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State of New York Public Employment Relations Board Decisions from April 12, 2013

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 12, 2013

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

In the Matter of

COUNTY OF SUFFOLK **CASE NO. S-0006**

for a determination pursuant to CSL §212.

BOARD DECISION AND ORDER

On November 20, 2012, the Suffolk County Board of Legislators adopted Resolution No. 961-2012 authorizing the termination of the Suffolk County Public Employment Relations Board as established by Suffolk County Local Law No. 4-1978,[1] as last amended by Suffolk County Local Law No. 4-1999[2] and currently codified as Section 68-6 of the Suffolk County Administrative Code. Pursuant to the most recent resolution, all local provisions and procedures relating to the Suffolk County Public Employment Relations Board were abolished. The County has published a notice of termination in the County office buildings and in a newspaper of general circulation.

We find that the County of Suffolk has fully complied with §203.6 of our Rules of Procedure to terminate a local public employment relations board and, therefore we

[1] Local Law No. 4-1978 amended Local Law No. 5-1968, which first established the Suffolk County Public Employment Relations Board as approved by this Board. *See*, *County of Suffolk*, 1 PERB ¶376 (1968).

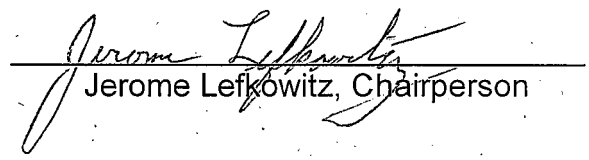
[2] The last amendment cited to in the Resolution adopted by Suffolk County Board of Legislators was dated 1999. However, the last amendment approved by this Board was dated 1990. See *County of Suffolk*, 23 PERB ¶3041 (1990).

determine that our March 27, 1968 Order[3] and all subsequent Orders[4] approving the establishment of the local public employment relations board should be rescinded.

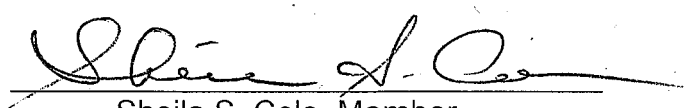
NOW, THEREFORE, WE ORDER that the order of this Board, dated March 27, 1968, and all subsequent Board Orders previously referenced, approving the resolution establishing the Suffolk County Public Employment Relations Board be, and the same hereby are, rescinded, effective April 12, 2013.

WE FURTHER ORDER that all matters pending before the Suffolk County Public Employment Relations Board as of April 12, 2013, be forwarded to PERB for further processing.

DATED: April 12, 2013
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

[3] *County of Suffolk*, 1 PERB ¶376 (1968).

[4] There have been over a dozen Board determinations concerning the establishment of the Suffolk County Public Employment Relations Board. See *County of Suffolk*, 1 PERB ¶376 (1968); 3 PERB ¶3075 (1970); 4 PERB ¶3054 (1971); 5 PERB ¶3016 (1972); 7 PERB ¶3033 (1974); 8 PERB ¶3001 (1975); 11 PERB ¶3041 (1978); 13 PERB ¶3018 (1980); 15 PERB ¶3026 (1982); 17 PERB ¶3053 (1984); 19 PERB ¶3007 (1986); 21 PERB ¶3013 (1988); 23 PERB ¶3041 (1990).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUTCHESS UNITED EDUCATORS,

Charging Party,

CASE NO. U-29746

- and -

DUTCHESS COMMUNITY COLLEGE and COUNTY OF DUTCHESS,

Respondent.

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Charging Party

ROEMER WALLENS GOLD & MINEAUX LLP (EARL T. REDDING of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Dutchess United Educators (DUE) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the Dutchess Community College and County of Dutchess (College) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed procedures governing promotions and tenure by making deletions to the Professional Staff Handbook, and thereafter failed to negotiate with DUE concerning the deletions.

The ALJ concluded that although the subject of the charge is a mandatory subject, the College satisfied its duty to negotiate that subject under the Act based upon

§7.2 of the parties' collectively negotiated agreement (agreement).[1]

In its exceptions, DUE asserts, *inter alia*, that the ALJ erred in determining that the College satisfied its duty to negotiate because the defense was not pleaded in the answer, the defense was not litigated by the parties, and the record does not support such a defense.

Following our review of the DUE's exceptions and the College's response, we reverse the ALJ's decision finding that the College satisfied its duty to negotiate and conclude that the College violated §209-a.1(d) of the Act when it unilaterally changed the promotion and tenure procedures and thereafter did not negotiate in good faith with DUE concerning the changes.

PROCEDURAL BACKGROUND

After DUE filed its charge, the College filed an answer, which pleaded the following first affirmative defense:

> 13. DUE has waived its right to negotiate with respect to the subject matter herein in that the Collective Bargaining Agreement at Article 7.2 provides for the establishment of a Committee on Promotion and Tenure which has the exclusive responsibility to "advise the President and Board of Trustees on all matters having to do with promotion of teacher educators..."

The College's answer does not include a separate duty satisfaction defense. During the College's opening statement, it twice stated it intended to prove "waiver by the union."[2] Toward the end of the hearing, the College again referenced its

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[1] 45 PERB ¶4605 (2012).

[2] Transcript, pp. 14,16.

affirmative defense of waiver.[3] Prior to issuance of the ALJ's decision, the College did not seek leave to amend its answer, pursuant to §204.3 of the Rules of Procedure (Rules), to add a duty satisfaction defense premised upon the terms of the parties' agreement.

FACTS

Article 7.2 of the parties expired agreement is entitled "Promotion of Teaching Educators." Article 7.2(b) and (c) state:

> (b) A Committee on Promotion and Tenure shall be established to advise the President and Board of Trustees on all matters having to do with promotion of teaching educators, granting of continuing appointments and non-reappointment of continuing appointments. The Committee shall consist of 10 tenured faculty members—one from each department—with one-half elected annually by the teaching educators. Each department will elect its representative through a process conducted by the office of the Dean of Academic Affairs. Department heads will be ineligible to serve if they have candidates for promotion or tenure from their department. No faculty member will be allowed to serve more than two successive two-year terms. No candidate for promotion shall serve on the committee during the period of his/her candidacy for promotion.
>
> (c) Within each department of the College, all teaching educators meeting minimum requirements for promotion and/or tenure shall be considered by a committee composed of the department head and all tenured teaching educators of that department. Formal procedures for departmental recommendations on promotions and continuing appointments shall be made in accordance with procedures promulgated by the Board of Trustees.[4]

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[3] Transcript, p. 91.

[4] Joint Exhibit 1.

Since at least 2000, §8.2.3 of the College's Professional Staff Handbook (Handbook) has delineated a detailed procedure for promotion and tenure of DUE unit members. On September 16, 2009, the College president sent an e-mail announcing unilateral editorial and procedural changes to §8.2 of the Handbook that he had approved after receiving recommendations from the Committee on Promotion and Tenure. The Committee on Promotion and Tenure is composed of ten DUE members representing each academic department. The changes to the Handbook unilaterally imposed by the College president included the deletion of procedural rights for candidates seeking promotion and tenure under §§8.2.3(B) and (C) of the Handbook.

Section 8.2.3(B) was changed to eliminate the right of a candidate to submit materials to supplement her or his application form for promotion or tenure:

> The department head will send 12 copies of the signed application form to the Office of the Dean of Academic Affairs by 5:00 p.m. of the first day of classes of the spring semester. An additional copy should be placed in the open personnel file. The form should be submitted without attachment unless additional space is needed to furnish a complete explanation on a point. ~~A candidate may create a packet of materials to be held by the Promotion and Tenure Committee chairperson, if desired.~~

The change to §8.2.3(C) of the Handbook eliminated a candidate's right to request a review or an explanation of the recommendations made by the Committee on Promotion and Tenure concerning her or his application:

> The Committee on Promotion and Tenure shall forward in writing its recommendations to the Dean of Academic Affairs. The Dean of Academic Affairs shall carefully consider the recommendations of the Committee and shall thereafter forward his/her recommendations, together with the Committee's recommendations, to the President. The President shall carefully consider the recommendations of

> the Committee and shall thereafter forward his/her recommendations, together with the Committee's recommendations, to the Board of Trustees. Notice of promotion and tenure shall be publicly announced within a reasonable time after the individuals concerned are notified. ~~Any candidate may request a review or explanation of Committee recommendations from either the Dean of Academic Affairs or the President, or both.~~

Thereafter, the Committee on Promotion and Tenure rescinded its recommendations concerning the two changes to the Handbook. The College, however, has not restored the unilaterally deleted sentences to the Handbook, leading to the filing of the present charge.

DISCUSSION

There is a fundamental distinction between a waiver defense and a duty satisfaction defense under the Act. While earlier precedent had confused those distinctions, our decision over a decade ago in *County of Nassau (Police Department)*[5] succinctly clarified the essential differences:

> We take the opportunity at the outset of our decision to clarify the nature of a defense grounded upon a claim that the subject(s) sought to be bargained pursuant to a charging party's demand have already been negotiated to completion. This Board's decisions have sometimes characterized this defense as duty satisfaction, sometimes waiver by agreement, and sometimes simultaneously both duty satisfaction and waiver. Although the second and third characterizations cannot be considered wholly inaccurate, we believe that the first most accurately describes the true nature of this particular defense.
>
> Waiver concepts suggest that a charging party has surrendered something. Although waiver may accurately describe a loss of right, such as one relinquished by silence,

[5] 31 PERB ¶3064 (1998).

> inaction, or certain other types of conduct, the defense as described is not one under which a respondent is claiming that the charging party has suffered or should be made to suffer a loss of right. Under this particular defense, a respondent is claiming affirmatively that it and the charging party have already negotiated the subject(s) at issue and have reached an agreement as to how the subject(s) is to be treated, at least for the duration of the parties' agreement. By expressing this particular defense as duty satisfaction, we give a better recognition to the factual circumstances actually giving rise to it and expect to avoid the confusion and imprecision in analysis which have sometimes been caused by the other noted characterizations of this defense.[6] (Footnote omitted)

Pursuant to §204.3(c)(2) of our Rules, an answer shall "include a specific, detailed statement of any affirmative defense," containing "a clear and concise statement of the facts supporting any affirmative defense...." The Rule's specificity requirement ensures that a charging party is not taken by surprise by an issue not appearing on the face of the responsive pleading.[7]

In order for an affirmative defense of waiver to be sustained, a respondent must have pleaded the defense,[8] and proved that a negotiated agreement contains a clear, intentional and unmistakable relinquishment of the right to negotiate the particular

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[6] *Supra*, note 5, 31 PERB ¶3064 at 3142. *See also*, *County of Columbia*, 41 PERB ¶3023 (2008); *Village of Pelham Manor*, 44 PERB ¶4595 (2011)(referencing the distinctions between the two defenses.)

[7] *New York City Transit Auth*, 20 PERB ¶3037 (1987).

[8] *See*, *New York City Transit Auth*, *supra*, note 7; *Clarkstown Cent Sch Dist*, 24 PERB ¶3047 (1991)("Waiver is an affirmative defense which must be raised in the answer if the defense is to be properly considered.")

subject under the Act.[9] Neither Article 7.2(b) nor (c) satisfies the applicable standard for waiver.

With respect to the distinct affirmative defense of duty satisfaction, the burden rests with the respondent to plead and prove through negotiated terms that are reasonably clear that it satisfied its duty to negotiate a particular subject.[10]

In the present case, the College did not plead duty satisfaction as an affirmative defense or allege in its answer that Article 7.2(c) of the parties' agreement constitutes a reasonably clear provision that satisfied its duty to negotiate procedures concerning promotion and tenure. The answer included only a waiver defense, which the College premised upon language from Article 7.2(b) of the agreement concerning the creation of the Committee on Promotion and Tenure to "advise the President and Board of Trustees on all matters having to do with promotion of teacher educators..." Furthermore, the record reveals that the duty satisfaction defense was not litigated or even mentioned during the hearing and the College stated on the record that its contractual defense was premised upon waiver.

Based upon the foregoing, we conclude that the ALJ erred in sustaining the duty

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[9] *CSEA v Newman*, 88 AD2d 685, 15 PERB ¶7011 (3d Dept 1982) *app dismissed* 57 NY2d 775, 15 PERB ¶7020 (1982), *affd* 61 NY2d 1001, 17 PERB ¶7007 (1984)(subsequent history omitted.) *See also*, *County of Columbia*, *supra*, note 6; *New York State Canal Corp*, 30 PERB ¶3070 (1997).

[10] *Shelter Island Union Free Sch Dist*, 45 PERB ¶3032 (2012); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶3023 (2009); *County of Greene and Sheriff of Greene County*, 42 PERB ¶3031 (2009); *NYCTA*, 41 PERB ¶3014 (2008).

satisfaction defense because the College did not plead it as an affirmative defense.[11] Therefore, we reverse the ALJ's decision dismissing the charge and conclude that the College violated §209-a.1(d) of the Act when it unilaterally changed a mandatory subject of negotiations, the promotion and tenure procedures in the Handbook, and did not negotiate the changes in good faith with DUE.

THEREFORE, IT IS HEREBY ORDERED that Dutchess Community College and the County of Dutchess:

1. Reinstate the procedural rights for candidates seeking promotion and tenure that were deleted from §§8.2.3(B) and (C) of the Professional Staff Handbook on September 16, 2009;

2. Cease and desist from failing to negotiate with Dutchess United Educators concerning the deletions to §§8.2.3(B) and (C) of the Professional Staff Handbook;

3. Conduct a *de novo* review of all applications for promotions and tenure by Dutchess United Educators unit employees that were denied since September 16, 2009, without regard to the deletions made to the procedural rights in §§8.2.3(B) and (C) of the Professional Staff Handbook; if such *de novo* reviews result in determinations to promote or grant tenure, the affected Dutchess United Educators unit employees shall be made whole for any loss of pay, benefits or positions with interest at the maximum legal rate; and

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[11] We might have reached a different conclusion had the College's answer been filed prior to our clarification in *County of Nassau (Police Department)*, *supra*, note 5 regarding the distinctions between the two defenses. *See*, *State of New York (Racing and Wagering)*, 45 PERB ¶3041 (2012) *confirmed sub nom*, *Kent v. Lefkowitz*, 46 PERB ¶7006 (Sup Ct Albany County 2013).

4. Sign, post and distribute the attached notice in all locations normally used to communicate both in writing and electronically with unit employees.

Dated: April 12, 2013
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 Dutchess Community College and the County of Dutchess (College), in the unit represented by the Dutchess United Educators, that the College will:

1. Reinstate the procedural rights for candidates seeking promotion and tenure that were deleted from §§8.2.3(B) and (C) of the Professional Staff Handbook on September 16, 2009;

2. Negotiate with Dutchess United Educators concerning the deletions to §§8.2.3(B) and (C) of the Professional Staff Handbook;

3. Conduct a *de novo* review of all applications for promotions and tenure by Dutchess United Educators unit employees that were denied since September 16, 2009, without regard to the deletions that had been made to the procedural rights in §§8.2.3(B) and (C) of the Professional Staff Handbook; if such *de novo* reviews result in determinations to promote or grant tenure, the affected Dutchess United Educators unit employees shall be made whole for any loss of pay, benefits or positions with interest at the maximum legal rate.

Dated . . . . . .

By . . . . . .
On behalf of Dutchess Community
College and County of Dutchess

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AFM,

Charging Party,

- and -

NESHOMA ORCHESTRAS,

Respondent.

CASE NO. UP-32452

HARVEY MARS, ESQ., for Charging Party

RAAB, STURM & GANCHROW, LLP (IRA A. STURM of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on a pre-hearing motion dated February 11, 2013, by Neshoma Orchestras (Neshoma), pursuant to 12 NYCRR §253.6, concerning an unfair labor practice complaint on a charge filed by the Associated Musicians of Greater New York, Local 802, AFM (AFM) alleging that Neshoma engaged in an unfair labor practice in violation of §§704.6 and 10 of the New York State Employment Relations Act (SERA). In its motion, Neshoma requests the Board to file a petition with the National Labor Relations Board (NLRB) for an advisory opinion, pursuant to 29 CFR §102.98, concerning whether the NLRB would decline to assert jurisdiction over the parties.

On January 28, 2013, the Director of Public Employment Practices and Representation (Director) issued a complaint, and the case has been assigned to an Administrative Law Judge (ALJ). The ALJ issued a notice on February 5, 2013 scheduling a conference and directing Neshoma to file an answer to the complaint.

In support of its motion, Neshoma has submitted an affidavit describing its business, the location of its offices, and its gross annual revenues in the past three calendar years. It contends that the information contained in its affidavit satisfies the NLRB's discretionary jurisdiction criteria for both retail sales and non-retail sales[1] and, therefore, we lack jurisdiction.

DISCUSSION

Our procedures under SERA provide Neshoma with a full and fair opportunity to plead in its answer and to present evidentiary proof demonstrating that our jurisdiction is preempted because it is an employer under §2 of the NLRA. Indeed, it is possible that the question of jurisdiction may be resolved at the scheduled pre-hearing conference. It is far more expeditious for the jurisdictional question raised by Neshoma to be resolved through the continued processing of the complaint under SERA. If the jurisdictional issue remains in dispute following an ALJ decision, the Board retains the discretion to petition the NLRB for an advisory opinion, if necessary.

IT IS, THEREFORE, ORDERED that the Neshoma's motion is denied, and that the processing of the complaint shall proceed forthwith consistent with our decision.

DATED: April 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

[1] *See*, *Marty Levitt*, 171 NLRB 739 (1968).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

CASE NO. U-32090

- and -

SISULU-WALKER CHARTER SCHOOL OF HARLEM,

Respondent.

RICHARD E. CASAGRANDE, GENERAL COUNSEL (JENNIFER A. HOGAN of counsel), for Charging Party

DLA PIPER LLP (US) (PHILLIP H. WANG of counsel), for Respondent

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 the Director of Public Employment Practices and Representation (Director) on an improper practice charge filed by the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) concluding that Sisulu-Walker violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it failed to respond to two requests from the UFT to commence collective negotiations.[1]

In its exceptions, Sisulu-Walker asserts, *inter alia*, that the Director erred in finding that it violated §209-a.1(d) of the Act and in ordering it to commence negotiations with the UFT. It also claims that the Director's ruling, which granted it

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[1] 46 PERB ¶4505 (2013).

additional time to submit a brief, constitutes a reversible procedural error because the extension of time was not sufficient. UFT supports the Director's decision.

PROCEDURAL HISTORY AND FACTS

A. Board Decision, Certification and Order to Negotiate

In *Sisulu-Walker Charter School of Harlem*,[2] we denied exceptions filed by Sisulu-Walker and affirmed a decision of an Administrative Law Judge (ALJ) concluding that the unit most appropriate at the school for purposes of collective negotiations under the Act is one composed of the following positions: 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. In reaching our decision, we rejected Sisulu-Walker's contention that employees who participate in the School Leadership Team (SLT) should be excluded from the unit on the grounds that they are managerial and/or confidential employees:

> 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.[3]

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[2] 45 PERB ¶3019 (2012), *petition dismissed Sisulu-Walker Charter School of Harlem v New York State Pub Empl Rel Bd,* 45 PERB ¶7012 (Sup Ct New York County 2012)(notice of appeal filed).

[3] 45 PERB ¶3019, at 3048 (2012).

We subsequently certified the UFT as the exclusive representative of the at-issue unit and ordered Sisulu-Walker to negotiate collectively with the UFT.[4] In our certification and order, we stated:

> 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.

B. Article 78 Proceeding Commenced by Sisulu-Walker

On May 12, 2012, Sisulu-Walker commenced a CPLR Article 78 proceeding seeking a judgment reversing our decision to include employees who participate in SLT in the negotiating unit. It has not sought judicial review of our certification of the UFT and our related order mandating it to negotiate with the UFT.

On November 25, 2012, New York State Supreme Court Justice Joan B. Lobis issued a decision, order and judgment dismissing the Article 78 proceeding commenced by Sisulu-Walker finding that our denial of its exceptions was not affected by an error of law or was arbitrary and capricious.[5] While disagreeing with our legal conclusion that the Charter Schools Act of 1998[6] (Charter Schools Act) deprives us of jurisdiction to make designations pursuant to §201.7(a) of the Act, Justice Lobis found that, as a

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[4] *Sisulu-Walker Charter School of Harlem*, 45 PERB ¶3000.18 (2012).

[5] *Sisulu-Walker Charter School of Harlem v New York State Pub Empl Rel Bd, supra,* note 2.

[6] Educ Law §§2850, *et seq.*

matter of law, the at-issue employees are not managerial or confidential under criteria set forth in §201.7(a) of the Act. In reaching her decision, Justice Lobis correctly recognized that a remand to the Board was unwarranted because we would have reached the same legal conclusion under §201.7(a) of the Act in light of our findings.[7] Sisulu-Walker has filed a notice of appeal concerning the decision, order and judgment dismissing its Article 78 proceeding.

C. UFT's Improper Practice Charge

During the pendency of the Article 78 proceeding, the UFT filed the present charge alleging that Sisulu-Walker violated §209-a.1(d) of the Act when it failed to respond to UFT demands dated June 28, 2012 and July 7, 2012, seeking commencement of negotiations. Following a conference call between the Director and the parties concerning the charge, Sisulu-Walker submitted a letter to the Director acknowledging that:

> There is no dispute that demands to bargain were made as referenced in the charge and that the employer has refused to bargain because it believes that it is not appropriate to so given the related court litigation.[8]

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[7] *See*, *Town of Walworth*, 43 PERB ¶3013 (2010); *Fashion Institute of Technology*, 42 PERB ¶3018 (2009); *City of Binghamton*, 10 PERB ¶3038 (1977). The concept of managerial and confidential employees predates the 1971 amendment to §201.7 of the Act. Under our decisional law prior to the 1971 amendment, we excluded managerial or confidential employees from the at-issue negotiating unit. When the Legislature amended §201.7 of the Act, it codified the applicable criteria applied by us but created a new procedure wherein an employee designated as managerial or confidential is excluded from the Act's coverage. *See*, *State of New York*, 1 PERB ¶399.21 (1968); *State of New York*, 5 PERB ¶3001 (1972).

[8] Letter of Phillip H. Wang, October 25, 2012.

A briefing schedule was set by the Director in a letter to the parties dated November 9, 2012. Under the schedule, each party was permitted the opportunity to file briefs on or before November 30, 2012. The UFT served and filed a brief consistent with the briefing schedule, which was received by the Director on December 3, 2012, with an affidavit of service stating it was served by mail upon the attorney for Sisulu-Walker.

During a telephone conversation with the Director on December 17, 2012, Sisulu-Walker's counsel acknowledged receipt of the UFT's brief. He denied, however, receiving the Director's November 9, 2012 letter and requested an extension of time to file a brief on behalf of his client. The Director instructed him to contact UFT's counsel to obtain its position concerning the requested extension and to explain why he had not made the request earlier. Despite Sisulu-Walker's counsel's failure to follow the Director's instructions, the Director sent a letter dated December 19, 2012, wherein an extension was granted until December 24, 2012. On December 24, 2012, Sisulu-Walker filed its brief with a copy of its notice of appeal concerning the decision, order and judgment dismissing its Article 78 proceeding.

DISCUSSION

We begin with Sisulu-Walker's claim that the Director made a prejudicial procedural ruling when he granted its request for an extension of time to file a brief, but required the brief to be filed on or before December 24, 2012.

While Sisulu-Walker claims not to have received the Director's November 9, 2012 briefing schedule, it did receive the UFT's brief, which was served by mail on

November 30, 2012. When it sought the extension of time from the Director, it did not provide a reason for its delay in making the request after receipt of the UFT's brief. Similarly, its exceptions do not explain the delay, or its failure to contact the UFT as instructed by the Director on December 17, 2012. Furthermore, Sisulu-Walker does not articulate any actual prejudice resulting from the Director's grant of an extension. In fact, the extension provided Sisulu-Walker with a distinct advantage in that, unlike the UFT, it had an opportunity to respond to its opponent's arguments.

Based upon the foregoing, we conclude that the Director acted well within his discretion in granting Sisulu-Walker's request for an extension, and requiring that the brief be filed on or before December 24, 2012.

Sisulu-Walker's exceptions to the Director's decision finding that it violated §209-a.1(d) of the Act are equally without merit. The public policy of New York, as set forth in the Act, favors collective negotiations between public employers and public employees as a means for ensuring harmonious and cooperative relationships in public employment and avoiding interruptions in governmental operations.[9] Section 204.2 of the Act mandates that an employer meet at reasonable times and negotiate in good faith with a certified or recognized employee organization concerning terms and conditions of employment. The refusal of an employer to negotiate constitutes an improper practice under §209-a.1(d) of the Act. The requirement that an employer negotiate with a certified or recognized employee organization was extended to all New

[9] Civ Serv Law §200.

York charter schools through enactment of the Charter Schools Act.[10] The importance of charter schools complying with its obligations under the Act is reflected in Education Law §2855(d), which grants PERB a preliminary adjudicatory role in the charter revocation process.

Contrary to Sisulu-Walker's argument, the fact that it sought judicial review of our uniting determination, and has filed a notice of appeal from Justice Lobis's decision, order and judgment, does not constitute a defense to its admitted failure to respond to the UFT's request to commence negotiations following our certification and order to negotiate. Our reasoning and conclusion in *Hempstead Union Free School District*[11] is equally applicable to the present case:

> Respondent argues that because it is now seeking a reversal of our decision rejecting managerial status for building principals, its obligation to negotiate with the charging party on behalf of the building principals is somehow not applicable. In effect, it asserts that it has an automatic stay by reason of the fact that it has appealed from the PERB decision. No such automatic stay is provided and no actual stay has been sought from or granted by the courts.

Based upon the foregoing, we deny Sisulu-Walker's exceptions and affirm the Director's decision concluding that it violated §209-a.1(d) of the Act. The conduct by Sisulu-Walker in the present case constitutes a flagrant disregard of its legal obligations under the Act and the Charter School Act to engage in good faith collective negotiations with the UFT.

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[10] Educ Law §§2850, 2854.3.

[11] 7 PERB ¶3017 at 3025-6 (1974). *See also*, *Hempstead Union Free Sch Dist*, 7 PERB ¶3032 (1974).

Nothing in this decision, however, precludes the parties from mutually agreeing to limit the scope of their initial negotiations to those unit employees who are not in dispute.

IT IS, THEREFORE, HEREBY ORDERED that Sisulu-Walker will:

1. Forthwith respond to the UFT's request to commence negotiations;
2. Not refuse to engage in good faith negotiations with the UFT concerning the terms and conditions of employment of unit employees; and
3. Sign, post and distribute the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: April 12, 2013
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 Sisulu-Walker Charter School of Harlem in the unit represented by United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT), that the Sisulu-Walker Charter School of Harlem will:

1. Forthwith respond to the UFT's request to schedule negotiations; and

2. Engage in good faith negotiations with the UFT concerning the terms and conditions of employment of unit employees.

Dated . . . . . . **By . . . . . .**
on behalf of Sisulu-Walker Charter School of Harlem

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, WESTCHESTER COUNTY LOCAL #860, CITY OF WHITE PLAINS UNIT #9152,

Charging Party,

-and-

CASE NO. U-29374

CITY OF WHITE PLAINS,

Respondent.

STEVEN A. CRAIN and DAREN J. RYLEWICZ, GENERAL COUNSELS (MIGUEL G. ORTIZ of counsel), for Charging Party

LAMB & BARNOSKY, LLP (ALYSON MATHEWS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester County Local #860, City of White Plains Unit #9152 (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the City of White Plains (City) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued a multi-year past practice of two unit members working an additional five hours per week at their discretion for the purpose of increasing their annual salaries.[1]

Following a hearing, the ALJ dismissed the charge on the grounds that the extra

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[1] 45 PERB ¶4598 (2012).

hours worked constituted overtime under the terms of the collectively negotiated agreement (agreement) between the City and CSEA, and the availability of overtime constitutes a nonmandatory subject under the Act.

EXCEPTIONS

In its exceptions, CSEA challenges the ALJ's failure to find that the City violated §209-a.1(d) of the Act by unilaterally discontinuing an enforceable past practice involving hours of work and wages, under which two CSEA unit employees were permitted to work up to five extra hours each week to increase their salaries. CSEA argues that the ALJ was mistaken in concluding that the additional hours worked constituted overtime under the terms of the parties' agreement, rather than an expansion of the employees' workweek. Finally, CSEA contends that the ALJ erred in failing to credit the testimony of its witnesses over the testimony of the City's witness, and failing to grant a negative inference against the City for not calling certain relevant witnesses.

The City supports the ALJ's decision on various grounds including that the ALJ correctly determined that at-issue practice concerns the availability of overtime for the two CSEA unit members. Furthermore, the City urges denial of CSEA's exceptions on the ground that they fail to comply with §213.2(b) of our Rules of Procedure (Rules).

Following our review of the record and the parties' argument, we reverse the ALJ's decision, and remand the case for further processing consistent with our decision.

FACTS

The relevant facts in the present case are largely undisputed. The parties' agreement does not identify a specific workday or workweek for CSEA unit members.

Instead, Article II of the agreement states:

ARTICLE II – WORKDAY - WORKWEEK

The present rules as heretofore practiced of the various authorities, departments and the present ordinances of the Employer as heretofore existed shall govern the number of hours per day and per week which an employee will be required to work.

Any change in existing schedules shall be subject to notification, in writing, to the Union and all affected employees.

Flex Time Schedule. The department head and individual employee(s) may agree upon a flexible work schedule, subject to approval of the Law Department. Nothing in this paragraph shall otherwise modify the City's position that it has the right to unilaterally implement flexible work schedules, or the Union's position that such schedules must be negotiated with the Union prior to implementation.

Article III, §§10(A)(1)(a), and 10(A)(4) of the agreement state:

SECTION 10 – PREMIUM PAY

A. Overtime Pay

1. The Employer shall pay time and one-half the employee's rate of pay (except as hereinafter referred to) for all hours worked in excess of forty hours per week, as may be authorized by the Mayor.

    a. Employees who normally work fewer than forty hours per week shall be paid straight time or compensatory time off at the Employer's option for all hours worked between their normal workweek up to forty hours. They shall be paid time and one-half the employee's rate of pay for all time worked in excess of forty hours or on the employee's sixth day of work in the employee's work week.

4. Lists of overtime worked shall be posted weekly. The Employer agrees to equal distribution of overtime within classifications and within departments to the extent this is equitable and practicable. A record of actual overtime hours worked by employee shall be maintained and made available to the Union representatives. Employees who decline overtime will be credited with the actual hours worked on the assignment for

> purposes of equitable distribution (e.g., an employee refusing an OT assignment of four hours will be credited as having worked four OT hours on the weekly list.)

The at-issue CSEA unit employees are Bruce Barrese (Barrese) and Michael Caldarola (Caldarola). Barrese is a Parking Ramp Attendant Supervisor, Grade 12, and Cladarola is a Senior Ramp Attendant, Grade 10. Each has held his position for over two decades.

On February 16, 2000, then Parking Authority Executive Director Albert T. Moroni (Moroni)[2] submitted a request to City Personnel Officer Elisabeth Wallace (Wallace) for the position of Parking Ramp Attendant Supervisor to be reclassified to Grade 14. Attached to the request was a questionnaire signed by Barrese, setting forth his job duties and identifying comparable positions classified as Grade 14. At the time, the Parking Ramp Attendant Supervisor worked a 35-hour workweek.

In his supporting cover memorandum, Moroni stated:

> "It is out desire to have the two Parking Ramp Attendant Supervisor positions elevated from their present Grade 12 level to that of Grade 14, which I believe is commensurate with the level of responsibility associated with these positions and is on par with the other supervisory positions within the City."

In addition, Moroni informed Wallace that the Parking Authority Board fully supported the proposed reclassifications.

On May 3, 2001, Wallace issued a decision with Moroni concurring, denying reclassification of the Parking Ramp Attendant Supervisor position. In denying the request, Wallace reasoned that employees in the comparative Grade 14 positions

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[2] Following the July 2004 abolition of the Parking Authority, Moroni was appointed Commissioner of the City Department of Parking.

"worked and were compensated for additional five hours per week," and therefore, the annual compensatory rate for the Parking Ramp Attendant Supervisor position was "about the same" as the Grade 14 positions.

In his concurring memorandum, Moroni articulated his disagreement with the decision's analysis and reaffirmed his "belief that upgrading these positions to a Grade 14 would have been fair and appropriate." Moroni stated, in part, the following:

> In reviewing your analysis I do not understand the logic you applied in attempting to compare the hourly rates of a 35-hour workweek WPPA employee with that of a 40-hour workweek of a City of White Plains employee. While this would appear to be a fair means of comparison on the surface, I believe that there are underlying factors which have not been considered in this equation. The first and most important factor is that these employees have won the right to a 35-hour workweek through labor negotiations and contract settlements for many years.
>
> In essence, this analysis says to them that "yes, you are performing at a higher level in that your work parallels that of a Grade 14 in other City departments." *However, in essence the way they are interpreting your analysis, as have I, is that you are agreeing that their work deserves salaries equivalent to that of a Grade 14, but that they must work 40 hours a week to achieve it.* (Emphasis added)

Barrese testified that shortly after Wallace's decision, Moroni met with him and the other Parking Ramp Attendant Supervisor in the Parking Authority's conference room. During the meeting, Moroni offered them the opportunity to work an additional hour each day, at their discretion, to increase their salaries to be equivalent to a Grade 14 position. For the next eight years, Barrese regularly worked a 40-hour Monday-Friday workweek. He was paid straight time for the additional hours but listed them on his bi-weekly timesheets in the column for "non-scheduled overtime." In her decision, the ALJ credited Barrese's testimony that the extra 5 hours during the workweek "were

intended to help compensate him for the denial of the upgrade application."[3] During the same eight year period, Barrese also frequently worked "scheduled overtime" on weekends, which was separately documented on his timesheets, and he was compensated with premium pay.

During his testimony, Caldarola stated that he met with Moroni, Superintendent of Parking Joseph DeSantis (DeSantis), and others in February 2002 to discuss reclassifying his position. Rather than making a formal reclassification request, which Wallace would likely to deny, Caldarola was advised to begin working an additional hour each workday like Barrese. For the next seven years, he worked and was paid straight time for an eight hour, rather than a seven hour, workday. He listed the extra hours on his bi-weekly timesheets in the column for "non-scheduled overtime" and he separately listed the scheduled overtime on the timesheets.

Moroni conceded during his testimony that he was not happy with Wallace's decision regarding Barrese but did not recall meeting with him to discuss the denial. He did, however, recall a meeting with Superintendent DeSantis and Deputy Commissioner John Larson (Larson) in which they convinced him that there was an operational need for Barrese to work additional overtime to complete his workload. He agreed to the additional overtime so long as it was supervised by DeSantis and the overtime was within budget. According to Moroni, all overtime had to be approved through a chain of command and he never granted employees the discretion to determine whether overtime was necessary. Moroni described "non-scheduled overtime" as overtime caused by exigent circumstances such as a snow emergency or a car fire.

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[3] *Supra*, note 1, 45 PERB ¶4598 at 4780.

On April 24, 2009, Moroni issued a memorandum revising the work schedules for all City Parking employees by imposing a seven day rotational workweek schedule, effective June 1, 2009. As a result of the announced change, the City eliminated the practice of Baresse and Calderola working an extra hour each workday at their discretion.

DISCUSSION

We begin our discussion with the City's procedural argument that CSEA's exceptions should be dismissed based upon its purported failure to comply with §213.2(b) of our Rules. Following our review of the exceptions and the supporting brief, we conclude that CSEA satisfied the mandate of §213.2(b) of our Rules, and therefore deny the City' s procedural argument.[4]

Next, we examine CSEA's exceptions to the ALJ's decision, which dismissed the charge on the basis that the subject of the at-issue practice is nonmandatory because the availability of overtime is a staffing decision. The ALJ's conclusion was premised upon the following: Barrese and Caldeola listed the extra hour worked per day on their timesheets as "non-scheduled overtime"; the City-CSEA agreement purportedly defined working more than 35 hours per week as overtime; and Barrese and Calderola were paid for the extra hours they actually worked.

Following our review of the record, we reverse the ALJ's finding that the subject of the practice is nonmandatory. By a preponderance of the evidence, CSEA has demonstrated the existence of a multi-year practice, recommended and accepted by the City, to increase the annual salaries of Barrese and Caldarola by extending, at their

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[4] *County of Monroe and Sheriff of Monroe County*, 45 PERB ¶3048 (2012).

discretion, the regular workday by an hour in lieu of reclassifications. The genesis of the practice stemmed from Barrese's 2001 meeting following Wallace's reclassification denial, which Moroni was unhappy with. The meeting's occurrence is supported by Barrese's testimony, the timing of the practice's commencement, and Moroni's memorandum to Wallace expressing his agreement with the employees' interpretation of the denial: "their work deserves salaries equivalent to that of a Grade 14, but that they must work 40 hours a week to achieve it." One year later, the practice was extended to Caldarola based upon the conclusion that filing another reclassification request with Wallace would be futile.

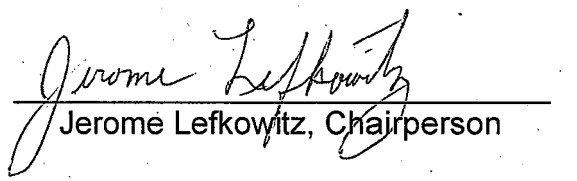
Under the facts and circumstances of the present case, we find that the employees' listing of the daily extra work in the timesheet column for "non-scheduled overtime" does not prove that the extra work performed under the at-issue practice constituted overtime. The phrase "non-scheduled overtime" is defined by the City as assigned overtime responsive to an emergency, and it is assigned through a chain of command. The daily extra hour performed under the practice, however, was not assigned by a supervisor and it was not performed in response to daily exigent circumstances.

In addition, the parties' agreement does not define the term "overtime" or distinguish between scheduled and unscheduled overtime. The City did not treat the daily extra hours of work by Barrese and Caldarola as overtime under the agreement by weekly posting the extra hours they worked nor did it equally distribute the opportunity to work those hours. In reaching our conclusion that the extra worked performed was not assigned overtime, we have drawn a negative inference based upon the failure of

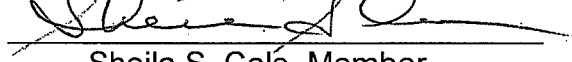
the City to call Moroni's subordinates responsible for supervising Barrese and Caldarola during the years of the at-issue practice.[5]

Based upon the foregoing, we reverse the ALJ's decision, reinstate the improper practice charge, and remand the case for further processing to determine whether the City violated §209-a.1(d) of the Act. Nothing in our decision precludes the ALJ from determining the City's defense that CSEA has a reasonably arguable source of right under the agreement, or from hearing arguments from the parties concerning whether the case should be deferred to arbitration under our merits or jurisdictional deferral policies.

DATED: April 12, 2013
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

[5] *County of Tioga*, 44 PERB ¶3016 (2011).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JILL GUTTMAN,

Charging Party,

-and-

CASE NO. U-31232

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

Respondent.

GLASS AND KRAKOWER LLP (BRYAN D. GLASS of counsel) for Charging Party

DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE BARGAINING (ALLISON S. BILLER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board[1] on an exception filed by Jill Guttman (Guttman) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the Board of Education of the City School District of the City of New York (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when she was harassed, threatened and ultimately terminated from a probationary teacher position in retaliation for her protected activity under the Act.[2]

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[1] The Board acknowledges the assistance of law student intern Jeremy Ginsburg in the preparation of its decision.

[2] 45 PERB ¶4606 (2012).

EXCEPTIONS

In her exception, Guttman asserts that the ALJ erred by crediting the testimony of Principal Pauline Shakespeare (Shakespeare) concerning the motivation underlying her actions and in failing to find a violation of the Act based upon Shakespeare's statements secretly recorded by Guttman during two meetings. The District supports the ALJ's decision.

Following our review of the parties' arguments and the record evidence, we affirm the ALJ's decision to dismiss the charge.

FACTS

Guttman's employment as a District school teacher began on September 7, 2010. In October 2010, she transferred to P.S. 34, the John Harvard Elementary School, in Queens Village and commenced teaching a second grade class. As the school's principal, Shakespeare regularly observed Guttman's classroom in Fall 2010. Guttman received direct verbal feedback from Shakespeare concerning class lessons. Shakespeare assigned literacy coach Vera Tomaselli (Tomaselli) to provide Guttman with regular guidance concerning literacy instruction. Gwendolyn Brown-Walker (Brown-Walker), a staff developer at the school, also provided Guttman with direct assistance.

In November or December, 2010, Guttman attended a United Federation of Teachers (UFT) meeting in the school's teacher lounge. Guttman played no role in organizing the meeting, which was attended by other teachers. It is undisputed that Shakespeare did not know that Guttman attended the meeting.

On January 5, 2011, Shakespeare sent a letter to Guttman with recommendations concerning the proper development of future reading lessons, emphasizing the importance of identifying learning objectives. The following day, Shakespeare observed Guttman teaching a phonics lesson. The classroom observation was consistent with Shakespeare's practice of observing all second grade classrooms.

During a post-observation conference and in a written report, Shakespeare notified Guttman that her phonics lesson on January 6, 2011 was unsatisfactory. The report set forth four deficiencies: the lesson appeared unplanned; the learning objectives were unclear; Guttman displayed a lack of knowledge in the subject matter; and one student did not participate in the entire lesson because he was sorting library books.

Shakespeare observed another classroom lesson on January 11, 2011, which was followed by a written report concluding that the lesson was unsatisfactory. The report set forth a series of concerns including a comment that Guttman's reading of a passage "was not fluent and did not provide a model for oral reading for her young students." Shakespeare's report about the lesson was discussed with Guttman during a subsequent meeting.

On January 18, 2011, Shakespeare met with Guttman to discuss her shared reading lesson, the purpose of shared reading and proper questioning techniques. Shakespeare was concerned that Guttman did not grasp her responsibilities as an instructor. The following day, Shakespeare observed another lesson and provided Guttman with an unsatisfactory post-observation report finding that her questioning

technique needed improvement and her reading continued to be less than fluent. Shakespeare made two recommendations: Guttman should consult with literacy coach Tomaselli about observing lessons by other teachers and Guttman should tape record her shared reading lessons to help improve her pace during oral readings.

On January 20, 2011, Shakespeare directed Guttman to attend a January 24, 2011 meeting and advised her to bring a UFT union representative. At the January 24, 2011 meeting, Shakespeare informed Guttman and the UFT representative that Guttman was in danger of receiving an unsatisfactory performance rating for the 2010-2011 school year. Two days after the meeting, Guttman received a follow-up letter from Shakespeare outlining her performance deficiencies. In addition, the letter stated:

> Please be advised that a plan of assistance will be developed to support in the hope of avoiding an adverse rating in June 2011. This plan will include, but not necessarily be limited to the weekly submission of lesson plans, weekly meetings with Ms. Tomaselli and peer observation. Your progress with regard to this plan will be assessed by March 1, 2011.[3]

While it is undisputed that Guttman was in regular communication with another UFT representative in January 2011 concerning the unsatisfactory reports and the level of support she was receiving from the school, there is no record evidence that Shakespeare knew of Guttman's communications with the UFT prior to the January 24, 2011 meeting.

On February 1, 2011, Guttman received a plan of assistance from Shakespeare delineating a course of support aimed at avoiding an unsatisfactory

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[3] Charging Party Exhibit 9.

rating for the school year. The plan included scheduled meetings with Tomaselli for additional guidance concerning literacy lessons, and weekly meetings with staff developer Brown-Walker to develop math lessons and create an effective classroom learning environment. Guttman testified that she communicated with Tomaselli on a daily basis and attended staff development meetings with Brown-Walker.

On February 9, 2011, Guttman observed another teacher's second grade classroom to obtain ideas about making her classroom more child-friendly. After the visit, Guttman met with Shakespeare to discuss steps she intended to implement to improve her classroom environment.

Shakespeare and staff developer Brown-Walker met with Guttman and another second grade teacher on February 18, 2011, after Shakespeare had observed their classrooms. Unbeknownst to Shakespeare and Brown-Walker, the meeting was secretly recorded by Guttman utilizing her iPhone voice recorder.[4]

The meeting centered on the unsatisfactory nature of the teachers' performance concerning student literacy despite the level of support they received from the school including workshops, weekly meetings, coaching and mentoring. During the meeting, Shakespeare expressed frustration that the teachers were limiting themselves by failing to take initiative to improve literacy lesson planning and

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[4] A compact disc of Guttman's secret recordings of the February 18, 2011 meeting and another meeting with Shakespeare on April 28, 2011 was admitted into evidence without objection from the District. Transcript, p.182; Charging Party Exhibiti 18(a). Two documents prepared by Guttman containing typed excerpts from the recordings were admitted into evidence over the District's objection. Transcript, pp.182-186; Charging Party Exhibits 18(b) and (c). While the correctness of the evidentiary rulings is questionable, the District did not preserve the admissibility issue concerning the compact disc and did not file cross-exceptions concerning the admission of Guttman's typed excerpts. As a result, neither issue is before us.

performance. She also referenced complaints received from the UFT about the teachers not receiving sufficient support from the school. Shakespeare emphasized that the school is noted for teacher training and that it has provided them with training and mentoring.

During her testimony, Shakespeare acknowledged that a UFT representative spoke to her in late January or early February 2011 about Guttman's status and the level of support she was receiving from the school. On cross-examination, Shakespeare denied she spoke about that conversation during the February 18, 2011 meeting. In addition, she testified that she did not recall stating that the teachers were limiting themselves, the school is noted for teacher training, and the UFT had contacted her about second grade teachers not receiving sufficient support.

Following the first day of hearing, Shakespeare was given an opportunity to listen to the audio recording of the meeting. Thereafter, Shakespeare acknowledged on redirect that she was upset during the meeting because she believed that the UFT received incorrect information about the level of support provided to the second grade teachers. Shakespeare also admitted telling both teachers at the meeting that they were limiting themselves, and that the complaints to the UFT were contradicted by the scope of the school's efforts to support them.

For the next four weeks, Shakespeare visited Guttman's classroom on a daily basis, and spoke with her about her job performance. On March 17, 2011, Shakespeare provided Guttman with a written observation report concluding that her math lesson was unsatisfactory. On the same day, after speaking with the superintendent, Shakespeare submitted a report to the District finding that Guttman's

performance was unsatisfactory and recommended discontinuance of her probationary service.

After submitting the probationary report and recommendation, Shakespeare continued to observe Guttman's classroom performance until the end of the school year. On April 28, 2011, following a classroom observation, Shakespeare summoned Guttman to attend a meeting along with Tomaselli to discuss multiple pedagogical problems observed during her classroom visit. The subjects discussed included assignments of books below students' reading levels, the lack of independent reading, and the poor quality and incompleteness of student handwriting books. As part of her critique, Shakespeare referenced specific students and expressed deep concerns that the status quo would "kill the love of reading," and that students were "never going to learn to write." She told Guttman that she did not know how to manage a classroom and did not understand her responsibilities as a teacher.

Shakespeare also stated that:

> If anybody had told me Ms. Guttman that I could have a teacher in this building like this, I would have said no. I have asked you, I have coddled you. I have never been so gentle with anybody. Never, never, but I am very careful with you because I see how you think and how you think and (know you). You think you are going to use the union against me. It doesn't work like that. My dear (the only) The Union cannot protect a bad teacher, cannot, cannot! So I am going to go by the book with you. But I don't want you here. I can't afford it. These kids can't afford it. You can't teach.
>
> As I said I have to be very careful with you because my God, you know if you had played your cards right, you could have gone on and done something else, but now I have to be very, very careful.

> I just want you to understand that this is not acceptable, not acceptable, not acceptable. See, in certain neighborhoods the children can bounce back. These children can't bounce back.[5]

In response to Guttman's claim that her students were learning, Shakespeare replied that Guttman felt that way because she was "arrogant." In response to Guttman's rejection of the characterization, Shakespeare stated:

> I know. See, you are still arrogant because you are deferring (*sic.*) to what I am saying. Very arrogant and that's why you don't learn. You and Ms. Lall really are the first people that I have ever taught that can't learn. Usually, all the experts in this building, we all started together and grew up together. Your arrogance has prevented you from learning. The very fact that you are challenging wheat (*sic.*) I am saying is proof enough. You are telling me that the children are learning. If they are learning, Ms. Guttman, they could have learned 10 times more because you can't do the job.[6]

Shakespeare also told Guttman during the meeting that she would not allow her to "tell anyone that I told you to resign....I know people too well to get myself into trouble that way. There is a process that we have to follow and we are going to follow that process."[7]

According to Tomaselli, Shakespeare labeled Guttman as arrogant due to her failure to grow professionally despite extensive training provided by the school. Tomaselli described Shakespeare and Guttman as being frustrated during the meeting.

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[5] Charging Party Exhibit 18(c).

[6] Charging Party Exhibit 18(c).

[7] Charging Party Exhibit 18(a).

Guttman received a letter on May 5, 2011 notifying her that she would be terminated, effective June 10, 2011. On May 27, 2011, Guttman received another unsatisfactory report following Shakespeare's observation of a writing lesson. In the report, Shakespeare stated that the conditions of students' notebooks continued to be unacceptable and that Guttman failed to utilize the templates for writing instructions required by the school's literacy program.

On Guttman's last day at the school, she received an unsatisfactory performance rating for the school year. Three other P.S. 34 teachers also received unsatisfactory ratings.

DISCUSSION

In an improper practice charge alleging unlawfully motivated interference or discrimination in violation of §§209-a.1(a) and/or (c) of the Act, a charging party has the burden of demonstrating by a preponderance of evidence that: a) the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.[8]

To meet the relatively low initial threshold for demonstrating a *prima facie* case, a charging party must present sufficient evidence to give rise to an inference that improper motivation under the Act was a factor in a respondent's actions. If the evidence establishes that inference, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that its conduct was

[8] *UFT, Local 2, AFT, AFL-CIO (Jenkins),* 41 PERB ¶3007 (2008)(subsequent history omitted); *County of Wyoming*, 34 PERB ¶3042 (2001); *Stockbridge Valley Cent Sch Dist,* 26 PERB ¶3007 (2000); *County of Orleans*, 25 PERB ¶3010 (1992); *Town of Independence*, 23 PERB ¶3020 (1990); *City of Salamanca*, 18 PERB ¶3012 (1985).

motivated by a legitimate non-discriminatory business reason.[9] If the respondent presents evidence of a nondiscriminatory reason, the burden shifts back to the charging party to establish that the proffered reason is pretextual.[10] At all times, however, the burden of proof remains with the charging party to demonstrate the requisite causation under the Act by a preponderance of the evidence.[11]

In the present case, we find no basis in the record to disturb the ALJ's credibility finding, which was limited to crediting Shakespeare's testimony that she did not issue formal negative evaluations prior to January 2011 in order to provide Guttman with an opportunity to develop her professional skills. The evidence fully supports the conclusion that Shakespeare purposefully delayed conducting formal evaluations because Guttman was new to the profession and the school.

In addition, we conclude that Guttman has not demonstrated a *prima facie* case of improper motivation with respect to Shakespeare's criticisms and unsatisfactory evaluations on and before January 24, 2011 because Guttman failed to prove an essential element: Shakespeare's knowledge of the protected activity. While Guttman engaged in protected activity by attending the 2010 UFT meeting, Shakespeare did not know of Guttman's attendance at that meeting. With respect to Guttman's contacts with the UFT in January 2011, Shakespeare first learned that Guttman had communicated with the UFT when Guttman brought a union representative with her to the January 24, 2011 meeting at Shakespeare's suggestion. At the meeting, Shakespeare reiterated her criticisms of Guttman's performance and warned her that

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[9] *Town of Tuscarora*, 45 PERB ¶3044 (2012).

[10] *UFT, Local 2, AFT, AFL-CIO (Jenkins), supra*, note 8.

[11] *Elwood Union Free Sch Dist*, 43 PERB ¶3012 (2010).

she was in danger of receiving an unsatisfactory performance rating for the school year. Based upon the foregoing, we affirm the dismissal of the charge with respect to the unsatisfactory evaluations and criticisms on and before January 24, 2011.

With respect to the remainder of the charge, we find that Guttman presented sufficient evidence to demonstrate a *prima facie* case of improper motivation under the Act concerning events following the January 24, 2011 meeting, thereby shifting the burden of persuasion to the District to demonstrate a legitimate non-discriminatory basis for the negative performance evaluations and Guttman's discharge.

The inference of improper motivation is supported by Shakespeare's reaction to receiving complaints from a UFT representative, following the January 24, 2011 meeting, concerning second grade teachers not receiving adequate support from the school. Certain comments by Shakespeare during the February 18, 2011 and April 28, 2011 meetings, along with her initial testimonial denials regarding those meetings, suggest unlawful retaliatory animus toward Guttman because of her complaints to the UFT.[12] At the February 18, 2011 meeting, Shakespeare was admittedly upset about the complaints. In addition, Shakespeare stated at the April 28, 2011 meeting that she had to be "very careful" because Guttman was going to use the UFT against her and the UFT "cannot protect a bad teacher."

Following our review of the record, however, we conclude that the District refuted the inference with overwhelming and unrebutted evidence demonstrating a legitimate non-discriminatory basis for the negative evaluations and the decision to

[12] However, Shakespeare's inability to recall all aspects of the meetings during her testimony, and her need to refresh her recollection, does not constitute proof of animus or dishonesty.

discharge: Guttman's consistently unsatisfactory probationary job performance as a second grade teacher despite extensive efforts to help her improve her performance and avoid a final unsatisfactory performance rating.

Prior to being aware of Guttman's protected activity, Shakespeare had already negatively critiqued her job performance. In addition, she discussed with Guttman the nature of those deficiencies. Shakespeare also provided recommendations for improving her performance including observing other teachers and utilizing a tape recorder to enhance her oral reading during literacy lessons.

Notably, it was Shakespeare who recommended that Guttman obtain UFT representation for the January 24, 2011 meeting. At the meeting, Shakespeare reiterated Guttman's performance deficiencies and warned that she was in danger of receiving an unsatisfactory performance rating at the end of the school year. Following the meeting, Shakespeare prepared and sent a written plan of assistance aimed at avoiding the negative school year performance rating. Thereafter, Guttman also received regular assistance from Tomaselli and Brown-Walker and met with Shakespeare concerning measures to improve her classroom.

The February 18, 2011 meeting with Guttman, another teacher and staff developer Brown-Walker was an outgrowth of Shakespeare's continued dissatisfaction with both teachers' job performance despite the school's extensive efforts to help them. At the meeting, Shakespeare was frustrated by the teachers' lack of improvement despite the school's extensive assistance, and their failure to act upon suggested measures for self-improvement. Her annoyance at the inaccuracies

in the complaints to the UFT regarding the support provided is insufficient evidence to rebut her well-documented dissatisfaction with Guttman's job performance.

Similarly, we conclude that Shakespeare's comments at the April 28, 2011 meeting do not rebut the overwhelming evidence demonstrating that the evaluations and discharge were motivated by Guttman's unsatisfactory performance. The meeting took place over a month after Shakespeare submitted her report recommending the probationary termination. It focused on multiple problems found during Shakespeare's latest visit to Guttman's classroom. During the meeting, Shakespeare expressed her strong belief that Guttman was not competent to teach and was depriving second grade students of a proper education in reading and writing. Shakespeare cited Guttman's arrogance as a reason for her failure to improve as a teacher despite the efforts by the school to assist her. While Guttman contested Shakespeare's opinions, that is not sufficient to rebut the non-discriminatory motivation underlying the adverse actions.

Finally, the evidence demonstrates that Shakespeare's comments during the April 28, 2011 meeting about utilization of the UFT against her and that the UFT cannot protect a bad teacher do not violate §209-a.1(a) of the Act. Both comments were clear statements of opinion, and within the context of the meeting, they cannot be construed as a deliberate attempt to interfere with and restrain Guttman from exercising her right under the Act to obtain UFT representation. Nor can they be construed as an effort to persuade Guttman that it would be futile to exercise her right to employee organizational representation, thereby chilling the exercise of that right.[13]

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[13] *Brunswick Cent Sch Dist (Jackson),* 19 PERB ¶3063 (1986).

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

Dated: April 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL 1179

Petitioner,

-and-

CASE NO. TIA2012-022

MTA BUS COMPANY

Respondent.

GLADSTEIN REIF & MEGINNISS LLP, ESQ., BETH M. MARGOLIS of counsel), for Petitioner

PROSKAUER ROSE, LLP (NEIL H. ABRAMSON, ESQ., of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us from a report and recommendation of the Director of Conciliation (Director) dated April 2, 2013, regarding a petition for interest arbitration filed by the Amalgamated Transit Union, Local 1179 (ATU) under §209.5 of the Public Employees' Fair Employment Act (Act) and §205.15 of our Rules of Procedure (Rules) with respect to an impasse in contract negotiations between ATU and the MTA Bus Company (MTA).

In his report and recommendation, the Director concludes that a voluntary resolution of the contract negotiations between the ATU and the MTA cannot be effected and recommends that the impasse be referred to a public interest arbitration panel.

The MTA has not filed an objection to the Director's report and recommendation, pursuant to §205.15(b) of the Rules.

Following our review of the Director's report and recommendation, we hereby certify that a voluntary resolution of the contract negotiations between the ATU and the MTA cannot be effected and we, therefore, refer the impasse involving these parties to a public interest arbitration panel.

SO ORDERED.

DATED: April 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6135

COUNTY OF CHAUTAUGUA and CHAUTAUGQUA COUNTY SHERIFF,

Employer,

-and-

CHAUTAUQUA COUNTY SHERIFF'S EMPLOYEES ASSOCIATION,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act, the incumbent is decertified and,

IT IS CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees

Case No. C-6135

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: Pilot, Cook, Emergency and Police Dispatcher, Emergency and Police Dispatcher Trainee, Senior Emergency and Police Dispatcher, Correction Officer, Senior Correction Officer, Recreation Specialist/Correction Officer, Seasonal Deputy Sheriff when assigned to navigation and patrol and part-time Corrections Officers.

Excluded: All other employees of Chautauqua County.

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 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6124

TOWN OF PINE PLAINS,

Employer,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the 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 members of the police department of the Town of Pine Plains.

Excluded: The officer in charge of the police department and all other employees of the Town of Pine Plains.

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 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JAMES CARTER,

Petitioner,

- and -

CASE NO. C-6160

UNIONDALE PUBLIC LIBRARY,

Employer,

- and -

UNIONDALE PUBLIC LIBRARY STAFF ASSOCIATION,

Intervenor.

BOARD DECISION AND ORDER

On October 9, 2012, James Carter (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking decertification of the intervenor as the exclusive representative of certain employees of the Uniondale Public Library (employer).

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

Included: All regular full-time and part-time employees in the titles of Librarian III, Librarian II, Librarian I, Library Aide, Senior Typist Clerk, Clerk Typist, Senior Library Clerk, Clerk, Clerk B-Lingual, Page and Cleaner.

Excluded: All other employees.

Pursuant to that agreement, a secret-ballot election was held on January 31, 2013, at which a majority of ballots were cast in favor of the intervenor.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots desire to be represented by the intervenor for the purpose of collective bargaining, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: April 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROMULUS ADMINISTRATORS ASSOCIATION,

Petitioner,

-and-

CASE NO. C-6120

ROMULUS CENTRAL SCHOOL DISTRICT,

Employer,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Romulus Administrators 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: Pre K-12 principal, assistant principal/data coordinator and building maintenance supervisor.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Romulus Administrators 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 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COMMANDING OFFICERS ASSOCIATION OF LONG BEACH, N.Y, INC.,

Petitioner,

-and-

CASE NO. C-6082

CITY OF LONG BEACH,

Employer,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF LONG BEACH, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Commanding Officers Association of Long Beach, N.Y., Inc. has been designated and selected by a majority of the employees of

the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Employees who have attained the civil service rank of police lieutenant and above.

Excluded: All police officers below the rank of lieutenant.

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

DATED: April 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 687,

Petitioner,

- and -

CASE NO. C-6175

COUNTY OF FRANKLIN,

Employer,

- and -

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Intervenor.

BOARD DECISION AND ORDER

On January 9, 2013, the Teamsters Local 687 (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the County of Franklin (employer).

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

Included: Full and less than full-time Cook, Cook/Manager, Clerk, Account Clerk/Civil Deputy, Correction Officer, Deputy Sheriff/Correction Officer, Senior Account Clerk, Correction Officer Sergeant, Deputy Sheriff/Correction Officer Sergeant, Deputy Sheriff/Civil Officer, Senior Account Clerk/Civil Deputy and less than full-time Licensed Practical Nurse and Registered Nurse.

Excluded: Sheriff, Undersheriff, Warden, Principal Account Clerk/Typist, Correctional Facility Nurse and all other employees.

Pursuant to that agreement, a secret-ballot election was held on April 4, 2013, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: April 12, 2013
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member