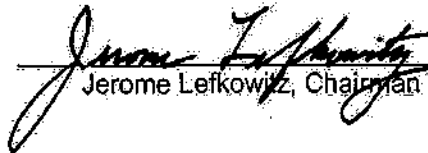
accreted to its negotiating unit would be mandatory subjects of negotiation.<sup>18</sup> While the record evidence is that DC 37 had been successful in such negotiations in the past, the ALJ did not state that they would be successful in future negotiations. Accordingly, the fourth exception is rejected.

UCS's final exception is that DC 37's petition herein is untimely because the ALJ should not have applied §201.2(b) of our Rules as amended in 1996, which permits the filing by public employers and recognized or certified employee organizations of unit clarification or placement petitions "at any time". Instead, it argues, he should have applied our pre-1996 Rule which only authorized unit placement and unit clarification petitions for new or substantially altered positions.

We reject this exception. The rule that UCS would have us apply was superseded more than ten years before the petition herein was filed.

Having rejected each of UCS's exceptions, we affirm the decision of the ALJ, and we order that the title of Secretary to Judge be placed in the DC 37 unit.

DATED: October 30, 2009  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

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<sup>18</sup> Sections 203 and 201.4 of the Act.

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

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In the Matter of

**NEW YORK STATE LAW ENFORCEMENT OFFICERS  
UNION, COUNCIL 82, AFSCME, AFL-CIO, GREENE  
COUNTY DEPUTY SHERIFF'S ASSOCIATION,  
LOCAL 2790G,**

Charging Party,

**CASE NO. U-27095**

- and -

**COUNTY OF GREENE and SHERIFF OF GREENE COUNTY,**

Respondents.

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**ENNIO J. CORSI, ESQ. GENERAL COUNSEL (CHRISTINE CAPUTO  
GRANICH of counsel), for Charging Party**

**ROEMER WALLENS & MINEAUX LLP, GENERAL COUNSEL (DIONNE A.  
WHEATLEY of counsel), for Respondents**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the New York State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO, Greene County Deputy Sheriff's Association, Local 2790G (Council 82) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on an improper practice charge filed by Council 82 alleging that the County of Greene and the Sheriff of Greene County (joint employer) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act). In her decision, the Assistant Director concluded that the charge alleged only that the joint employer violated §209-a.1(d) of the Act by unilaterally

changing the amount of the co-payment cost for a doctor office visit. The Assistant Director dismissed that allegation concluding that the joint employer had met its burden of demonstrating its duty satisfaction defense.<sup>1</sup>

### EXCEPTIONS

In its exceptions, Council 82 asserts that the Assistant Director misconstrued the charge by concluding that it is limited to alleging a unilateral change in the amount of the co-payments. According to Council 82, the charge contains a separate and distinct allegation that the joint employer violated its duty to negotiate in good faith when it failed to disclose to Council 82, during negotiations, that the co-payments would increase if Council 82 agreed to certain health insurance concessions proposed by the joint employer. In addition, Council 82 excepts to the Assistant Director's conclusion that the joint employer satisfied its duty to negotiate the subject of co-payments. The joint employer supports the Assistant Director's decision.

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

### FACTS

Council 82 is the recognized representative of a collective bargaining unit of individuals employed by the joint employer holding full-time positions of Deputy Sheriffs (criminal) and Deputy Sheriff Sergeants (criminal). Following the expiration of the January 1, 2003-December 31, 2005 collectively negotiated agreement (agreement), the parties' commenced negotiations for a successor agreement through the exchange

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<sup>1</sup> 42 PERB ¶4513 (2009).

of negotiation proposals on January 24, 2006. The joint employer submitted 13 proposals including two concerning health benefits. In proposal No. 2, it sought to amend Article 9 of the expired agreement to provide that changes to co-payments for doctor visits be added to the health insurance issues subject to the review and recommendations of a labor-management Health Insurance Committee (Committee).<sup>2</sup> Proposal No. 3 sought two health benefit concessions from Council 82: a) the elimination of an option permitting the carrying over of excess deductible remaining to a unit employee's credit; and b) lowering the maximum eligibility age for dependent children in college.

At the hearing before the Assistant Director, Council 82 representative Richard Stevens (Stevens) testified that during the negotiations he specifically asked the joint employer's representatives what would be the economic consequences of its health benefit proposals.<sup>3</sup> Greene County Director of Personnel Audrey G. Adrezin (Adrezin) testified, however, that she did not recall Council 82 inquiring whether there would be other related changes resulting if it agreed to the proposed health benefit concessions.<sup>4</sup> However, it is undisputed that despite the joint employer's awareness that the proposed concessions would result in the co-payment cost for a doctor office visit to increase from \$10 to \$15, it did not disclose this information to Council 82 during the negotiations.

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<sup>2</sup> Under the expired agreement, the Committee was authorized to review and make recommendations with respect to prescription drugs, insurance co-payments and/or deductibles.

<sup>3</sup> Transcript, pp. 69-70.

<sup>4</sup> Transcript, p. 36.



On March 9, 2006, the parties entered into a memorandum of agreement (MOA) containing modifications to the expired agreement including the joint employer's two health benefit proposals.<sup>5</sup> The MOA was subsequently ratified and is silent with respect to increasing the amount of the co-payment for a doctor office visit. In June, 2006, unit members learned, when they received their new health insurance cards, that their co-payments had been increased to \$15 a visit.

Consistent with the MOA, on November 8, 2006, the parties executed a successor agreement for the period January 1, 2006-December 31, 2008.<sup>6</sup> Section 9.2.2 of the successor agreement states, in relevant part that:

- B. The prescription drug co-pay and doctor visit co-pays shall be the minimum cost offered by the HMO carrier. If the prescription drug co-payments and/or doctor visit co-payments increase above the minimum level, the additional costs will be the responsibility of the employee.
- C. Any change to the prescription drugs, insurance co-pays, doctor visit co-pays and/or deductibles will be referred to a Health Insurance Committee comprised of three (3) Union and three (3) County people. The Committee will review the matter and make a recommendation as to how to proceed. If the recommendation of the Committee is not accepted, the increase proposed by the carrier will be implemented. The implementation of the higher prescription drug co-pay, insurance co-payment, doctor visit co-pays or deductible will not be subject to the grievance procedure or form the basis for an improper practice charge.

#### DISCUSSION

We begin with Council 82's exception targeting the Assistant Director's determination that the charge did not include an allegation that the joint employer failed

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<sup>5</sup> Charging Party Exhibit No. 1.

<sup>6</sup> Joint Exhibit No. 1.

to negotiate in good faith during the parties' negotiations leading to the successor agreement.

Pursuant to §204.1(b)(3) of our Rules of Procedure (Rules), an improper practice charge must contain a clear and concise statement of facts that provides reasonable notice of the alleged conduct by the respondent, which the charging party avers constitutes a violation of the Act.<sup>7</sup>

In the present case, the charge alleges that, during the negotiations, the joint employer knew that its proposed health benefit concessions would result in an increase in the co-payments paid by unit members and it did not disclose this information to Council 82.<sup>8</sup> Following our review of the allegations of the charge, we conclude that the charge provides reasonable notice to the joint employer that Council 82 is alleging that the joint employer engaged in bad faith bargaining by withholding information about the complete impact of its proposed health benefit concessions on unit members.

In reaching our conclusion, we note that both parties understood that the charge includes that allegation. This is clear from Council 82's opening statement, the evidence presented during the hearing, the arguments made by the joint employer in its motion to dismiss and in the parties' respective closing briefs submitted to the Assistant Director.<sup>9</sup>

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<sup>7</sup> *CSEA (Dennis)*, 26 PERB ¶3059 (1993); *Wappingers Cent Sch Dist*, 28 PERB ¶3016 (1995).

<sup>8</sup> ALJ Exhibit Nos. 1, ¶¶3, 4, 5 and 7.

<sup>9</sup> Transcript, pp. 10-13, 36, 39, 41, 46-48, 69-70, 104. See, Charging Party's Closing Argument, pp. 9-10; Brief Submitted on Behalf of the County of Greene and Greene County Sheriff, pp. 1, 3-6.

Therefore, we find that the Assistant Director erred in her interpretation of Council 82's charge and remand the case to her for further processing with respect to the claim that the joint employer engaged in bad faith negotiations by intentionally withholding requested information during negotiations about the adverse economic impact of its proposed health benefit concessions.

Next, we consider Council 82's exceptions challenging the Assistant Director's finding that the joint employer demonstrated it satisfied its duty to negotiate under the Act over the subject of the change in the amount of the co-payments.

When parties have negotiated a subject to completion and have entered into an agreement with respect to that subject, a respondent has satisfied its duty to negotiate under the Act.<sup>10</sup> In *New York City Transit Authority*,<sup>11</sup> we reiterated the applicable standard for determining a duty satisfaction defense:

A satisfaction of the duty to negotiate necessitates record evidence of facts establishing that the parties negotiated an agreement upon terms which are reasonably clear on the subject presented to us for decision.<sup>12</sup>

Absent Council 82's allegation in the charge that the joint employer intentionally withheld requested information about the economic impact of its health care proposals,

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<sup>10</sup> *County of Nassau (Police Department)*, 31 PERB ¶3064 (1998); *State of New York (Workers' Compensation Board)*, 32 PERB ¶3076 (1999); *County of Columbia*, 41 PERB ¶3023 (2008); *Niagara Frontier Transit Metro Systems, Inc.*, 42 PERB ¶3023 (2009).

<sup>11</sup> 41 PERB ¶3014 (2008); *see also*, *City of Albany*, 41 PERB ¶3019 (2008).

<sup>12</sup> *Supra*, note 11, 41 PERB ¶3014 at 3076 (quoting from *Town of Shawangunk*, 32 PERB ¶3042, at 3095 [1999]).

we would have affirmed the Assistant Director's conclusion that §9.2.2 of the parties' successor agreement demonstrates that the joint employer satisfied its duty to negotiate the subject matter of the unilateral change in co-payments for doctor office visits. However, an intentional misrepresentation of material facts by a party during negotiations constitutes a separate violation under §209-a.1(d) of the Act.<sup>13</sup> Pursuant to §205.5(d) of the Act, if it is found that the joint employer deliberately misled Council 82 in response to its specific inquiry about the consequences of the health care proposals, the Board has the authority to order the joint employer to reopen the negotiations at Council 82's request. Under these circumstances, we are unable to render a final decision on Council 82's exceptions challenging the Assistant Director's determination with respect to the duty satisfaction defense.

Based on the foregoing, we grant Council 82's exceptions, in part, and remand the case to the Assistant Director to determine the merits of Council 82's claim that the joint employer engaged in bad faith bargaining by intentionally failing to disclose information about the increase in the amount of the co-payment for a doctor's office visit that would result from it agreeing to the joint employer's health care proposals.<sup>14</sup>

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<sup>13</sup> *County of Rockland*, 29 PERB ¶¶3009 (1996), *reversed on other grounds*, *CSEA v New York State Pub Empl Rel Bd*, 29 PERB ¶¶7012 (Sup Ct Albany County 1996) *nor*. See also, *State of New York (Governor's Office of Employee Relations)*, 25 PERB ¶¶3078 (1992), *confirmed sub nom. Council 82 v Kinsella*, 197 AD2d 341, 27 PERB ¶¶7006 (3d Dept 1994).

<sup>14</sup> Following the Assistant Director's decision on remand, Council 82 may renew its exceptions with the Board, if necessary, with respect to the Assistant Director's decision sustaining the joint employer's duty satisfaction defense.

IT IS, THEREFORE, ORDERED that the decision of the ALJ is reversed and the case is remanded to the ALJ for further processing of the charge consistent with this decision.<sup>15</sup>

DATED: October 30, 2009  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
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Sheila S. Cole, Member

<sup>15</sup> Board Member Hite took no part.