STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of BRIGHTON CENTRAL SCHOOL DISTRICT, Employer, -and- BRIGHTON TEACHERS' ASSOCIATION, NEW YORK EDUCATORS ASSOCIATION/NATIONAL EDUCATION ASSOCIATION, Petitioner.	#2A-11/11/80 BOARD DECISION AND ORDER CASE NO. C-1989

HARRIS, BEACH, WILCOX, RUBIN and LEVEY (A. TERRY VAN HOUTEN, ESQ., of Counsel), for Employer

PAUL E. KLEIN, ESQ. (HAROLD G. BEYER, JR., ESQ., of Counsel), for Petitioner

The Brighton Teachers Association, New York Educators Association /National Education Association (Association) petitioned to add tutors employed by the Brighton Central School District (District) to a unit of teachers that it already represents.[1] It argued that the two groups share a community of interest. The District opposed the petition on the ground that the teachers and tutors do not share a community of interest and, therefore, should not be in the same unit.

The Director of Public Employment Practices and Representation (Director) determined that there was not a sufficient community of interest between the tutors and the teachers for them to be included in a single unit and he dismissed the petition.

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1 The Association indicated that it wished to represent the tutors only if they were included in the same unit as the teachers.

He found that the benefits received by the tutors and the teachers are significantly different in that tutors work less than full time and are paid an hourly wage for the actual hours worked. Moreover, they receive no fringe benefits except that individual tutors may elect to be covered by the teachers' retirement system. The teachers, on the other hand, receive an annual salary and many fringe benefits.

The Director concluded that the interests of both the tutors and teachers would be adversely affected if they were placed in a single unit. Quoting his decision in Somers CSD, 12 PERB ¶4016 (1979), in which he held that groups of employees with diverse terms of employment should not be in a single unit,[2] he said that:

> "as one would likely seek to gain economic advantages already attained by the other, possibly at the expense of their continuation or enhancement. This potential for confilict is such as to make joinder unwise."

The Association argues against the reasoning applied by the Director. It contends that tutors function as teaching assistants and share working conditions with teachers, both groups of employees being engaged in allied professional work. The Association notes that in Whitesboro, 11 PERB ¶4043 (1978), the Director placed teaching assistants and teachers in a single unit.

The Association now makes the same argument in support of the exceptions as it made before the decision of the Director.

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2 The Somers decision was appealed to this Board and was affirmed, 12 PERB ¶3068 (1979). As the exceptions did not deal with the issue before us here, we did not comment on this aspect of the Director's decision.

Having reviewed the record, we affirm the material findings of fact of the Director.[3] In Whitesboro, the teaching assistants and teachers had nearly identical working conditions and benefits and had many similar duties. Here, although there is some similarity between the occupational tasks of tutors and teachers, there is no similarity in the benefits of the two groups.

For the reasons stated by the Director, we affirm his conclusion of law that groups of employees with diverse terms of employment should not be in a single unit.

NOW, THEREFORE, WE ORDER that the petition herein be, and it hereby is, dismissed.

DATED: Albany, New York
November 10, 1980

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

[3] We note the Association's objection to the Director's statement that tutors are not evaluated pursuant to any formalized procedure and have considered the evidence in the record that there is a two-page guideline form for the evaluation of tutors. Whether the use of the guideline form constitutes a formalized evaluation procedure is irrelevant. It is clear that the manner of the evaluation of tutors is so significantly different from the manner of the evaluation of teachers as to constitute a distinct term and condition of employment.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of UNITED UNIVERSITY PROFESSIONS, INC., Respondent, -and- THOMAS C. BARRY, Charging Party.	#2B-11/11/80 BOARD DECISION AND ORDER CASE NO. U-4229

BERNARD F. ASHE, ESQ., (IVOR MOSKOWITZ, ESQ., of Counsel), for Respondent

THOMAS C. BARRY, pro se

The charge herein was filed by Thomas C. Barry against United University Professions, Inc. (UUP) alleging that UUP violated §209-a.2(a) of the Act by refusing to supply him with any financial information in support of its refund to him of so much of the agency fee paid by Barry as UUP uses "in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment" [CSL §208.3(a)]. After the hearing, the hearing officer found that UUP had failed to provide such information and that such failure violated §209-a.2(a) of the Act (13 PERB ¶4541). As a remedy, he directed UUP to furnish all individuals who applied for and received refunds for the fiscal years 1977-78 and 1978-79 detailed explanations and information related to their refunds; and to furnish such information in connection with all future refunds at the time of such refunds.

The matter comes before us on the exceptions filed by UUP.

FACTS

UUP is the exclusive negotiating representative of the Professional Services Unit of the State University of New York. Pursuant to §208.3(a) of the Act, UUP receives agency fee deductions from the salaries of unit employees who are not UUP members. Barry is such an agency fee payer. UUP has established, as required by §208.3(a), a procedure under which agency fee payers may apply for a refund. Barry applied for and received a refund for the 1977-78 fiscal year.

The UUP refund procedure provides that if the employees seeking refunds are not satisfied with the amount received they may then appeal through a three-step process: first, to the UUP Executive Board; next to its governing body, the Delegate Assembly; and finally to a neutral appointed and paid for by UUP. Barry applied for a refund for the 1977-78 fiscal year in September 1978, and in March 1979 received a check for seventy-six cents (76¢). Shortly thereafter, he filed an appeal which was turned down by the Executive Board in June 1979. He then appealed to the Delegate Assembly which rejected his appeal in October 1979. He took his appeal to the next step, a hearing before the neutral, in January, 1980. It appears that the neutral's determination was rendered on or about June 6, 1980.

Barry testified that when he first requested the refund, and thereafter at the first two stages of the appeals process, he asked

UUP to supply him with an "itemized, audited and notarized statement of the complete receipts and expenditures" not only of UUP but also of its state and national affiliates. UUP supplied none of the requested figures prior to the hearing before the neutral.

EXCEPTIONS

In its exceptions to the hearing officer's determination, UUP argues that:

1. PERB lacks jurisdiction to consider the adequacy of its appeal procedures;

2. UUP has met the requirements imposed by this Board in earlier cases;

3. Barry had not exhausted his internal union remedies when he filed the charge;

4. Pertinent information was available to all unit employees during the first two steps of the appeals procedure, but that in any event, UUP is not required to provide the information requested until the last step of the procedure;

5. The hearing officer's remedial order transcends PERB's authority; and

6. By not availing himself of opportunities for disclosure during the hearing before the neutral, Barry has waived his rights to obtain the information he seeks.

Barry has filed a response in support of the hearing officer's determination, but urges only that the remedy is inadequate.

DISCUSSION

On the basis of the record herein, there can be no dispute that Barry requested itemized financial information in support of the refund which UUP gave him and that such information was not made available at the time of the refund nor during the first two appellate steps of UUP's procedures. In effect, Barry was required to appeal to the Executive Board, to the Delegate Assembly and, finally, to the neutral without having any idea on what basis UUP determined the amount of the refund. We agree with the conclusion of the hearing officer, and so determine, that the refusal of the UUP to provide the requested information at the times in question constituted a violation of §209-a.2(a) of the Act.

We may briefly dispose of several of UUP's exceptions. (1) We have previously considered UUP's argument addressed to our jurisdiction (UUP and Eson, 11 PERB ¶3068).[1] That jurisdiction exists here because a refund procedure which does not adequately protect the rights of nonmembers violates §209-a.2(a) of the Act by interfering with their right to refrain from participating in an employee organization (CSL §202). UUP is under a continuing responsibility to ensure that its procedure is fairly maintained and implemented. The charge herein raises a question related to such implementation. (2) UUP's exhaustion of remedies argument is without merit. Barry complains that the appeals process itself is violative of his rights under the Act, since UUP's refusal to furnish relevant information has made its procedure co-

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1 See also UUP v. Newman, ___ AD2d___; lv. to app. den., ___ NY2d___ (October 14, 1980).

ercive and unworkable. As Barry reasonably seeks by this charge to have this information in advance of invoking the appeals process, the neutral cannot grant that relief. There is no reason, therefore, to compel Barry to exhaust the appeals process prior to filing his charge. (3) Finally, we cannot consider the hearing before the neutral -- whatever right of discovery may there have been afforded Barry -- to be corrective of the coercive impact under the Act of UUP's prior conduct. As an important incident of his right to refrain from participating in the UUP, Barry had the right to have the requested information before proceeding to appeal in order to make a reasonable judgment as to whether an appeal from UUP's refund was warranted and likely to succeed. UUP's refusal to give such information at that time denied him that right and the charge based upon that denial is not rendered moot by subsequent events that might occur at the ultimate stage of the UUP appeal procedure.

In view of UUP's first and second exceptions, in particular, reference to background events is, we believe, necessary to indicate that UUP's refund procedure, together with the three-step appellate procedure, was devised by UUP and not by this Board. Questions as to the adequacy of that procedure and its appellate process have been presented to this Board through the filing of improper practice charges. In UUP and Eson, 11 PERB ¶3068, we determined that UUP's published refund procedure did not comply with the statutory requirement that a reasonable refund procedure be "established and maintained" to preserve the carefully prescribed rights of nonmembers. We required certain specific changes to be made in the procedure. Subsequently, we determined that a revised refund procedure complied with the statute, pro-

vided it was understood that the appellate process would be accomplished in an expeditious manner (UUP and Eson, 11 PERB ¶3074). These decisions were rendered on the facial provisions of the procedure without any evidence -- since none was available at that time -- as to the manner in which UUP would implement its procedures in practice.

Thereafter, we directed an investigation to determine whether UUP was implementing its procedures in compliance with our previous orders. We concluded that UUP was not in compliance with our orders since it was not implementing its procedures in an expeditious manner. We directed UUP to complete all appellate steps within specified time limits (UUP and Eson, 12 PERB ¶3093). That determination has been confirmed by the Appellate Division, United University Professions, Inc. v. Newman, ___AD2d___, lv. to app. den., ___NY2d___ (October 14, 1980).

Now, on the basis of Barry's improper practice charge, we are apprised of further details of the manner in which UUP has "maintained" and implemented its refund procedures. The record in this case demonstrates that, notwithstanding the union's burden of proving the propriety of the refund (see Brotherhood of Railway and Steamship Clerks v. Allen, 373 US 113 [1963]), UUP refuses to furnish any financial information in justification of its refund to the objectors prior to the final-step hearing before the neutral. In accepting the three-step appellate process as reasonable, we anticipated that each step would provide the objectors with successive opportunities to obtain relevant information so that UUP's initial determination of the amount of the refund might be intelligently reviewed by them. It is now

clear that the two intermediate steps can serve no such purpose and that the appeals are not treated by UUP as a true review process. Without the requested financial information, it is not possible for an objector either to make an informed decision whether to appeal or to effectively utilize the appeals process.[2] We reject as inadequate for the purposes of the effective implementation of the refund procedure UUP's assertion that its yearly budget and external audit are given to all Chapter delegates and are available on campus. Nonmembers should not be required to seek out the information in such an uncertain way in order to pursue their right of appeal.

As implemented by UUP, no legitimate purpose appears to be served by the intermediate appeal steps. They yield no useful information and they delay unnecessarily, and frustrate, anyone seeking a genuine review. Until UUP offers a detailed justification of its refund at the time of making such refund, the requirement that the objectors file successive appeals should be suspended.

REMEDY

The hearing officer has concluded that the remedy for the violation found is to require UUP to furnish the requested detailed information at the time of refund. Such a requirement is warranted so that employees may understand the basis on which their refund has been calculated and thus be able to determine whether an appeal is warranted and likely to succeed. However,

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2 At least 1021 objectors sought refunds. Approximately 85 of these appealed to the Executive Board. Forty-seven appealed to the Delegate Assembly. Twenty sought a hearing before the neutral.

the hearing officer's direction to provide the required information in connection with the 1977-78 and 1978-79 refunds is not adopted by this Board. No relevant purpose would be served by such information since the effect of the past violation found herein cannot now be corrected unless we were to direct a reopening of the time period to appeal those refunds. While we are concerned with eradicating the effects of the improper practices found, we recognize that the public interest would not be served by delaying recourse to the final UUP appeals step and to any further avenues of relief that may be available to the employees for the protection of their rights under this statute.

We conclude, however, that UUP's refusal, as a general practice, to provide such information until the procedures are exhausted and the objection is submitted to the neutral represents a more fundamental defect in the appellate procedures. Such refusal discourages employees from appealing the propriety of the amount of the refund received. The effect is to coerce them into allowing UUP to keep funds to which it may have no right under the statute, which would be tantamount to use by UUP of the agency fee for all purposes. Thus, as long as the procedures are implemented as they are, they serve only as an obstacle to the exercise by the agency fee payers of their §209-a.2(a) right to refrain from assisting the UUP in activities of a "political or ideological" nature.

Accordingly, the coercive impact of UUP's inadequate implementation of its procedures requires that we now direct that UUP refrain from requiring that employees follow the first two steps of the appellate process of its refund procedures and that these

steps remain inoperative until such time as this Board has determined that UUP has complied with our order directing it to furnish the requested information at the time of refund. We shall retain jurisdiction of this proceeding for the purpose of assuring compliance with this order and for such other purposes as may appear to us to be necessary to effectuate the policies of the Act.

NOW, THEREFORE, WE DETERMINE that United University Professions, Inc., has violated §209-a.2(a) of the Act, and

WE ORDER that United University Professions, Inc. be, and it hereby is, directed:

1. At the time of making any future refunds, to furnish to all individuals who apply for and receive refunds an itemized, audited statement of the complete receipts and expenditures of both UUP and any of its affiliates which receive, either directly or indirectly, any portion of its revenues from agency fees or dues, together with the basis of UUP's determination of the amount of the refund, including identification of those items of expense determined by UUP and its affiliates to be refundable.
2. Until this Board has determined that UUP has complied with paragraph numbered "1" of this

order, to cease requiring employees to follow the first two steps of the appellate process of its refund procedures.

3. To post immediately upon all bulletin boards regularly used by UUP to communicate with unit employees a copy of the notice attached hereto and made a part of this order.

Dated: Albany, New York
November 11, 1980

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

APPENDIX

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 THAT:

1. United University Professions, Inc. will, at the time of making any future refunds of any portion of agency fee payments, furnish to all individuals who apply for and receive refunds an itemized, audited statement of the complete receipts and expenditures of both United University Professions, Inc. and any of its affiliates receiving either directly or indirectly, any portion of its revenues from agency fees or dues, together with the basis of United University Professions, Inc.'s determination of the amount of the refund, including identification of those items of expense determined by United University Professions, Inc. and its affiliates to be refundable.

2. Until the Public Employment Relations Board has determined that United University Professions, Inc. has complied with paragraph numbered "1" herein, United University Professions, Inc., will not require employees to follow the first two appellate steps of its agency fee refund procedure.

United University Professions, Inc.
Employee Organization

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

In the Matter of	:	#2C-11/11/80
COUNTY OF ROCKLAND and ROCKLAND COUNTY COMMUNITY COLLEGE,	:	
Respondents,	:	BOARD DECISION AND ORDER
-and-	:	
ROCKLAND COMMUNITY COLLEGE FEDERATION OF TEACHERS, LOCAL 1871, NYSUT, AFT, AFL-CIO,	:	CASE NO. U-4123
Charging Party.	:	

MARC L. PARRIS, ESQ. (Jack M. Blecher, Esq., of Counsel) for Respondents

WILLIAM J. BEENHOUWER, for Charging Party

The charge herein was filed by the Rockland Community College Federation of Teachers, Local 1871, NYSUT, AFT, AFL-CIO (Local 1871). It alleges that the County of Rockland and Rockland County Community College (County) violated §209-a.1(a), (b) and (c) of the Taylor Law in that the College removed teachers from summer school classes because they refused to waive their right to file grievances over the rate of pay that they were to receive for summer school work.

Before filing the charge, Local 1871 had also filed a grievance which was awaiting the award of an arbitration panel when the improper practice charge came before the hearing officer. The hearing officer issued an interim decision, 13 PERB ¶4507 (1980), adjourning the hearing pending the

issuance of the arbitration award. He stated:

> "The charging party, upon receipt of the arbitration award, is directed to advise this hearing officer as to whether it still desires to proceed with the improper practice charge, and if it does, to submit the award in order that it may be reviewed under the criteria set forth in New York City Transit Authority." [1]

There were no exceptions to the interim decision of the hearing officer. Accordingly, we have not been asked to consider whether the hearing officer should have dealt with the merits of the charge.

The arbitration award was issued on February 5, 1980.[2] After the issuance of the arbitration award, the charging party advised the hearing officer that it did not object to the arbitration award insofar as it dealt with the allegations of its charge related to §209-a.1(a) and (c) of the Taylor Law. It acknowledged that the arbitration hearing was fairly conducted and that the award is not in conflict with the purposes of the Taylor Law. It asserted, however, that one of the issues presented by the improper practice charge was not litigated in the arbitration proceeding.

The hearing officer determined that the parties did not, in

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1 In the Matter of New York City Transit Authority, 4 PERB ¶3031 (1971), we approved the deferral of the consideration of an improper practice charge to arbitration on these grounds: the issues raised by the improper practice charge were fully litigated in the arbitration proceeding; the arbitration proceeding was not tainted with unfairness or serious procedural irregularities; and the determination of the arbitrator was not clearly repugnant to the purposes and policies of the Taylor Law.

2 A tripartite arbitration panel found that the County violated its contractual agreement with Local 1871 and it awarded the teachers who were removed from their summer school positions back pay.

the arbitration proceeding, litigate the question whether the conduct of the County constituted a violation of §209-a.1(b) of the Taylor Law.[3] He, therefore, considered the specification of the charge that the County violated this provision, and he determined that it was without merit.

As set forth in the charge, the basis for this particular allegation is:

> "On June 29, 1979, RCCFT President, Judith McFatter, met with College President, Seymour Eskow. Eskow demanded that, not only the individual Science faculty members, but also the Union, must sign such a release. McFatter refused to do so on behalf of the Union and indicated to Eskow that each faculty member had the right by contract and law to grieve. Eskow remained adamant in his demands."

Local 1871 asserts that the conduct of the County constituted improper interference with its affairs and that it was designed to prevent it from properly representing the employees in its bargaining unit.

Relying upon our decision in Board of Education/Albany 6 PERB ¶3012 (1973), the hearing officer concluded that Local 1871 misreads §209-a.1(b) of the Law. As stated in the Albany decision, §209-a.1(b) parallels §8(a)(2) of the National Labor Relations Act and prohibits employer domination of an employee organization or the granting of unlawful assistance or support to an employee organization. The reference in §209-a.1(b) to interference with the internal affairs of an employee organization

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3 CSL §209-a.1(b) declares that it is improper for a public employer "to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights."

is, like the reference to employer dominance and support, designed to prevent a public employer from meddling in the internal affairs of the organization or trying to control it. The conduct complained of here is not of that character. Rather it is an interference with the rights of unit employees to be represented by their employee organization in the processing of grievances. This is a violation of §209-a.1(a) of the Taylor Law, and it was dealt with by the arbitrator. Thus, even if established by the evidence, the conduct alleged by Local 1871 would not constitute a violation of §209-a.1(b) of the Taylor Law.

We affirm the decision of the hearing officer.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: Albany, New York
November 11, 1980

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of CITY OF POUGHKEEPSIE, Respondent, -and- CITY OF POUGHKEEPSIE UNIT OF THE DUTCHESS COUNTY LOCAL OF CSEA, Charging Party.	#2D-11/11/80 BOARD DECISION AND ORDER CASE NO. U-4458

RICHARD I. CANTOR, ESQ., for Respondent

ROEMER & FEATHERSTONHAUGH, ESQS., (Richard L. Burstein, Esq., of Counsel), for Charging Party

The charge herein was filed by the City of Poughkeepsie Unit of the Dutchess County Local of CSEA (CSEA) on January 1, 1980. It alleges that the City of Poughkeepsie (City) improperly subcontracted its waste water treatment and parking facilities to private contractors. A hearing was held on March 31, 1980. At the end of CSEA's direct case, the City moved to dismiss the charge on the ground that the collective agreement between the parties contained a management rights clause which authorized the City's conduct.[1] The hearing officer indicated that she was

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1 The management rights clause provides that, "The City retains the right...to determine whether and to what extent the work required in operating its business and supplying its service shall be performed by employees covered by this agreement...."

inclined to grant the motion to dismiss, but would reserve judgment until she read the transcript. CSEA then asked for an opportunity to present two additional witnesses.[2] The hearing officer agreed to permit CSEA to do so and adjourned the hearing until May 1, 1980.

Thereafter, CSEA sought and obtained two further adjournments. No hearing was yet scheduled on September 3, 1980, and the hearing officer wrote to CSEA that she would recommend to the Director of Public Employment Practices and Representation (Director) that he dismiss the charge if, by September 12, 1980, CSEA did not advise her of dates in October when both it and the City would be available for a continuation of the hearing.[3] When, by October 3, 1980, the hearing officer had not been advised by CSEA as to the dates in October when it and the City would be available for continuation of the hearing, she issued her decision dismissing the charge for failure to prosecute.

CSEA has filed exceptions to the decision of the hearing officer. In support of its exceptions, it asserts that, commencing September 10, 1980, it placed several phone calls to the City's corporation counsel so as to ascertain when, in October,

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2 CSEA sought to call the City Manager and the Mayor of the City. It indicated that it had anticipated that the two witnesses would have been called by the City and that it would have had an opportunity to cross-examine them. As it now appeared that the City would not call them as witnesses, it wished to call them as its own witnesses.

3. The letter states:

> "If you wish to schedule the second day of hearing, please advise me no later than September 12, 1980 of dates in October on which both you and Mr. Cantor will be available. If I do not hear from you by that date, I will recommend to the Director that the charge be deemed withdrawn and the case closed."

the City would be available to continue the hearing. It further asserts that it was unsuccessful in reaching the City's corporation counsel. It also argues that it did not understand the hearing officer's letter as indicating that the record would be closed without any further notice to it, if, by September 12, 1980, it did not furnish the hearing officer with a list of the dates when it and the City would be available to continue the hearing. Because of the statement in the hearing officer's letter that she would recommend to the Director that he deem the charge withdrawn, CSEA believed that there would be a further communication from the Director which would afford it an opportunity to explain to the Director that it was trying to ascertain dates when the City would be available to continue the hearing.

We reverse the decision of the hearing officer because the hearing officer's letter could reasonably have misled CSEA into believing that it would have a further opportunity to explain why it had not responded to that letter. We also note that the letter imposed upon CSEA alone the burden of ascertaining when, in October, the City would be available for resumption of the hearing and it gave CSEA a short time to do so.

NOW, THEREFORE, WE REMAND the matter to the hearing officer to reopen the hearing and, upon its completion, to submit her

decision and proposed order on the merits of the dispute.

DATED: Albany, New York
November 11, 1980

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member