STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-7/10/81

In the Matter of : BOARD DECISION & ORDER

STATE OF NEW YORK, UNIFIED COURT SYSTEM : Case No. E-0411

Upon the Application for Designation of Persons as Managerial or Confidential :

PAUL A. FEIGENBAUM, ESQ. (MICHAEL COLODNER, ESQ., and NORMA MEACHAM CROTTY, ESQ., of Counsel), for the State of New York

ROEMER and FEATHERSTONHAUGH (STEPHEN J. WILEY, ESQ., of Counsel), for CSEA

BLUM, HAIMOFF, GERSEN, LIPSON, SLAVIN & GARLEY (JAMES P. DOLLARD, JR., ESQ., of Counsel), for the Law Assistants Association of the City of New York

This matter commes to us on the exceptions of the Unified Court System of the State of New York, through its administrative arm, the Office of Court Administration (OCA), to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its application for the designation of Law Assistants and Law Clerks as managerial and confidential.[1/] The Civil Service Employees Association, Inc. (CSEA) and the Law Assistants Association of the City of New York (LAA) have filed briefs in opposition to the exceptions.

Law Assistants work in pools in the courts of New York State under general administrative supervision; Law Clerks work for individual judges. The employees working in both titles are professionals who do legal research, analyze questions of law and prepare drafts of legal documents, including judicial opinions

1/ The Director also rejected the contention of OCA that certain secretaries to judges were confidential. No exceptions were taken to this part of the Director's decision and we do not consider the issues raised by it.

and decisions. Some Law Assistants conduct hearings to ascertain facts which will be used in the decision of court cases. These duties, according to the Director, do not make Law Assistants or Law Clerks managerial or confidential employees within the meaning of §201.7(a) of the Taylor Law. We agree.

Section 201.7(a) of the Taylor Law provides, in essence, that employees may be designated managerial only if they (i) formulate policy or (ii) have a major role in personnel administration or in the negotiation or administration of collective bargaining agreements. Employees may be designated confidential only if they act in a confidential capacity to employees who are managerial by reason of (ii). Without designating them as managerial or confidential, §201.7(a) also excludes judges from coverage under the Taylor Law.

In its arguments before us, OCA contends that a court decision is a statement of policy by the judiciary and that the issuance of a court decision constitutes formulation of policy. Moreover, according to OCA, the issuance of a court decision involves not only the judges in the formulation of policy, but also the Law Assistants and Law Clerks, because they participate in the process which results in the formulation of policy that is declared by the court decision. CSEA and LAA disagree. They assert that a judicial decision is an interpretation of statute or common law and that the issuance of a decision is not the formulation of policy.

It is not necessary for us to resolve the dispute between OCA and the two employee organizations as to whether judges formu-

late policy within the meaning of the Taylor Law. Even if we were to determine that judges do formulate policy when they issue decisions, we would not hold that the technical professional help provided to them by Law Assistants and Law Clerks also constitutes formulation of policy. We conclude that Law Assistants and Law Clerks do not formulate policy. Judicial decisions are issued by judges. In doing so they utilize the professional services of Law Assistants and Law Clerks. Nevertheless, it is the judges who exercise the decision-making function. They alone decide the cases that come before them.

The status of Law Assistants was considered in 1968 by the Board of Certification of the Office of Collective Bargaining in New York City (OCB) which then had jurisdiction over non-judicial employees of the court system who worked in New York City. Law Assistants Association of the City of New York, Dec. No. 62-68. LAA had petitioned for certification as the representative of Law Assistants II and Chief Law Assistants. The Administrative Board of the Judicial Conference, which is the predecessor of OCA had objected to the petition on the ground that the Chief Law Assistants were "managerial" employees. Neither the Taylor Law nor the New York City Collective Bargaining Law explicitly excluded managerial employees at that time, but OCB assumed that managerial employees were excluded. OCB adopted a test for determining whether an employee is managerial that is similar to the test since set forth in the Taylor Law. In deciding that Chief Law Assistants are not managerial employees, OCB stated:

> "Chief Law Assistants do not formulate, or effectively participate in the formulation of, policy, and do not act as a representa-

> tive of management in collective bargaining, or in labor-management relations generally. Their primary and basic function is limited to legal research and the supervision of other employees similarly engaged."

There has been no relevant change in the duties of Law Assistants since that decision was written and we find its reasoning to be persuasive.

Law Assistants and Law Clerks are also not confidential employees of the judges within the meaning of the Taylor Law. While they may be confidential employees of the judges for other purposes, to be confidential for Taylor Law purposes, a person must assist or act in a confidential capacity to an employee who is managerial by reason of his labor relations or personnel administration functions. As judges are not managerial by reason of labor relations or personnel administration functions, we cannot designate the Law Assistants or Law Clerks as confidential.

NOW, THEREFORE, we affirm the decision of the Director, and

WE ORDER that the application for the designation of Law Assistants and Law Clerks as managerial or confidential be, and it hereby is, dismissed.

DATED: Albany, New York
July 9, 1981

Ida Klaus
IDA KLAUS, Member

David C. Randles
DAVID C. RANDLES, Member

6976

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-7/10/81

In the Matter of

EAST MORICHES TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Respondent,

-and-

C. ELLEN UPHAM,

Charging Party.

BOARD DECISION AND ORDER

CASE NOS. U-4465 & U-4753

JAMES R. SANDNER, ESQ. (RICHARD E. CASSAGRANDE, ESQ., of Counsel), for Respondent

STUART A. ROSENFELDT, ESQ., for Charging Party

These cases come to us on exceptions filed by the East Moriches Teachers Association, NYSUT, AFT, AFL-CIO (EMTA) to the hearing officer's decision that EMTA failed to establish and maintain a refund procedure in compliance with Civil Service Law §208.3 and his remedy directing the return in full of all agency fee monies collected from the charging party for the 1978-79 school year, together with interest.

Among EMTA's exceptions is one which contends that the basis upon which the hearing officer found the refund procedure improper was not within the allegations of the improper practice charges filed by the charging party. We find merit to such exception.

Nevertheless, we also conclude that there is a basis for sustaining, in part, the improper practice charges.

IMPROPER PRACTICE CHARGES

Case U-4465

This charge appears to have been prepared and filed by the charging party herself. In it she details her attempts to obtain a refund. The charge does not contain a specific allegation of error, but does complain of "stalling" on the part of EMTA and does contain a statement that "I feel that I am entitled to a rebate and that there were monies used for expenses other than those related to the cost of collective bargaining."

Case U-4753

This charge appears to have been prepared and filed by the attorney for the charging party. It contains a repetition of the facts alleged in the first charge plus facts occurring after the filing of that charge. The specific improper practices charged are:

1. The failure to transmit the $1.80 refund of the affiliates of EMTA;
2. The failure to "explain the standard" by which rebates were calculated and the failure to provide "sufficient financial information"; and
3. The allegation that the amount determined by EMTA does not "accurately represent the full amount of agency fees that should be returned".

HEARING OFFICER'S DECISION

The hearing officer found that EMTA established a refund procedure providing for objections to be filed with EMTA's President by registered or certified mail between September 1-15 of each year. If dissatisfied with the decision of the President, the objector may file an appeal within thirty days to the Executive Board. That Board shall render a decision within thirty days after hearing the appeal and its decision "shall be final and binding". There are no other steps in the EMTA's refund procedure.

The hearing officer found that by letter dated September 5, 1979, the charging party requested a refund and "an accounting" of all funds paid to EMTA and its affiliates "which will accurately identify and compute all costs and expenditures supported by my past dues/fees". Sometime in September, she received EMTA's "Statement of Income and Expenses" and "Budget Guidelines". By letter dated September 25, 1979, the President of EMTA advised her that EMTA had no refundable expenses and that any rebate from NYSUT and AFT would have to await an audit. By letter of November 11, 1979, the charging party appealed to the Executive Board. After some delay a meeting was scheduled with the Executive Board. Prior to that meeting, the charging party filed in early January 1980 the improper practice charge in Case U-4465. After the meeting with the Executive Board, she was advised that the Board had decided that she was entitled to a refund from EMTA in two areas: Special Gifts and Bonds to Graduating Seniors. The refund

was in the amount of $5.90.

At the time of the filing in June 1980 of the charge in Case U-4753 she had not received any refund from AFT and NYSUT although it was alleged that on or about February 8, 1980, those organizations had determined that $1.80 should be refunded. In August 1980, after the filing of the second charge, she received a check in the amount of $1.80 representing the NYSUT/AFT refund. It appears that the President of EMTA was advised in February of the amount of the refund but, according to him, his failure to transmit the amount to the charging party was an oversight.

In his decision, the hearing officer referred to his examination of the President of EMTA in which the President acknowledged that the Association could not examine the books of NYSUT and AFT and that there was no way that EMTA could review the NYSUT/AFT portion of the refund.

The hearing officer concluded, "It is clear that the Association has neither established nor maintained, nor did it intend to establish or maintain, a refund procedure applicable to its affiliates". On that basis, the hearing officer determined that EMTA never established its right to any agency fee payments and directed the return in full of all agency fee monies collected from the charging party. In light of that decision, the hearing officer found it unnecessary to determine whether adequate financial information was furnished to the charging party or whether proper standards were used in determining the amount of the refund.

EXCEPTIONS BY EMTA

EMTA excepts to the hearing officer's decision on the following bases:

1. The hearing officer's ultimate holding is in error because (a) the issue of an inadequate refund procedure was never raised by the charging party; (b) the statutory requirement of a refund procedure does not include an appellate process; and (c) the charging party never sought to appeal the affiliates' refund determination.
2. PERB has no jurisdiction over agency fee cases.
3. PERB has no jurisdiction over the issue of the adequacy of disclosure of financial information.
4. The charge in Case U-4465 should be dismissed on the basis of prematurity, failure to exhaust the internal refund procedure and a failure to state a cause of action.

Although denominated "cross exceptions", the charging party's response deals only with EMTA's exceptions.

DISCUSSION

We agree with EMTA that neither improper practice charge can be construed as raising any question concerning the adequacy of the refund procedure applicable to the affiliates. Section 204.1(b)(3) of the Board Rules of Procedure requires that an improper practice charge contain "a clear and concise statement of the facts constituting the alleged improper practice, including the names of the individuals involved in the alleged improper practice, the time and place of occurrence of each particular act alleged, and the subsections of §209-a of the Act alleged to have been violated". Section 204.1(d) of the Rules authorizes the Director of Public Employment Practices and Representation or a hearing officer to permit amendments to a charge. We will not find an improper practice which is not alleged in a charge or a timely amendment thereto. No attempt was made to amend the charges or to file a separate charge.

Accordingly, we do not sustain the basis upon which the hearing officer determined that the respondent committed an improper practice nor can we adopt the remedy which he recommended.

The charges filed herein do allege a failure by EMTA to furnish adequate financial information in connection with the refund determinations. On the basis of our review of the record, we conclude that the information furnished to the charging party by EMTA in connection with that portion of the refund representing

EMTA's share of the agency fee was sufficient to permit the charging party to evaluate the basis of the refund and to determine whether an appeal was warranted and likely to succeed. The information contained in EMTA's "Statement of Income and Expenses" and "Budget Guidelines" is sufficient to meet the obligation which the statute requires. (UUP and Barry, 13 PERB ¶3090; Hampton Bays Teachers Association, 14 PERB ¶3018).

The record discloses, however, that no financial information was furnished to the charging party regarding the basis for the refund determination by NYSUT and AFT. We conclude that the failure or refusal to provide adequate financial information as to the basis of the affiliates' refund at the time the refund was made constitutes a failure to maintain a proper refund procedure under §§202 and 209-a.2 (a) of the Act. We will, therefore, require EMTA to furnish to the charging party financial information regarding the affiliates' determination to the same extent as we have previously directed in Barry and Hampton Bays. The sole appellate procedure available to the charging party is an action in court. The information identifying those disbursements which the affiliates deemed not to be refundable would serve a useful purpose by enabling the charging party to make an informed judgment whether or not to sue.

As to the remaining allegations of these charges, we would first consider the claim of delay in completing EMTA's refund procedure. Unfortunately, this issue, as well as that relating to the alleged prematurity of the improper practice charges, is

complicated by the fact that there were, in effect, two refund determinations. EMTA notified the charging party of its refund determination long before the affiliates were able to complete their audit. Insofar as EMTA's portion of the refund is concerned, the single step appellate process appears to have been completed in a reasonably expeditious manner. However, we consider the delay in transmitting the affiliates' portion of the refund to be unwarranted and find it to be a violation of the charging party's right to an expeditious refund determination. Because of this delay we reject EMTA's contention that the charges should be dismissed because the charging party never sought to appeal the affiliates' refund determination to EMTA's Executive Board. Inasmuch as the affiliates' refund was transmitted to the charging party shortly after the filing of her second charge, we do not deem a remedial order to be warranted in regard thereto.

Finally, it is apparent that the principal purpose of these charges was to challenge the correctness of the amount of the refund and the "standards" used in determining that refund. They were filed and litigated by the charging party before our recent decision in Hampton Bays. We there held that we do not have jurisdiction to consider a charge which alleges that the amount of a refund is incorrect. Lacking such jurisdiction we cannot consider the propriety of the "standards" used by a union in determining the amount of a refund. Accordingly, we must dismiss these charges to the extent that they challenge the correctness of the refund determination.

NOW THEREFORE,

WE DETERMINE that East Moriches Teachers Association, NYSUT, AFT, AFL-CIO has violated §209-a.2(a) of the Taylor Law and

WE ORDER East Moriches Teachers Association, NYSUT, AFT, AFL-CIO

1. Within 60 days of the date of this order, to furnish to all individuals who applied for and received agency shop fee refunds for 1978-79 an itemized, audited statement of receipts and disbursements of any of its affiliates receiving any portion of its revenues from agency fees, such statement to indicate the basis of the determination of the amount of refund, including identification of those disbursements of its affiliates that are refundable and those that are not.

2. At the time of making any other and future refunds, to furnish, together with those refunds, an itemized, audited statement of its receipts and disbursements, and those of any of its affiliates receiving any portion of its revenues from agency fees, such statement to indicate the basis of the determination of the amount of refund, including identification of those disbursements of the Association and its affiliates that are refundable and those that are not.

3. To post a notice in the form attached, at each facility at which any unit personnel are employed, on bulletin boards to which it has access by contract, practice or otherwise.

DATED: Albany, New York
July 9, 1981

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 UNIT EMPLOYEES THAT:

1. We will, within 60 days of the date of PERB's order, furnish to all individuals who applied for and received agency shop fee refunds for 1978-79 an itemized, audited statement of receipts and disbursements of any of our affiliates receiving any portion of its revenues from agency fees, such statement to indicate the basis of the determination of the amount of refund, including identification of those disbursements of our affiliates that are refundable and those that are not.

2. We will, at the time of making any other and future refunds, furnish, together with those refunds, an itemized, audited statement of our receipts and disbursements, and those of any of our affiliates receiving any portion of its revenues from agency fees, such statement to indicate the basis of the determination of the amount of refund, including identification of those disbursements of the Association and our affiliates that are refundable and those that are not.

East Moriches Teachers Assn., NYSUT,AFT,AFL-CIC
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.

6986

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

#2C-7/10/81

In the Matter of

WESTMORELAND NON-INSTRUCTIONAL EMPLOYEES SERVICE ORGANIZATION, NYSUT, AFT, AFL-CIO,

upon the Charge of Violation of Section 210.1 of the Civil Service Law.

BOARD DECISION AND ORDER

Case No. D-0215

On April 14, 1981, Martin L. Barr, Counsel to this Board, filed a charge alleging that the Westmoreland Non-Instructional Employees Service Organization, NYSUT, AFT, AFL-CIO (Respondent), had violated the Public Employees' Fair Employment Act (Act), in particular Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned, and engaged in a 29 work-day strike against the Westmoreland Central School District (District) during the period from January 12, 1981, through and including February 20, 1981. It appears from the charge that during the strike 41 to 50 of the approximately 62 non-instructional employees[1/] of the District in the bargaining unit represented by Respondent absented themselves from their duties without authorization. This is the second instance involving a strike violation by Respondent (See 12 PERB ¶3016).

Respondent filed an answer which, inter alia, denied the material allegations of the charge. However, it thereafter agreed to withdraw its answer, thus admitting all of the allegations of the charge, upon the understanding that Counsel would recommend, and this Board would accept, a penalty of indefinite suspension of Respondent's check-off privileges for dues and agency shop fees, if any, with permission to Respondent to apply to this Board after

1/ The non-instructional employees include clericals, aides, custodians, maintenance personnel, bus drivers and cafeteria workers.

December 31, 1982, for full restoration of such deduction privileges upon fulfillment of the conditions of our Order, hereinafter set forth. The Counsel has recommended this penalty.[2/]

On the basis of the unanswered charge, we determine that the recommended penalty is a reasonable one, and will effectuate the policies of the Act.

We find that the Westmoreland Non-Instructional Employees Service Organization, NYSUT, AFT, AFL-CIO violated CSL §210.1 in that it engaged in a strike as charged.

WE ORDER that the deduction privileges for dues and agency shop fees, if any, of the Westmoreland Non-Instructional Employees Service Organization, NYSUT, AFT, AFL-CIO, be suspended indefinitely, commencing on the first practicable date, provided that it may apply to this Board at any time after December 31, 1982, for the full restoration of such privileges. Such application shall be on notice to all interested parties and supported by proof of good faith compliance with subdivision one of Section 210 of the Civil Service Law since the violation herein found, such proof to include, for example, the successful negotiation, without a violation of said sub-

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2/ It is intended that full restoration shall not occur until the expiration of a period during which one and one half times the annual deductions would be made if dues and agency shop fees, if any, were deducted in equal monthly installments. In fact, the annual dues of Respondent are not deducted in equal monthly installments.

division, of a contract covering the employees in the unit affected by the violation, and accompanied by an affirmation that it no longer asserts the right to strike against any government as required by the provisions of Civil Service Law §210.3(g). If it becomes necessary to utilize the dues deduction process for the purpose of paying the whole or any part of a fine imposed by order of a court as a penalty in a contempt action arising out of the strike herein, the suspension of dues deduction privileges ordered hereby may be interrupted or postponed for such period as shall be sufficient to comply with such order of the court, whereupon the suspension ordered hereby shall be resumed or initiated, as the case may be.

DATED: Albany, New York
July 10, 1981

Ida Klaus
IDA KLAUS, Member

David C. Randles
DAVID C. RANDLES, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
VILLAGE OF ATTICA,	:	#3B-7/10/81
Employer,	:	
-and-	:	Case No. C-2240
VILLAGE OF ATTICA DPW UNIT, WYOMING COUNTY LOCAL, CSEA, LOCAL 1000, AFSCME,	:	
Petitioner.	:	

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 Village of Attica DPW Unit,

Wyoming County Local, CSEA, Local 1000, AFSCME

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.

Unit: Included: All full-time and part-time employees in the following titles: MEO I, MEO II, Mechanic, Laborer, Sewage Plant Operator, Water Plant Operator and Water Meter Reader.

Excluded: All elected officials and the Superintendent of Public Works.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Village of Attica DPW Unit, Wyoming County Local, CSEA, Local 1000, AFSCME

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 10th day of July , 1981
Albany, New York

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

PERB 58.3

6991

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#3C-7/10/81
COUNTY OF ROCKLAND,	:	
Employer,	:	
-and-	:	Case No. C-2247
SHERIFF'S CORRECTION OFFICERS ASSOCIATION OF ROCKLAND COUNTY,	:	
Petitioner.	:	

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 Sheriff's Correction Officers Association of Rockland County

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.

Unit: Included: Correction Officer II, Correction Officer III.

Excluded: All other employees of the employer.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Sheriff's Correction Officers Association of Rockland County

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 10th day of July , 1981
Albany, New York

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

PERB 58.3

6992

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
VILLAGE OF ATTICA,	:	#3A-7/10/81
Employer,	:	
-and-	:	Case No. C-2241
VILLAGE OF ATTICA POLICE UNIT, WYOMING COUNTY LOCAL, CSEA, LOCAL 1000, AFSCME,	:	
Petitioner.	:	

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 Village of Attica Police Unit, Wyoming County Local, CSEA, Local 1000, AFSCME,

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.

Unit: Included: All members of the police force.

Excluded: All elected officials and the Police Chief.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Village of Attica Police Unit, Wyoming County Local, CSEA, Local 1000, AFSCME

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 10th day of July , 1981
Albany, New York

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

PERB 58.3

6990