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Board (PERB)

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4-23-2012

## State of New York Public Employment Relations Board Decisions from April 23, 2012

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from April 23, 2012

### 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

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

CASE NO. C-6092

**BAYPORT-BLUE POINT UNION FREE SCHOOL  
DISTRICT,**

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, 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 United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

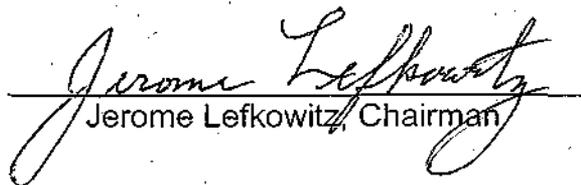
public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All food service workers including all Cooks, Assistant Cooks and Food Service Workers.

Excluded: All other employees.

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

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

CASE NO. C-6099

**EASTPORT/SOUTH MANOR CENTRAL SCHOOL  
DISTRICT,**

Employer,

-and-

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

Intervenor/Incumbent.

---

**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

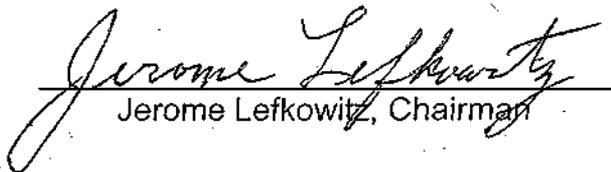
public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All employees in the title of School Nurse.

Excluded: All other employees.

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

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

CASE NO. C-6100

**INCORPORATED VILLAGE OF LYNBROOK,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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

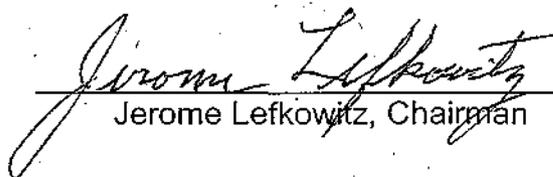
Included: All employees, including full-time and part-time employees, in the

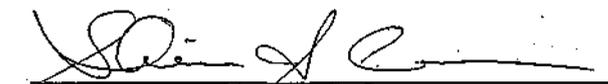
following titles: Account Clerk, Senior Account Clerk, Deputy Assessor, Building Inspector, Code Enforcement Inspector, Clerk, Clerk/Typist, Stenographer, Messenger, Secretary, Secretary to the Board of Zoning and Recreation Attendant.

Excluded: All other employees, including employees performing seasonal work.

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

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
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,**

Petitioner,

-and-

CASE NO. C-6101

**NANUET UNION FREE SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

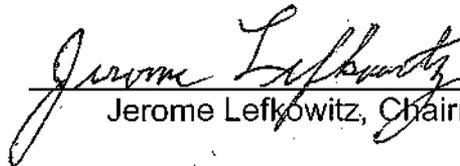
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All employees in the following titles: Senior Food Service Helper, Food Service Helper, School Cook, Food Service Cashier and Substitute Food Service Helper.

Excluded: All other employees.

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

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

TEAMSTERS LOCAL 445,

Petitioner,

-and-

CASE NO. C-6104

VILLAGE OF HARRIMAN,

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

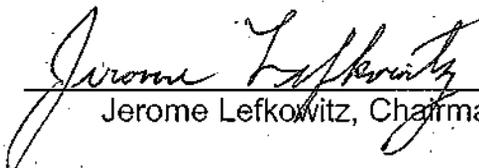
IT IS HEREBY CERTIFIED that the Teamsters Local 445 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

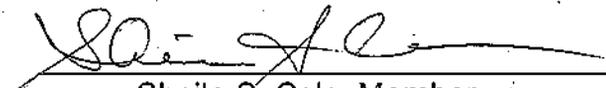
Included: All full-time employees in the titles water treatment plant operator, motor equipment operator and laborer.

Excluded: All other employees and all elected officials.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 445. 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: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

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

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In the Matter of

**PINNACLE CHARTER SCHOOL INSTRUCTIONAL  
STAFF ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6113**

**PINNACLE CHARTER SCHOOL,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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

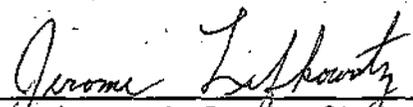
**Included:** Teachers, Counselors, Assistant Teachers, Reading Specialists, Library Media Specialists, Speech Pathologists and Nurses.

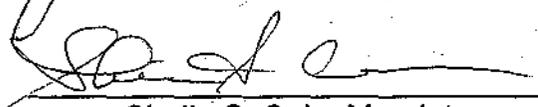
**Excluded:** All other employees including Chief Administrative Officer, Director of Operations, Director of Student Services, Dean of Students, Assistant Dean of Students, Technology Specialist, Director of Facilities, Family Services Coordinator, After School Program

Coordinator, Athletic Director, Teacher Aides, Administrative Assistants, Board Clerk, Lunch Monitors, and Per diem Substitute Teachers

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Pinnacle Charter School Instructional Staff 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: April 23, 2012  
Albany, New York

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

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL 118,**

Petitioner,

-and-

**CASE NO. C-6098**

**TOWN OF BRUTUS,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

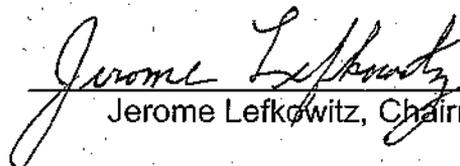
IT IS HEREBY CERTIFIED that the Teamsters Local 118 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement 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 118. 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: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

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

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In the Matter of

**UNITED FEDERATION OF TEACHERS, NYSUT,  
AFT,**

Petitioner,

-and-

**CASE NO. C-6103**

**NEW YORK FRENCH AMERICAN CHARTER SCHOOL,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Federation of Teachers, NYSUT, AFT 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.<sup>1</sup>

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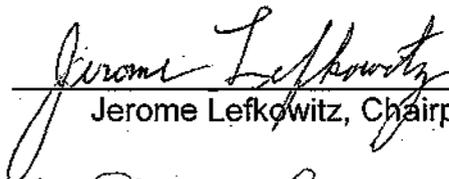
<sup>1</sup> The Director of Public Employment Practices and Representation (Director) made a determination on March 12, 2012, pursuant to §201.9(g)(1) of PERB's Rules of Procedure (Rules), that the petitioner satisfied the requirements for certification without an election over the unsubstantiated allegations of respondent. The Board has not received any written objections to the Director's determination pursuant to §201.9(g)(1) of the Rules.

Included: Teachers, Assistant Teachers, ESL Teachers, Special Education Teachers and Social Workers.

Excluded: Principals, Assistant Principals, Finance Managers, Operations Managers, Directors of Curriculum, Curriculum Specialists, Data Analysts, Secretaries, Office Assistants, and all other clerical staff, Enrollment Specialist, Assistants to the Principal, Interns, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Teachers, NYSUT, AFT. 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: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-6030**

**SISULU-WALKER CHARTER SCHOOL OF HARLEM,**

Employer.

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**MEYER, SOUZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK & HANAN B. KOLKO of counsel), for Petitioner**

**DLA PIPER LLP (PHILLIP H. WANG of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Sisulu-Walker Charter School of Harlem (Sisulu-Walker) to a decision of an Administrative Law Judge (ALJ) on a representation petition filed by the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) seeking to represent a unit composed of Teachers, Teacher Assistants, Social Workers, Guidance Counselors and other employees at Sisulu-Walker.

Following two days of hearing, the ALJ issued a decision rejecting Sisulu-Walker's argument that certain employees should be excluded from the proposed unit because they are managerial and/or confidential employees within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act) due to their involvement

in the School Leadership Team (SLT).<sup>1</sup> The ALJ concluded that the proposed bargaining unit sought in UFT's petition is the most appropriate unit: Teacher, Co-Teacher, Resident Teacher, Guidance Counselor, Teacher Assistant, Social Worker, Title 1 Teacher, ELL Intervention Specialist, Special Education Teacher, Chorus Coordinator/Director and Recreational Coordinator. All other titles at the school are excluded.

#### EXCEPTIONS

In its exceptions, Sisulu-Walker asserts that the ALJ erred by denying its request to adjourn the second day of hearing due to the unavailability of Sisulu-Walker's Principal, Dr. Dawn Cejas (Dr. Cejas). Alternatively, it contends that the ALJ erred in refusing to strike the testimony of two witnesses called by UFT concerning their SLT duties or in failing to give less weight to their testimony. Finally, Sisulu-Walker maintains that the ALJ erred in concluding that SLT members are not managerial and/or confidential employees under the Act. UFT supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision, as modified

#### PROCEDURAL HISTORY

On November 22, 2010, UFT filed its petition seeking to be certified as the representative of a bargaining unit of approximately 28 employees at Sisulu-Walker in the above-identified titles. In its response, Sisulu-Walker asserted that certain

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<sup>1</sup> 44 PERB ¶14018 (2011).

employees involved in SLT activities should be excluded on the grounds that they are managerial and/or confidential employees under the Act.

During the course of the investigation into the question of representation, Sisulu-Walker submitted an offer of proof and exhibits in support of its managerial/confidential argument. In response to the offer, UFT argued that Sisulu-Walker's managerial/confidential claim should be rejected in light of our decision in *Brooklyn Excelsior Charter School and Buffalo United Charter School (Brooklyn Excelsior and Buffalo United)*.<sup>2</sup> In the alternative, UFT posited that Sisulu-Walker failed to demonstrate in its offer that the at-issue employees should be designated managerial and/or confidential under the Act.

Following the submission and review of the offer of proof and the response, a hearing was held on June 15, 2011. At the hearing, Dr. Cejas testified concerning SLT's purpose, function, and activities. She also testified about the powers and responsibilities of Sisulu-Walker's Board of Trustees (Board of Trustees), Victory Schools, Inc. (Victory) and Sisulu-Walker's administration team in managing and operating the school.

At the conclusion of Dr. Cejas's testimony, there was a colloquy on and off the record between the ALJ and the parties with respect to scheduling a second day of hearing.<sup>3</sup> In response to the ALJ's proposal to resume the hearing on June 23 or 24,

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<sup>2</sup> 44 PERB ¶3001 (2011) (appeal pending). UFT renewed this argument during its opening statement at the hearing and in its post-hearing brief to the ALJ. Transcript, pp. 8-9; Post-Hearing Brief of UFT, pp. 2-3.

<sup>3</sup> Transcript, pp. 209-212.

2011, Dr. Cejas stated that she was unavailable because of scheduled meetings outside of school, and her need to complete annual teacher reviews by June 28, 2011, which she indicated was the last day of school.<sup>4</sup> At the conclusion of the colloquy, the ALJ scheduled the hearing to resume on June 28, 2011 without objection from either party.<sup>5</sup>

On June 23, 2011, Sisulu-Walker faxed a letter to the ALJ requesting an adjournment of the second day of hearing on the ground that Dr. Cejas was unavailable.<sup>6</sup> The letter stated that an adjournment was necessary because June 28, 2011 is the last day of school, during which Dr. Cejas must attend to various last-minute duties including inventory, retrieving keys and budgetary issues. According to the letter, Dr. Cejas did not have possession of her complete schedule when the second day of hearing was set, and Sisulu-Walker needed her present at the hearing. The ALJ denied the requested adjournment, after hearing oral argument during a conference call.

At the June 28, 2011 hearing, Sisulu-Walker objected to proceeding without the presence of Dr. Cejas, stating that she was unable to attend because it was "the last day of school and she could not leave the children unattended."<sup>7</sup> Amy Koven (Koven) and Linda Osorio (Osorio) testified that day on behalf of UFT concerning their SLT

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<sup>4</sup> Transcript, pp. 209-210.

<sup>5</sup> Transcript, p. 212.

<sup>6</sup> ALJ Exhibit 13. The adjournment request was made one day after Sisulu-Walker's counsel received word from Dr. Cejas that she was unavailable, and UFT refused to consent to the adjournment. Transcript, p. 221.

<sup>7</sup> Transcript, pp. 219, 326.

activities. Both were cross-examined by Sisulu-Walker's counsel. At the conclusion of their testimony, Sisulu-Walker did not move to strike their testimony, claim that it had been prejudiced by the absence of Dr. Cejas or request a continuance to call a rebuttal witness.<sup>8</sup>

In its post-hearing brief, however, Sisulu-Walker asserted it had been prejudiced because the absence of Dr. Cejas deprived it of the ability to "verify Koven and Osorio's unsubstantiated statements at the June 28, 2011 hearing."<sup>9</sup> Sisulu-Walker asked the ALJ to strike the testimony of Koven and Osorio or, in the alternative, to give their testimony less weight than that of Dr. Cejas.

In her decision, the ALJ rejected Sisulu-Walker's post-hearing claim of prejudice on various grounds including: Sisulu-Walker had sufficient time to prepare for the hearing and the cross-examination of Koven and Osorio; it failed to explain why Assistant Principal Katrina Kelly (Kelly) or Business Manager Karlene Cowan (Cowan) was not an acceptable replacement as a resource at the hearing; and it did not seek a continuance of the hearing or request that the hearing be reopened following a review of the transcript with Dr. Cejas.

#### FACTS

The facts concerning the managerial/confidential issues raised by Sisulu-Walker under §201.7 of the Act are fully set forth in the ALJ's decision. They are repeated here only as necessary to determine its exceptions.

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<sup>8</sup> Transcript, p. 326.

<sup>9</sup> Respondent's Post-Hearing Brief, p. 1, n. 2.

Sisulu-Walker is a charter school created under the New York State Charter Schools Act of 1998 (Charter Schools Act).<sup>10</sup> The school began operations in September 1999, and it is currently operated pursuant to a renewal charter issued by the New York State Board of Regents. The renewal charter includes a staffing plan with an organizational chart, a description of the school's organization and governing structure, and the management agreement between Sisulu-Walker and Victory, a New York corporation.<sup>11</sup>

The Board of Trustees has ultimate governing authority over all budgetary matters, operational decisions and school policies, including staffing, academic assessment and curriculum. It has final decisional authority over issues such as hiring and discharge of staff, teacher assessment standards, and employee compensation and benefits.

The Board of Trustees has an Academic Committee, which closely supervises the school's administration, instructional methods, curriculum, academic performance and teacher support. The Academic Committee reviews all hiring and discharge recommendations of Dr. Cejas and it determines such issues as the allotted times for teacher preparation and for the direct supervision of instructional staff by Dr. Cejas and Assistant Principal Kelly.

Victory prepares the school's proposed annual budget and reports to the Board of Trustees concerning the school's academic, financial and operational performance. It

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<sup>10</sup> Educ Law §2850, *et seq.*

<sup>11</sup> Joint Exhibit 1, Response G-1, Response H-1, Exhibit 12-1, Exhibit 16-1.

makes recommendations to the Board of Trustees regarding staffing, compensation and employee benefit levels, and it maintains the school's personnel policies and administrative procedures. Victory drafted the employee manual for Sisulu-Walker, which sets forth the terms and conditions of employment for school staff. The manual states that only the Board of Trustees or Victory's Chief Operating Officer can alter or modify its terms.

Victory designs the school's educational, instructional and professional development programs, and it selects and acquires the school's instructional and curriculum materials, equipment and supplies. It recruits and recommends to the Board of Trustees, candidates for the positions of principal and business manager. Victory supervises Dr. Cejas and Business Manager Cowan and it can recommend their termination to the Board of Trustees. Victory also recruits and helps in the selection of teachers, non-teaching administrators and other staff. It attends job fairs, prepares job postings, collects resumes electronically, and conducts initial interviews of applicants by telephone. Following the telephonic interviews, applications are sent to Cowan or Kelly, who are responsible for checking credentials.

The school's in-house administration team is composed of Dr. Cejas, Kelly, Cowan, and Custodial Building Supervisor Simmons.<sup>12</sup> As Principal, Dr. Cejas is the educational leader responsible for supervising and evaluating Cowan, Kelly, the teachers and other staff. Dr. Cejas, Cowan and Kelly oversee the school's instruction

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<sup>12</sup> Transcript, pp. 178-179. The Custodial Building Supervisor was added to the administration team just prior to the hearing. Transcript, p. 178.

and operations. They report to and coordinate their activities with Victory. Dr. Cejas is supervised and evaluated by the Board of Trustees with input from Victory.

Following Dr. Cejas's appointment by the Board of Trustees in August 2009, SLT was created to permit each constituency group to have a voice in decision-making at the school. In particular, SLT is aimed at stemming the school's high level of teacher attrition. SLT's design and purpose was developed based upon Dr. Cejas's experiences with the collaborative SLT model when she was employed in the New York City public school system. Under that model, UFT-represented employees participated in SLT.

Dr. Cejas, Cowan, Kelly and Simmons are SLT members. SLT participation by teachers and other staff is voluntary. They do not receive additional compensation or a reduced workload for participating. To become an SLT member, an instructional employee must be interviewed and appointed by Dr. Cejas. In 2011, there were 13 regular SLT members.

The record demonstrates that SLT instructional staff members do not select curricula and textbooks, determine employee wages and benefits, impose discipline, evaluate and counsel other staff, develop the school budget, or investigate and determine employee grievances. SLT's activities have included: discussing ways to improve the staff's low morale; creating a social committee to organize staff birthday parties and baby showers; creating a school recycling initiative and improving student recess; drafting guidelines and ratings for student awards; fundraising; approving the purchase of a digital camera; drafting cafeteria rules and regulations for students;

developing and approving a protocol for coverage when staff members are absent; and discussing issues related to a mentoring program. In addition, SLT recommended that the position of Teaching Assistant be renamed Co-Teacher, had input concerning the creation of the Resident Teacher position and suggested that the Resident Teacher position receive a higher rate of pay. The latter suggestion, however, was rejected by Dr. Cejas and Cowan.

With respect to hiring, SLT conducts interviews of potential candidates, observes demonstration lessons, and makes recommendations to Dr. Cejas. Dr. Cejas makes all hiring decisions, which are subject to approval by the Board of Trustees. Finally, in preparation for a March 2010 inspection of the school by representatives of the New York State Education Department (SED), SLT members commented on proposed teacher job descriptions, and helped modify and distribute an SED-prepared classroom checklist related to the scheduled inspection.

#### DISCUSSION

We begin with the exceptions asserting that the ALJ abused her discretion by denying Sisulu-Walker's request for an adjournment of the June 28, 2011 hearing date.

It is a well-settled principle under the Act that representation petitions are to be expeditiously processed to avoid uncertainty concerning the representation rights of the at-issue employees.<sup>13</sup> This public policy is reflected in §205.5(d) of the Act, which

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<sup>13</sup> *State of New York (Office of Employee Relations)*, 8 PERB ¶13073 (1975)(subsequent history omitted).

states that the pendency of an improper practice charge shall not delay or interfere with a determination concerning representation status.

In the present case, the record demonstrates that the scheduling of the hearing and the ALJ's denial of Sisulu-Walker's adjournment request were aimed at fulfilling the Act's public policy imperative that an investigation into a question of representation, particularly in cases involving unrepresented employees, be given priority and completed in an expeditious fashion.<sup>14</sup> The prompt treatment of representation matters is necessary to ensure ascertainment of employee choice consistent with §207.2 of the Act and §201.9 of the Rules of Procedure (Rules). Therefore, parties must be prepared to begin and complete a scheduled investigatory hearing without unnecessary delays or dilatory tactics.

In addition, the ALJ did not abuse her discretion in denying Sisulu-Walker's adjournment request because it failed to state a good and sufficient factual basis for the requested adjournment, as required by §212.4(b) of the Rules. Section 212.4(b) of the Rules states:

The hearing will not be adjourned unless good and sufficient grounds are established by the requesting party, who shall file with the administrative law judge an original and three copies of the application, on notice to all other parties, setting forth the factual circumstances of the application and the previously ascertained position of the other parties to the

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<sup>14</sup> The need for expeditious processing of a particular representation petition will be dependent upon the question of representation raised. The processing of a petition seeking certification to represent a unit of unrepresented employees, and petitions seeking decertification, as well as related improper practice charges, must be given the highest priority. In contrast, a petition for unit placement /unit clarification or an application for the designation of a position in an existing unit pursuant to §201.7(a) of the Act do not generally warrant an equivalent level of expedited treatment.

application. The failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute ground for dismissal of the absent party's pleading.

Under the facts and circumstances of the present case, the reasons given by Sisulu-Walker for an adjournment are not sufficient to support an adjournment of the second day of hearing. On June 15, 2011, Sisulu-Walker did not object to the continuation of hearing on June 28, 2011, although it was fully aware that the date was the last day of school. One week later, Sisulu-Walker requested the adjournment based upon Dr. Cejas's ministerial duties at the end of the school year. In its letter, Sisulu-Walker did not explain the timing of the request or provide a reason why the cited duties could not have been reassigned to Kelly and/or Cowan.

Finally, the record does not support Sisulu-Walker's claim that it was prejudiced by the ALJ's denial of the adjournment. In its exceptions, Sisulu-Walker does not identify any specific prejudice it suffered as a result of Dr. Cejas's absence, and we have found nothing in the record to suggest that her absence impaired Sisulu-Walker's ability to cross-examine the UFT witnesses or present rebuttal evidence.

During the June 28, 2011 hearing, Sisulu-Walker did not claim that it was incapable of proceeding without Dr. Cejas or that she was not available by telephone or e-mail for consultation.<sup>15</sup> Nor did Sisulu-Walker articulate any reason why Kelly or Cowan did not replace Dr. Cejas as a resource person. Following the direct testimony

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<sup>15</sup> Sisulu-Walker's reliance on *West Genesee Cent Sch Dist*, 24 PERB ¶3038 (1991) is misplaced. In that case, the ALJ incorrectly precluded a party from calling a witness based upon an erroneous ruling that the witness was disqualified from testifying.

of Koven and Osario, Sisulu-Walker did not request an opportunity to contact Dr. Cejas or request additional time to prepare for cross-examination. At the conclusion of the hearing, it did not request a continuance for the purpose of calling Dr. Cejas, Cowan or Kelly as a rebuttal witness nor did Sisulu-Walker make a motion to reopen the hearing following its review of the transcript. Therefore, we find no support in the record for Sisulu-Walker's request that the testimony by Koven and Osorio be stricken or that their testimony be given less weight than the testimony of Dr. Cejas.

Next, we turn to Sisulu-Walker's exceptions to the ALJ's rejection of its argument that certain employees should be excluded from the proposed unit because they are managerial and/or confidential employees under §201.7(a) of the Act.

In *Brooklyn Excelsior and Buffalo United*,<sup>16</sup> we held that the Charter Schools Act does not grant us the authority to exclude charter school employees from coverage under the Act based upon the managerial/confidential standards set forth in §201.7(a) of the Act. This legal conclusion is premised upon the unambiguous wording of Education Law §2854.3(a), which mandates that charter school employees "shall be deemed" public employees under the Act, with the exception of the chief executive officer designated by the Board of Trustees. Unlike other statutes that created public benefit corporations,<sup>17</sup> the Charter Schools Act does not include a provision authorizing us to designate a charter school employee as managerial or confidential. Nevertheless, we retain the authority under the community of interest standards set forth in §207.1 of the

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<sup>16</sup> *Supra*, note 2.

<sup>17</sup> Pub Auth Law §§1147-h.2, 1949-g.2, 2350-x.3, 2642-j.2, 3304.2(c), 3558.3(c) and 3629.4.

Act to exclude individuals from a unit of rank and file charter school employees based upon inherent or actual conflicts of interest.<sup>18</sup>

As a result, the issue before us is not whether the at-issue Sisulu-Walker employees in SLT are managerial or confidential under the standards set forth in §201.7(a) of the Act. Rather, the issue is whether a conflict of interest exists requiring their exclusion from the petitioned-for unit based upon their SLT activities.

Following our review of the record, we conclude that participation in SLT activities by the at-issue employees does not create a conflict of interest warranting exclusion from the bargaining unit sought by UFT. While SLT members make suggestions and recommendations, they do not have the authority to formulate or modify school policies, objectives or curricula. Nor do they have the authority to determine the methods, means and personnel to effectuate school policies or have a primary role in personnel administration including hiring, discharge and evaluations. Those responsibilities rest squarely with the Board of Trustees, Victory and the school's administration team.

Based upon the foregoing, we deny Sisulu-Walker's exceptions, and conclude that the following unit is the most appropriate:

Included: Teacher, Co-Teacher, Resident Teacher, Guidance Counselor, Teacher Assistant, Social Worker, Title 1 Teacher, ELL Intervention Specialist, Special Education Teacher, Chorus Coordinator/Director and Recreational Coordinator.

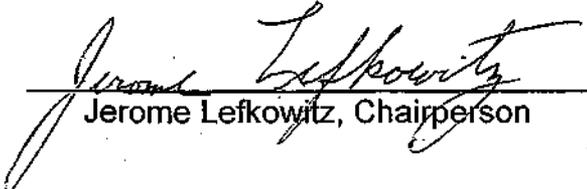
Excluded: All other employees.

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<sup>18</sup> *Supra*, note 2, 44 PERB ¶3001, n. 2.

IT IS, THEREFORE, ORDERED that the petition is hereby remanded to the Director of Public Employment Practices and Representation for further processing consistent with our decision and the Rules.

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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

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In the Matter of

**LAY FACULTY ASSOCIATION,**

Charging Party,

-and-

**CASE NO. UP-30392**

**ARCHDIOCESE OF NEW YORK AND  
OUR LADY OF LOURDES HIGH SCHOOL,**

Respondents.

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**ARCHER, BYINGTON, GLENNON & LEVINE LLP (JAMES W. VERSOCKI of  
counsel), for Charging Party**

**SHEPARD, MULLIN, RICHTER & HAMPTON LLP (JAMES R. HAYES of  
counsel), for Respondents**

**BOARD DECISION AND ORDER**

This case comes to the Board following an Intermediate Report of an Administrative Law Judge (ALJ)<sup>1</sup> dismissing a complaint issued concerning an unfair labor practice charge filed by the Lay Faculty Association alleging that the Archdiocese of New York and Our Lady of Lourdes High School engaged in an unfair labor practice in violation of §§704(6) and 10 of the New York State Employment Relations Act (SERA).

Lay Faculty Association has not filed exceptions to the Intermediate Report, and therefore, is deemed to agree with the recommended findings of fact, conclusions of law and order contained therein. Pursuant to 12 NYCRR §253.49, we have chosen not to

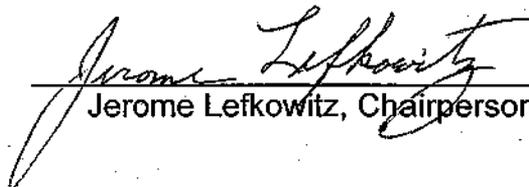
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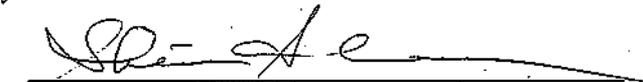
<sup>1</sup> 45 PERB ¶4401 (2012).

redetermine in whole or in part the ALJ's recommended findings of fact, conclusions and order including that the pending representation petition filed by Local 74, United Service Workers Union, IUSAT should be processed.<sup>2</sup>

IT IS, THEREFORE, ORDERED that the complaint is dismissed, and that the processing of the pending representation petition filed by Local 74, United Service Workers Union, IUSAT shall proceed forthwith consistent with our decision.

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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<sup>2</sup> In contrast to the mandate of §205.5(d) of the Public Employees' Fair Employment Act (Act), which denies us the authority to delay the processing of a representation petition when there is a pending related improper practice charge, we have the discretion to hold the processing of a representation petition in abeyance under SERA based upon the filing of a related unfair labor practice charge when the alleged conduct in the charge, if proven, would interfere with employee free choice in an election, were one to be conducted.

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Charging Party,

-and-

**CASE NO. U-28218**

**COUNTY OF COLUMBIA,**

Respondent.

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**RICHARD M. GREENSPAN, P.C. (ERIC J. LARUFFA of counsel), for  
Charging Party**

**ROEMER WALLENS GOLD & MINEAUX LLP (DIONNE A. WHEATLEY  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the County of Columbia (County) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the United Public Service Employees Union (UPSEU), finding that the County violated of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred exclusively performed UPSEU unit work of direct supervision of employees performing overtime snow and ice removal at County facilities, and when it unilaterally terminated an employee's use of an assigned County vehicle for commuting to and from work.<sup>1</sup>

In its exceptions, the County asserts that the ALJ's decision finding it violated §209-a.1(d) of the Act should be reversed because the evidence demonstrates that

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<sup>1</sup> 44 PERB ¶4521 (2011).

UPSEU unit members do not exclusively perform the at-issue work, and they do not have a reasonable expectation that those duties would continue to be performed by unit members.<sup>2</sup> In addition, the County seeks reversal of the ALJ's conclusion that it violated §209-a.1(d) of the Act by unilaterally discontinuing the use of a vehicle by a unit employee to commute to and from work. UPSEU supports the ALJ's decision.

Based upon our review of the record, and the positions of the parties, we affirm, in part, and reverse, in part, the ALJ's decision.

### FACTS

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

UPSEU is the exclusive representative of a county-wide unit that includes the title of Working Maintenance Foreperson in the Facilities Department. The title was first placed in the unit in June 2005. Joel Race (Race) has been Working Maintenance Foreperson since January 2004.

County Director of Facilities Robert Pinto, Jr. (Pinto) has overall supervisory responsibility concerning the maintenance of County facilities. Between January 2004 and January 2008, Pinto contacted Race when weather conditions required Facilities Department employees to perform overtime snow and ice removal at County facilities. Pinto determined the number of employees needed and the materials to be utilized, after he assessed the conditions surrounding each County building and parking lot. If

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<sup>2</sup> In its brief, the County also asserts that the ALJ's decision should be reversed because UPSEU's charge did not make a specific allegation concerning the at-issue work. Brief Submitted on Behalf of the Respondent in Support of its Exceptions, pp. 2-3. We reject the County's argument because the at-issue work falls well within the snow and ice removal work referenced in paragraph 4 of the details of charge.

one employee was needed, Race would perform the overtime work. If additional department employees were needed, Race would utilize the department's rotating overtime roster to call in others to perform the work. Race would then directly supervise and work with the other Facilities Department employees in performing the overtime snow and ice duties, including plowing, sanding and shoveling. At times, Pinto would also plow and sand County parking lots.

On January 28, 2008, Paul Martin (Martin) was appointed to a new nonunit County position, Assistant Director of Facilities. Following his appointment, Martin took over Race's duties supervising and working with other department employees performing overtime snow and ice removal. Race was placed on the rotating overtime roster, and he is now called in for snow and ice overtime only when his name is reached.

Prior to Martin's appointment, Race was assigned a white County pickup truck for use in snow and ice removal and for commuting to and from home. On January 24, 2008, County Commissioner of Public Works David Robinson (Robinson) met with Race to discuss Martin's appointment and the reassignment of the supervision of snow and ice work. Although it is undisputed that Race handed Robinson the keys to the pickup truck during the meeting, the underlying facts concerning that action are in dispute. Race testified that Robinson directed him to do so because the truck was being reassigned to Martin. In contrast, Robinson testified that Race voluntarily turned in the keys, and that he offered Race the use of an alternative County vehicle to commute with. While Race acknowledged that Robinson mentioned the use of a replacement vehicle, the vehicle was to be used by Race to perform his work duties.

The County and UPSEU met on February 20, 2008, after UPSEU sent a letter

objecting to the reassignment of the duties and the truck to Martin. According to Race, Robinson stated at the meeting that the County would be assigning another truck for Race's use during the workday. Robinson testified that during the meeting he renewed his offer to permit Race to use an alternative County vehicle for commuting, which was rejected. One month following the meeting, UPSEU filed the charge.

### DISCUSSION

There are two essential initial questions that we must address when deciding whether the transfer of unit work violates §209-a.1(d) of the Act: a) was the at-issue work exclusively performed by unit employees for a sufficient period of time to have become binding; and b) was the work assigned to nonunit personnel substantially similar to that exclusive unit work.<sup>3</sup> In determining the issue of exclusivity, we apply the following past practice test: 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>4</sup> In *City of New Rochelle*,<sup>5</sup> we acknowledged that we have never identified a specific period that is required to establish exclusivity "because the sufficiency of the

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<sup>3</sup> *Niagara Frontier Trans Auth*, 18 PERB ¶3083 (1985).

<sup>4</sup> *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 at 3024 (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); *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012, at 3046-47(2007)(quoting from *County of Nassau*, 24 PERB ¶3029 [1991])(subsequent history omitted).

<sup>5</sup> 44 PERB ¶3002 (2011).

duration depends upon the circumstances of each particular fact pattern.”<sup>6</sup>

In the present case, we conclude that Race’s direct supervision of Facilities Department employees while performing overtime snow and ice removal at County facilities between June 2005 and January 2008 is sufficient to demonstrate a binding past practice to establish exclusivity under the Act. The nature of the at-issue overtime work, and the frequency that it was performed, created a reasonable expectation that the practice of the at-issue work being performed by the Working Maintenance Foreperson would continue. Contrary to the County’s argument, we are unwilling to infer from Pinto’s general supervisory responsibilities over the maintenance of County facilities, and his incidental performance of snow and ice removal, that UPSEU lacks exclusivity over the at-issue work.

Therefore, we affirm the ALJ’s conclusion the County violated §209-a.1(d) of the Act by transferring the work of directly supervising overtime snow and ice removal at County facilities to a nonunit employee.

We reach a different conclusion with respect to the ALJ’s finding that the County violated §209-a.1(d) of the Act concerning Race’s use of a County vehicle to commute to and from work. UPSEU and the County presented sufficient evidence to demonstrate two equally credible but contradictory narratives concerning the essential events. According to UPSEU’s evidence, the County unilaterally changed the past practice when Robinson ordered Race to hand in the keys so that the truck would be reassigned to Martin, and Race was offered a substitute County vehicle for use only while performing his work duties. The County’s evidence presents a counter-narrative in which Race abandoned the economic benefit of the enforceable past practice by

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<sup>6</sup> *Supra*, note 5, 44 PERB ¶3002 at 3027.

voluntarily turning in the keys to the truck and refusing Robinson's offer for Race to use another County vehicle for commuting. Upon our review of the record, we cannot determine which party's narrative is more credible.

While the use of an employer's vehicle for commuting constitutes an economic benefit, and a unilateral change of an enforceable past practice concerning that benefit constitutes a violation of §209-a.1(d) of the Act,<sup>7</sup> we conclude that UPSEU has not met its burden of demonstrating by a preponderance of the evidence that the County unilaterally terminated the practice of the Working Maintenance Foreperson utilizing a County vehicle for commuting. Therefore, that portion of the charge must be dismissed. In reaching our conclusion, we note that UPSEU did not introduce into evidence a copy of its letter leading to the February 20, 2008 meeting, nor did it call the UPSEU representative who was present at the meeting, to contradict Robinson's testimony.

Based upon the foregoing, we affirm the ALJ's decision that the County violated §209-a.1(d) of the Act by unilaterally transferring the at-issue work to a nonunit employee, and we reverse to the extent that the ALJ found the County violated §209-a.1(d) of the Act by unilaterally terminating the past practice of the Working Maintenance Foreperson using the County truck for commuting. Accordingly, we have modified the remedial order.

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<sup>7</sup> *County of Onondaga*, 12 PERB ¶3035 (1979), *confd County of Onondaga v New York State Pub Empl Rel Bd*, 77 AD2d 783, 13 PERB ¶7011 (4<sup>th</sup> Dept 1980); *County of Nassau*, 13 PERB ¶3095 (1980), *confd County of Nassau v New York State Pub Empl Rel Bd*, 14 PERB ¶7017 (Sup Ct Nassau County 1981) *affd*, 87 AD2d 1006, 15 PERB ¶7012 (2d Dept 1982), *app denied* 57 NY2d 601, 15 PERB ¶7015 (1982); *Town of Islip*, 44 PERB ¶3014 (2011)(appeal pending).

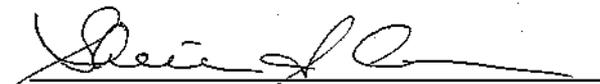
IT IS, THEREFORE, ORDERED that the County:

1. Cease and desist from unilaterally transferring the exclusive bargaining unit work of direct supervision over overtime time;
2. Forthwith restore such work to the County's bargaining unit;
3. Sign, post and distribute the attached notice in all locations normally used to communicate both in writing and electronically with unit employees.

IT IS FURTHER ORDERED that the charge is dismissed to the extent that it alleges that the County violated §209-a.1(d) of the Act by ending the past practice concerning the use of the County truck by the Working Maintenance Foreperson for commuting.

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Columbia (County) in the unit represented by the United Public Service Employees Union (UPSEU) that the County will forthwith:

1. Return to the unit of County employees represented by UPSEU the work of directly supervising overtime snow and ice removal at County facilities; and
2. Make Joel Race whole for any monetary losses resulting from the County's unilateral transfer of exclusive bargaining unit work, together with interest at the maximum legal rate.

Dated .....

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

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

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Charging Party,

-and-

**CASE NO. U-28527**

**COUNTY OF COLUMBIA,**

Respondent.

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**RICHARD M. GREENSPAN, P.C. (ERIC J. LARUFFA, of counsel), for  
Charging Party**

**ROEMER WALLENS GOLD & MINEAUX LLP (DIONNE A. WHEATLEY  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the County of Columbia (County) to a decision of an Administrative Law Judge (ALJ) on an amended improper practice charge filed by the United Public Service Employees Union (UPSEU), finding that the County violated of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally reassigned the exclusively performed UPSEU unit work of framing, taping and installing sheet rock in the non-secure administrative area of the County's Public Safety Building to inmates.<sup>1</sup>

In its exceptions, the County claims that the ALJ erred in defining the unit work, in crediting the testimony of UPSEU witnesses, and in concluding that UPSEU unit employees performed the work exclusively. UPSEU supports the ALJ's decision.

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<sup>1</sup> 44 PERB ¶4542 (2011).

Based upon our review of the record, we affirm the ALJ's decision.

### FACTS

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

UPSEU represents a county-wide unit that includes employees working in the Facilities Department who hold the titles of Working Maintenance Foreperson, Senior Building Maintenance Worker, Building Maintenance Worker, Maintenance Worker and Laborer. UPSEU unit employees are responsible for performing routine maintenance such as electrical work, plumbing, carpentry, cleaning, framing, installing sheetrock, taping, plastering and painting at the Public Safety Building.

The Public Safety Building is composed of a secured correctional facility and a separate non-secured administrative area. The correctional facility includes an inmate housing unit, a control room, a correctional administrative office, and a booking area. The non-secured administrative area contains the offices of the Sheriff and Undersheriff, administrative and secretarial offices, a communications center, and a training area. To travel between the administrative area and the correctional facility requires passage through a secured sliding door.

The ALJ credited the testimony of UPSEU witnesses who stated that unit members have exclusively framed, taped and installed sheetrock in the administrative area of Public Safety Building. Such work requires the use of equipment including hammers and saws, which are inaccessible to inmates. Inmate work crews, however, routinely paint both the administrative area and the correction facility, and inmates are routinely assigned to cleaning crews for unspecified areas in the Public Safety Building. Finally, special non-routine electrical and plumbing work in the Public Safety Building and other County buildings, which UPSEU unit employees are unable or unqualified to

perform, is done by private contractors, as needed.

### DISCUSSION

To determine the related issues of the scope of unit work and exclusivity in transfer of unit work cases, we examine whether an enforceable past practice exists by applying the following test: whether the "practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."<sup>2</sup> Among the criteria we will consider in determining whether a past practice has established a discernible boundary are the nature and frequency of the work, the geographic location of the work, the employer's explicit or implicit rationale for the practice, and other facts establishing that the at-issue work has been treated distinct from other work performed by nonunit personnel.<sup>3</sup>

Based upon our review of the record, we affirm the ALJ's definition of the unit work, his credibility determination, and his conclusion that the at-issue work has been exclusively performed by UPSEU unit members. Contrary to the County's argument, the definition of unit work is determined based upon a past practice analysis and not based on the broad wording of UPSEU's pleading.

The enforceable past practice in the present case demonstrates a discernible boundary between framing, taping and installing sheetrock in the non-secure administrative area of the Public Safety Building, and the work performed by private

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<sup>2</sup> *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 at 3024 (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); *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012, at 3046-47(2007) (quoting from *County of Nassau*, 24 PERB ¶3029 at 3058 [1991])(subsequent history omitted).

<sup>3</sup> *Manhasset Union Free Sch Dist*, *supra*, note 2.

contractors and inmates.

Contractors are not utilized by the County for routine maintenance; they are called in only when unit employees are unable or are unqualified to do the work. Similarly, while inmates are assigned to painting and cleaning work details in the Public Safety Building, there is a discernible boundary separating the at-issue work performed in the non-secure administrative area. Unlike the painting and cleaning details, the correctional facility does not have an inmate construction crew and there is no evidence of a past practice of inmates performing the at-issue work. In fact, installing walls with metal studs, sheetrock, taping and plastering would necessitate giving inmates access to tools that could be used by them as weapons in the non-secure administrative area. Finally, we find no basis in the record to deviate from the general rule of granting substantial deference to an ALJ's credibility determination.<sup>4</sup>

Based upon the foregoing, we affirm the ALJ's decision that the County violated §209-a.1(d) of the Act by unilaterally transferring the at-issue work to inmates incarcerated in the correctional facility at the Public Safety Building.

IT IS, THEREFORE, ORDERED that the County:

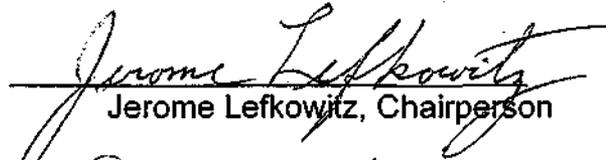
1. Cease and desist from assigning the work of framing, taping and installing sheetrock in the non-secure administrative areas of the Public Safety Building to individuals outside of the UPSEU bargaining unit;
2. Sign, post and distribute the attached notice in all locations normally used to

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<sup>4</sup> *County of Tioga*, 44 PERB ¶3016 (2011).

3. communicate both in writing and electronically with unit employees.

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Columbia, in the unit represented by United Public Service Employees Union, that the County will not assign framing, taping and installing sheetrock in the non-secure administrative area of the Public Safety Building to individuals outside of the UPSEU bargaining unit

Dated .....

By .....

On behalf of the County of Columbia

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**SOLVAY SCHOOL EMPLOYEES UNION,**

Charging Party,

-and-

**CASE NO. U-28225**

**SOLVAY UNION FREE SCHOOL DISTRICT,**

Respondent.

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**SUSAN MARIE DECARLO, for Charging Party**

**FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.  
(CRAIG M. ATLAS of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Solvay School Employees Union (Union) and cross-exceptions by the Solvay Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) dismissing the Union's improper practice charge as untimely pursuant to §204.1(a)(1) of the Rules of Procedure (Rules).<sup>1</sup> In its charge, the Union alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it failed to compensate a unit employee for his unused accrued vacation leave upon his retirement in contravention of an enforceable past practice.

The Union contends in its exceptions that the ALJ erred in dismissing the charge

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<sup>1</sup> 44 PERB ¶4523 (2011).

as untimely. The District supports that portion of the ALJ's decision. It has filed cross-exceptions, however, asserting that the ALJ erred in rejecting its other affirmative defenses: subject matter jurisdiction; duty satisfaction; res judicata and/or collateral estoppel; failure to present a timely notice of claim; and that payment of the accrued time would have been an unconstitutional gift of public funds.

#### FACTS

The relevant facts are fully set forth in the ALJ's decision, and are repeated here only as necessary for determining the exceptions and cross-exceptions.

For at least ten years, the District has had a practice of paying unit members for the value of their unused vacation leave upon retirement. On July 1, 2007, a unit member retired after 19 years of District employment. When the unit member received his last pay check, however, the District did not include a payment for his unused vacation leave. The District did not make the payment due to findings contained in an audit report received from the Office of New York State Comptroller (OSC) dated September 2006, concerning the District's practice of paying for unused vacation time upon separation from service. The OSC audit report states that the District is not authorized to make such payments unless pursuant to a negotiated agreement or a policy adopted by the Board of Education.

During a meeting on or about July 30, 2007, the District informed the Union that it would not pay the unit member for the value of his accrued leave time because of the OSC findings. At an October 23, 2007 meeting with the Union, the District stated it would not reconsider its position unless OSC approved the payment in writing. After the

Union continued to urge reconsideration, the District spoke with an OSC representative who stated that the District was not permitted to make the payment unless it was ordered to do so by a court. In response to the Union's November 9, 2007 written request, the District sent a letter to the Union reiterating that it was unable to make the payment because of the OSC audit report.

On March 13, 2008, the Union filed its charge alleging that the District violated §209-a.1(d) of the Act by failing to make payment to the unit member upon his retirement for the value of his accrued vacation leave.

#### DISCUSSION

Pursuant to §204.1(a)(1) of our Rules of Procedure (Rules), the four-month time period for filing a charge commences when a charging party had actual or constructive knowledge of the act or acts that form the basis for the charge.<sup>2</sup> We have consistently applied this timeliness requirement strictly.<sup>3</sup>

In the present case, the Union learned on or about July 30, 2007, that the District would not make the payment because of the findings in the OSC report. The time period for filing the charge was not tolled by the subsequent discussions about the District reconsidering its position, and the District's November 14, 2007 letter did not

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<sup>2</sup> *Nanuet Union Free Sch Dist*, 45 PERB ¶3007 (2012); *New York State Thruway Auth*, 40 PERB ¶3014 (2007); *City of Binghamton*, 31 PERB ¶3088 (1998); *City of Oswego*, 23 PERB ¶3007 (1990).

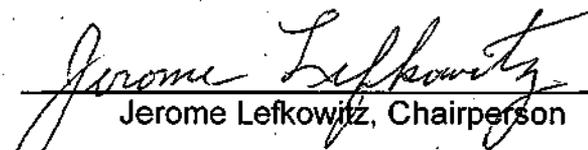
<sup>3</sup> *TWU (Edwards)*, 45 PERB ¶3014 (2012).

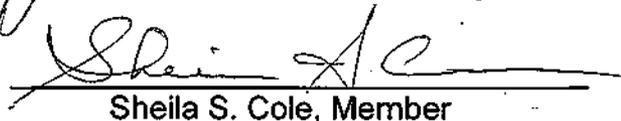
trigger a new time period for filing the charge.<sup>4</sup>

Based upon the foregoing, the Union's exceptions are denied and the ALJ's decision dismissing the charge as untimely is affirmed. In light our decision, we need not reach the issues raised in the District's cross-exceptions. However, we reiterate that a notice of claim is not a prerequisite for the filing of an improper practice charge under the Act, for the reasons set forth in *Manhasset Union Free School District*.<sup>5</sup>

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

DATED: April 23, 2011  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

<sup>4</sup> See, *New York State Thruway Auth, supra*, note 2; *United Steelworkers, Local 9434-00 (Buchalski)*, 43 PERB ¶13002 (2010).

<sup>5</sup> 41 PERB ¶13005 (2008), *confirmed and mod on other grounds, Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶17004 (3d Dept 2009), *on remittitur*, 42 PERB ¶13016 (2009). See also, *City of Syracuse v New York State Pub Empl Rel Bd*, 279 AD2d 98, 33 PERB ¶17022 (4<sup>th</sup> Dept 2000), *lv den*, 96 NY2d 717, 34 PERB ¶17025 (2001); *Freudenthal v Nassau County*, 99 NY2d 285 (2003); *Cayuga-Onondaga Counties BOCES v. Sweeney*, 89 NY2d 395, 30 PERB ¶17501 (1996); *Great Neck Union Free Sch Dist v New York State Div of Human Rights*, 304 AD2d 757 (2d Dept 2003).

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

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In the Matter of

**CORTLAND UNITED TEACHERS, NYSUT, AFT,  
AFL-CIO, LOCAL 11-040,**

Charging Party,

**CASE NO. U-30433**

- and -

**CORTLAND ENLARGED CITY SCHOOL DISTRICT,**

Respondent.

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**BRADLEY J. OVER, for Charging Party**

**DAVID G. MAESTRI, ESQ., for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Cortland Enlarged City School District (District) to a decision of an Administrative Law Judge (ALJ), on an improper practice charge filed by Cortland United Teachers, NYSUT, AFT, AFL-CIO, Local 11-040 (Association), finding that the District violated §209-a.1(e) of the Public Employees' Fair Employment Act (Act) by failing to pay salary step increments to Association unit employees pursuant to the salary schedule contained in the expired July 1, 2007-June 30, 2010 collectively negotiated agreement (agreement) between the parties.<sup>1</sup>

In lieu of a hearing, the parties entered into a joint stipulation of facts. The stipulation states that during negotiations for a successor agreement both parties made proposals to replace the salary schedule in the expired agreement with a new schedule. Article 2 of the expired agreement, Negotiation Procedures, which is included in the

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<sup>1</sup> 44 PERB ¶14567 (2011).

stipulation, states in relevant part:

## ARTICLE 2 NEGOTIATION PROCEDURES

- A. It is understood that terms and conditions of employment provided in this Agreement shall remain in effect until altered by mutual agreement in writing between the parties. Nevertheless, because of the special nature of the public education process, it is likewise recognized that matters may, from time to time, arise of vital mutual concern to the parties, which have not been fully or adequately negotiated, between them. It is in the public interest that the opportunity for mutual discussion of such matters be provided. The parties accordingly agree to cooperate in arranging meetings, selecting representatives for discussion, furnishing necessary information, and otherwise constructively considering and resolving any such matters.
- B. Upon request of either party for a meeting to open negotiations, a mutually acceptable meeting shall be set and held not more than fifteen (15) days following such request. Request for negotiations may be made at any time after January 15, immediately preceding expiration of the contract. There shall be a joint exchange of proposals or a mutually acceptable procedure to initiate negotiations.
- C. In the event a new contract is not executed prior to the termination date of the current Agreement, all items of the current contract except those that were the subject of negotiations will be carried forward. In addition, the District will not reduce the salaries or the monthly dollar contribution it pays per employee for employee health insurance benefits. [Emphasis added.]

The salary schedule in the expired agreement provides for annual wage increases, grade step advancements, and other negotiated supplemental payments for teacher and teacher assistants. The agreement also includes a sidebar agreement establishing a joint labor-management committee to review the current salary schedule prior to the beginning of negotiations for a successor agreement, and an addendum with respect to the sick leave and temporary leave of absence provisions of the agreement, which states that it "shall sunset" on June 30, 2010.

### DISCUSSION

Section 209-a.1(e) of the Act explicitly makes 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. Nevertheless, an employer and an employee organization are free under the Act to place a restriction upon the duration of a contract term, including a provision that the contract term expire coterminously with the agreement.<sup>2</sup>

The sole issue raised in the District's exceptions is whether Article 2(C) of the expired agreement constitutes a durational restriction that sunsets the District's statutory obligation to continue paying step increments because both parties have proposed changes to the salary schedule in their negotiations for a successor agreement. Based upon our review of the record, and the positions of the parties, we affirm the ALJ's conclusion that Article 2(C) does not sunset the District's obligation under §209-a.1(e) of the Act to continue paying increments following the expiration of the agreement.

When interpreting an agreement for purposes of determining whether an employer violated §209-a.1(e) of the Act, we will apply traditional principles of contract interpretation to discern the intent of the parties.<sup>3</sup> A review of Article 2 of the expired agreement evinces, at best, an ambiguity concerning the parties's intent when they agreed in Article 2(C) that "all items of the current contract except those that were the subject of negotiations will be carried forward." (Emphasis added). The ambiguity is demonstrated by the use of the past tense in Article 2(C) and the mandate in Article 2(A) that the terms of the agreement "shall remain in effect until altered by mutual

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<sup>2</sup> *Waterford-Halfmoon Union Free Sch Dist*, 27 PERB ¶3070 (1994).

<sup>3</sup> *NYCTA*, 41 PERB ¶3014 (2008). See also, *County of Livingston*, 30 PERB ¶3046 (1997).

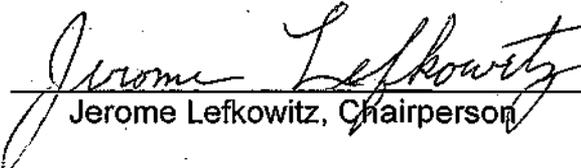
agreement in writing between the parties." This ambiguity is resolved, however, by comparing Article 2 to the explicit "sunset" provision in the parties's addendum concerning sick leave and temporary leave of absence. In light of that explicit sunset provision, we conclude that Article 2(C) is not a mutually agreed-upon durational restriction on the District's obligation under §209-a.1(e) of the Act to continue paying increments following the expiration of the agreement.

Based upon the foregoing, we find that the District violated §209-a.1(e) of the Act when it failed to continue to advance eligible Association employees on the applicable salary step schedule for the 2010-11 school year.

IT IS, THEREFORE, ORDERED that the District:

1. Cease and desist from refusing to continue the terms of the applicable salary step schedule in the expired agreement until such time as a successor agreement is negotiated;
2. Immediately make eligible unit employees whole for lost compensation as a result of the District's failure to provide salary increments for the 2010-11 school year, with interest at the maximum legal rate; and
3. Sign, post and distribute the attached notice at all physical and electronic locations used to communicate with unit employees.

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Cortland Enlarged City School District, in the unit represented by the Cortland United Teachers, NYSUT, AFT, AFL-CIO, Local 11-040, that the Cortland Enlarged City School District will:

1. Continue the terms of the salary step schedule in the parties' expired agreement until such time as a successor agreement is negotiated; and
2. Immediately make eligible unit employees whole for lost compensation as a result of the District's failure to provide salary increments for the 2010-11 school year, with interest at the maximum legal rate.

Dated .....

By .....

on behalf of **Cortland Enlarged City School District**

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

COUNTY OF ONONDAGA,

Charging Party,

CASE NO. U-30378

- and -

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

Respondent.

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GORDON J. CUFFY, COUNTY ATTORNEY (THOMAS H. KUTZER of  
counsel), for Charging Party

DAREN J. RYLEWICZ, DEPUTY COUNSEL, for Respondent

BOARD DECISION AND ORDER

Upon our review of the exceptions filed by the County of Onondaga (County) to a decision of the Administrative Law Judge (ALJ) dismissing the County's charge alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act), and CSEA's response to the exceptions, we affirm the ALJ for the reasons set forth in her decision.<sup>1</sup> In a final agency decision dismissing the County's earlier charge against CSEA,<sup>2</sup> it was determined that Article 1 of the parties' contract constitutes a specific waiver of the statutory duty to negotiate during the life of the agreement.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is,

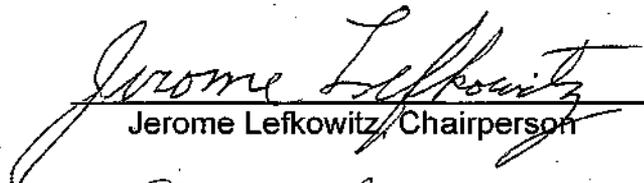
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<sup>1</sup> 44 PERB ¶4599 (2011).

<sup>2</sup> CSEA Inc, Local 1000, AFSCME, AFL-CIO, Onondaga County, Local 834, 26 PERB ¶4560 (1993); Rules of Procedure, §213.6(b).

dismissed in its entirety.

DATED: April 23, 2012  
Albany, New York

Handwritten signature of Jerome Lefkowitz in cursive script.

Jerome Lefkowitz, Chairperson

Handwritten signature of Sheila S. Cole in cursive script.

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,**

Petitioner,

**CASE NO. CP-1263**

- and -

**NIAGARA FRONTIER TRANSPORTATION AUTHORITY,**

Employer,

-and -

**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,  
LOCAL 2028,**

Intervenor.

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**STEVEN A. CRAIN and DAREN J. RYLEWICZ, CO-COUNSEL  
(KARA L. HILBURGER of counsel), for Petitioner**

**DAVID J. STATE, ESQ., GENERAL COUNSEL (WAYNE R. GRADLE  
of counsel), for Employer**

**WILLIAM E. GRANDE, ESQ., for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions by the International Longshoremen's Association, Local 2028 (Local 2028) to a decision of an Administrative Law Judge (ALJ) placing the position of Safety Analyst into a unit of Niagara Frontier Transportation Authority (NFTA) employees represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) rather than the unit represented by Local 2028.<sup>1</sup>

In its exceptions, Local 2028 contends that the Safety Analyst position should be

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<sup>1</sup> 45 PERB ¶4002 (2012).

placed into the unit it represents based upon the statutory uniting criteria set forth in §207.1 of the Public Employees' Fair Employment Act (Act). According to Local 2028, the ALJ misapplied the community of interest standards, and failed to grant deference to NFTA's preference that the position be placed in Local 2028's unit. CSEA supports the ALJ's decision.<sup>2</sup>

Following a careful review of the arguments by the parties, and the evidence in the record, we affirm the decision of the ALJ.

### FACTS

The relevant facts are set forth in the ALJ's decision, and are repeated here only as necessary to determine the exceptions.

The CSEA-represented unit includes over a dozen supervisory titles, and three non-supervisory titles including Safety Specialist.<sup>3</sup> The NFTA-represented unit is composed of clerical and technical office positions including Environmental Engineer.<sup>4</sup>

NFTA's Health, Safety and Environmental Quality (HSEQ) department has four divisions including the Safety and Training Division and the Environmental Division. All HSEQ offices are located in the same building in the City of Buffalo. HSEQ is

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<sup>2</sup> During the hearing, NFTA expressed a general preference for the Safety Analyst position to be placed in the unit represented by Local 2028 on the basis that it has traditionally represented NFTA administrative, professional and clerical employees who work in the NFTA headquarters. No exceptions, however, have been filed by NFTA to the ALJ's decision to place the position in the CSEA-represented unit.

<sup>3</sup> Joint Exhibit 1, pp. 4-5. The position of Safety Specialist was placed in the CSEA-represented unit as the result of a prior unit placement petition. *Niagara Frontier Transportation Auth*, 43 PERB ¶4003 (2010). More recently, we affirmed the dismissal of a unit placement petition by Local 2028 seeking to remove that title from the CSEA-represented unit and placing it in the Local 2028-represented unit. *Niagara Frontier Transportation Auth*, 44 PERB ¶3028 (2011).

<sup>4</sup> Joint Exhibit 7, pp. 27-28.

responsible for overseeing the operational safety of NFTA's mass transit services, and employee safety. The HSEQ Manager of Safety and Training supervises three positions in the Safety and Training Division: Safety Analyst, Safety Specialist and Safety Coordinator. The Safety Analyst and the Safety Specialist have related responsibilities for conducting injury investigations at NFTA facilities and property. Their salaries and benefits are comparable, and neither supervises other employees. The position of Environmental Engineer is not in the Safety and Training Division and it reports directly to the HSEQ Director.

### DISCUSSION

The most important criterion set forth in § 207.1 of the Act for determining a unit placement petition is the community of interest standard.<sup>5</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, common supervision, and an actual or potential conflict of interest between the members of the proposed unit.<sup>6</sup>

Based upon their common terms and conditions of employment, supervision and work responsibilities, we affirm the ALJ's conclusion that there is a community of interest between the Safety Analyst and the Safety Specialist positions warranting the placement of the former into the CSEA-represented unit.

The stipulation by the parties that employees in the CSEA-represented unit are

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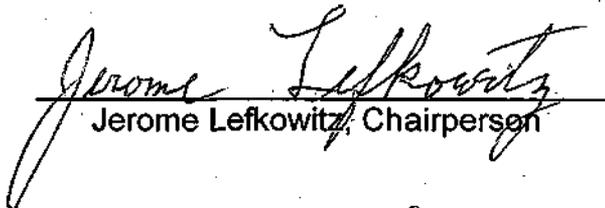
<sup>5</sup> *Regional Transit Service, Inc*, 39 PERB ¶3027 (2006).

<sup>6</sup> See, *Sachem Cent Sch Dist*, 42 PERB ¶3030 (2009); *St. Paul Blvd Fire Dist*, 42 PERB ¶3009 (2009); *Monroe #1 BOCES*, 39 PERB ¶3024 (2006); *Somers Cent Sch Dist*, 12 PERB ¶3068 (1979); *East Ramapo Cent Sch Dist*, 11 PERB ¶3075 (1978); *Somers Cent Sch Dist*, 12 PERB ¶3068 (1979).

"NFT Metro employees" is too ambiguous to support Local 2028's argument that the Safety Analyst position should be placed in its unit based upon work location. Finally, while weight must be given to NFTA's preference, the record does not include any facts demonstrating that such a preference outweighs the other factors supporting placement of the Safety Analyst position in the CSEA-represented unit.<sup>7</sup>

Based upon the foregoing, Local 2028's exceptions are denied, CSEA's petition for unit clarification is dismissed and the petition for unit placement is granted by placing the title of Safety Analyst into the CSEA-represented unit.

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

<sup>7</sup> *Town of Huntington*, 33 PERB ¶13049 (2000).

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

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In the Matter of

**UNITED FEDERATION OF TEACHERS,**

Petitioner,

-and-

**CASE NO. M2011-351**

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

Respondent.

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**STROOCK & STROOCK & LAVAN LLP (ALAN M. KLINGER, ESQ.,  
of counsel), MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK,  
ESQ., of counsel), and ADAM S. ROSS, ESQ., & CAROL L. GERSTL, ESQ.,  
for Petitioner**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE  
BARGAINING (RUSSELL J. PLATZEK, ESQ., of counsel) for Respondent**

**INTERIM BOARD DECISION AND ORDER**

This matter comes to the Board on an application by the United Federation of Teachers (UFT) for an order directing that mediation proceed during the pendency of the exceptions filed by the Board of Education of the City School District of the City of New York (District) to a decision of the Director of Conciliation (Director) concluding that an impasse exists in the negotiations between the parties within the meaning of §209 of the Public Employees' Fair Employment Act (Act). In the alternative, UFT requests that a preference be granted in determining the District's exceptions and UFT's response. The District opposes UFT's application on the grounds that mediation would be

unproductive and inefficient because of the current status of the dispute between the parties.

In its exceptions, the District has requested oral argument pursuant to §213.5 of the Rules of Procedure (Rules) and UFT opposes the District's request.

In his March 19, 2012 decision, the Director concluded that an impasse exists under the Act concerning negotiations between the District and UFT regarding a teacher evaluation system for certain schools under the Transformation and Restart models. A mediator was appointed by the Director on March 21, 2012 to provide assistance to the parties in reaching a voluntary agreement.

Pursuant to §213.6 of the Rules, the filing of exceptions by the District to the Director's March 19, 2012 decision makes that decision a non-final determination.<sup>1</sup> Under the Act and Rules, we do not have the authority to order either party to participate in mediation before the appointed mediator in the present procedural context.<sup>2</sup> We, therefore, deny UFT's application for an order requiring that mediation proceed during the pendency of the District's exceptions.<sup>3</sup>

We find merit, however, to the UFT's request that we grant a preference in determining the District's exceptions and UFT's response. From the respective

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<sup>1</sup> *Board of Educ of the City Sch Dist of the City of New York*, 34 PERB ¶13016 (2001).

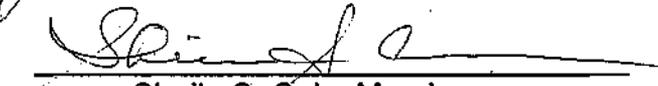
<sup>2</sup> We note, however, that mediation is an extension of negotiations. *Village of Wappingers Falls*, 40 PERB ¶13020 (2007). Therefore, the conduct of a party concerning mediation under certain facts and circumstances might constitute an improper practice under §209-a.1(d) or §209-a.2(b) of the Act, which would result in an appropriate remedy pursuant to §205.5(d) of the Act.

submissions of the parties, it is clear that they agree on at least one point: the subject of their negotiations and the issues raised in the exceptions are important for all concerned. In light of that importance and the quality of the filings by the parties, we conclude that oral argument is unnecessary in the present case.

IT IS, THEREFORE, ORDERED that UFT's application is granted, in part, and we hereby grant a preference in considering the District's exceptions and UFT's response, and we deny the District's request for oral argument.

DATED: April 23, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member