STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2A-10/12/83

EAST MEADOW TEACHERS' ASSOCIATION,

Respondent,

-and-

CASE NO. U-6379

EAST MEADOW UNION FREE SCHOOL DISTRICT,

Charging Party.

STANLEY H. KERN, for Respondent

JAY E. GREENE, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the East Meadow Teachers Association (Association) to a hearing officer's decision that it violated its duty to negotiate in good faith within the meaning of §209-a.2(b) of the Taylor Law by making a threat to engage in a strike against the East Meadow Union Free School District (District). The basis of the charge is an advertisement which the Association placed in a local newspaper on September 4, 1982, four days before school was scheduled to open. The advertisement announced

that the District's schools would not open on the scheduled day.[1/]

The hearing officer considered this advertisement in the context of the history of negotiations between the Association and the District, including the negotiation of past agreements. On the basis of that history, he concluded that the Association adhered to a "no contract, no work" policy and that the advertisement constituted "a meaningful threat of an imminent strike." He then reached the legal conclusion that such a strike threat constitutes a violation of the duty to negotiate in good faith.

The Association argues that the record does not support the hearing officer's conclusion that it made a strike threat. It argues that the advertisement does not, by

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[1/] The following is a reproduction of the advertisement:

EAST MEADOW TEACHERS ASSOCIATION

AS A RESULT OF THE BREAKDOWN OF CONTRACT NEGOTIATIONS-

THE EAST MEADOW SCHOOLS

WILL BE CLOSED

EFFECTIVE: WEDNESDAY, SEPTEMBER 8th

UNTIL FURTHER NOTICE

For Further Information We Suggest You Call-

Martin Walsh
SUPERINTENDENT OF SCHOOLS
489-0663

Michael Turner
BOARD PRESIDENT
489-7459

East Meadow Teachers Association • Herman May, President

itself, constitute a strike threat and that the hearing officer erred in finding record support for his conclusion that, in context, it constituted such a threat. In part the Association asserts that the record contains no evidence supporting the conclusion, and in part it asserts that the hearing officer should not have relied on record evidence relating to the history of negotiations because he had indicated that he would not deem the history of negotiations relevant. Finally, it makes a public policy argument that a decision inhibiting "pressure tactics" such as its advertisement would make it harder for parties to conclude negotiations successfully. This argument challenges the hearing officer's conclusion that a strike threat is violative of the duty to negotiate in good faith.

The hearing officer properly relied upon the record and the record supports the hearing officer's conclusion that the Association was threatening to strike. The hearing officer's statement that he would not consider evidence of negotiating history was related to specifications of the charge that were dropped from the case and not to the question of whether it had threatened strike.[2/] In any event, we find that

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[2/]The specifications that were dropped complained about the Association's conduct during negotiations.

the advertisement itself constituted a meaningful threat of an imminent strike even without the evidence of negotiation history. Indeed, having been made in a local newspaper, it was a particularly egregious strike threat in that it took the form of an unqualified, seemingly official announcement to the entire community that there would in fact be a strike. Made shortly before the opening of school, this announcement not only exerted direct pressure upon the District's negotiators to yield to the Association's negotiation demands, it was also designed to induce community pressure upon the District's negotiators. Clearly this is a meaningful threat of an imminent strike.

Having affirmed the hearing officer's finding of fact that the Association made a meaningful threat of an imminent strike, we also affirm his conclusion of law that such a threat constitutes a violation of the Association's duty to negotiate in good faith within the meaning of §209-a.2(b) of the Taylor Law.

We have not earlier had occasion to address the question of whether the making of a meaningful threat of an imminent strike is a violation of the duty to negotiate in good faith. This Board has previously stated that ". . . the use of a strike threat by [an] employee organization as part of the negotiating process is not countenanced by the

Taylor Law."[3/] Because the use of the strike threat is inimical to good faith negotiations and the public policy sought to be furthered by the Taylor Law, we reaffirm that opinion.

The Taylor Law duty to negotiate in good faith means that both parties should approach the bargaining table with a sincere desire to reach agreement.[4/] They have "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 . . ." (Civil Service Law §204.3). Under the Taylor Law, there must be a continuing willingness to submit one's demands to the consideration of the bargaining table where argument, persuasion and the free interchange of views can take place. When a public employee organization makes a meaningful threat of an imminent strike, as a tactic to obtain concessions, it evidences, by such threat of unlawful conduct, an unwillingness to meet and confer in good faith and to reach agreement by peaceful and lawful means. Such conduct is not countenanced by the Taylor

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[3/] Bethpage Federation of Teachers, 2 PERB ¶3039 (1969). See also Rome Teachers Association, 9 PERB ¶3041 (1975).

[4/] Southampton PBA, 2 PERB ¶3011 (1969).

Law. Just as the threat of unlawful violence or the threat of unlawful harrassment would be inconsistent with the duty to bargain in good faith, so the threat to strike in violation of law is similarly inimical to good faith negotiations.

We believe that this view of the duty to negotiate in good faith furthers the fundamental public policy expressed not only in §210.1 of the Taylor Law which prohibits strikes by public employee organizations, but also other sections of the Law as well. Thus, §207.3 of the Law conditions certification or recognition of a public employee organization upon its affirmation "that it does not assert the right to strike against any government . . . ." Clearly, §207.3 is designed to prevent a public employee organization seeking qualification as a negotiating representative from threatening a strike. Section 211 of the Law requires the chief legal officer of a public employer to "forthwith" apply for an injunction "where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten" of the Law.

That a meaningful threat of imminent strike made by an employee organization to attain its ends in negotiation is inconsistent with the public policy of the Taylor Law

is further evidenced by the history of that Law. The statutory provisions and their underlying purposes are based upon the report and recommendations of the Taylor Committee.[5/] That Committee rejected the pressure tactic of strike threats as inapplicable to public sector labor relations. It indicated that other kinds of pressure tactics are properly available to employee organizations representing public employees to obtain their bargaining demands, but that both strikes and strike threats have no place in representative government and cannot be permitted. Accordingly, we find that the East Meadow Teachers Association violated §209-a.2(b) of the Taylor Law by making a meaningful threat of an imminent strike in order to obtain its ends in negotiation.

NOW, THEREFORE, WE ORDER the Association:

1. to cease and desist from making a threat of an imminent strike as a negotiating tactic; and
2. to sign and post a copy of the attached notice at all places normally

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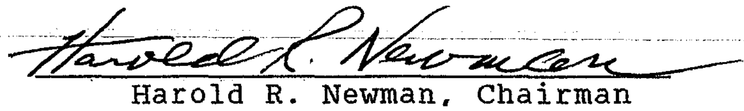
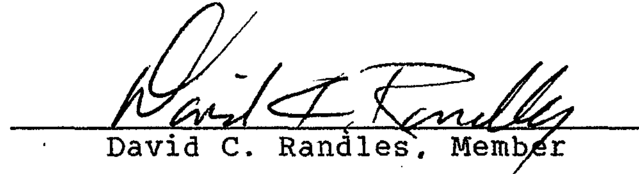
[5/] The Final Report of the Governor's Committee on Public Employee Relations, March 31, 1966.

used for communication with unit employees.

DATED: October 12, 1983
Albany, New York


Harold R. Newman, Chairman

Ida Klaus, Member


David C. Randles, Member

8559

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 represented by the East Meadow Teachers' Association that the Association will not make a threat of an imminent strike as a negotiating tactic.

......East Meadow Teachers' Association...............

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.

8560

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO, — #2B-10/12/83

Employer,

-and- — CASE NO. C-2529

BUFFALO BOARD OF EDUCATION PROFESSIONAL CLERICAL AND TECHNICAL EMPLOYEES ASSOCIATION, CHAPTER A,

Petitioner,

-and-

AFSCME, LOCAL 264,

Intervenor.

LEON HENDERSON, for Employer

SARGENT & REPKA, P.C. (NICHOLAS J. SARGENT, ESQ., of Counsel), for Petitioner

GORSKI & MANIAS, ESQS. (JEROME C. GORSKI, ESQ., of Counsel), for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Buffalo Board of Education Professional, Clerical and Technical Employees Association, Chapter A (Association) to a decision of the Director of Public Employment Practices and Representation, dismissing a petition of the Association to represent a unit of cook managers employed by the Board of Education of the City School District of the City of Buffalo (District). The approximately 50 cook managers have been in a unit of about 400 blue-collar workers which has been in existence since 1967 and which is represented by AFSCME, Local 264 (AFSCME). One

hundred fifty of the blue-collar workers are food service employees who are supervised by the cook managers.

A similar petition by the Association was dismissed by us on June 18, 1981.[1/] We gave two reasons for dismissing that petition. The first was that the Association had introduced no evidence of any conflict of interest between the cook managers and the rank and file blue-collar employees which would have overcome the indications of a community of interest inherent in a trouble free, long-standing joint negotiation relationship. The second was that the District had opposed the petition on the ground that fragmentation of a long-standing, existing unit would affect the administrative convenience adversely.

The Association has now submitted some evidence of a conflict of interest between the cook managers and the food service employees. Two cook managers testified that on three occasions some food service employees objected to the attendance of cook managers at AFSCME meetings. Each of these events occurred from three to five years before we rendered our decision in the prior case. The Association also complained that AFSCME had not given sufficient attention to various concerns of the cook managers.

The AFSCME president gave a satisfactory explanation of AFSCME's attention to the cook managers' concerns, and the

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[1/] Buffalo City School District, 14 PERB ¶3051 (1981).

incidents at the meetings are too remote in time, and in any event, not sufficient to demonstrate a conflict of interest between the two groups of employees.

The Association also relies upon a letter from the District's superintendent of schools which reverses the District's earlier position and says that "the Board of Education supports the efforts of the cafeteria managers to withdraw from Local 264 AFSCME . . . ." Upon receipt of the statement, the trial examiner wrote to the superintendent urging him to participate in the hearing and explain his statement. The superintendent declined to do so and the District submitted no evidence or argument in support of the statement. This unsupported expression of preference does not persuade us to reverse our prior decision and fragment the existing unit.

In Ulster County, 16 PERB ¶3069 (1983), we said that we would split a long-standing unit of supervisors and rank and file employees even without actual proof that the unit structure had actually subverted effective supervision. In the instant case, however, there is not even an allegation to that effect, and a mere expression of preference by an employer is not sufficient for the removal of supervisory employees from a mixed unit. Moreover, in deciding Ulster County, we distinguished the prior Buffalo case on the ground that the supervisory functions of the cook managers were exercised at a relatively low level in the operating structure of the District.

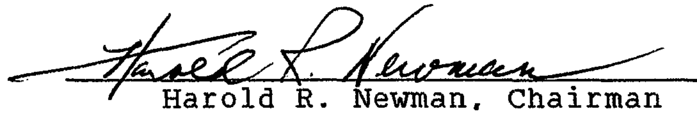
NOW, THEREFORE, WE AFFIRM the decision of the Director,

and

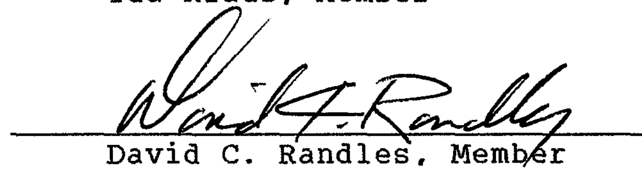
WE ORDER that the petition herein be,

and it hereby is, dismissed.

DATED: October 12, 1983
Albany, New York


Harold R. Newman, Chairman

Ida Klaus, Member


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2C-10/12/83

ELLENVILLE CENTRAL SCHOOL DISTRICT,

Respondent,

-and-

CASE NO. U-6465

ELLENVILLE TEACHERS ASSOCIATION,

Charging Party.

PLUNKETT & JAFFE, P.C., for Respondent

DENNIS CAMPAGNA, Field Representative,
NYSUT, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Ellenville Central School District (District) to the hearing officer's decision that it violated §209-a.1(d) of the Act by refusing the demand of the Ellenville Teachers Association (Association) to negotiate the impact of its unilateral change of terms and conditions of employment. The alleged unilateral change occurred on and shortly after March 31, 1982, when the District abolished, among others, the unit position of a physical education teacher (Forbes), and assigned some of the teacher's work to a nonunit administrator (Ralph). The Association's negotiation demand

was made on October 20, 1982, and the Association's improper practice charge was filed on November 17, 1982.

On the basis of his conclusion that the Association demanded the negotiation of the impact of the layoff and related unit work assignments, and not the change itself, the hearing officer determined that the charge was timely. Because we disagree with the hearing officer's interpretation of the demand and conclude that the Association's demand was a belated effort to negotiate the change itself, we must find that the charge herein is untimely.

In late March 1982, the Association's president was notified by the superintendent of schools that the District intended to eliminate four unit positions, including that held by Forbes. On March 31, 1982, Forbes was formally notified that her position was abolished effective June 30, 1982. At or about that time the District informed the Association of its intention to assign some courses previously taught by Forbes to Ralph. On April 2, 1982, the Association filed a contract grievance regarding "Dismissal of a bargaining unit member Ms. C. Forbes and appointment of an administrator Mr. K. Ralph to do bargaining unit work." The grievance proceeded to arbitration and, on October 5, 1982, the arbitrator issued his opinion and award in which he determined that "The District did not violate Article I

and Article V of the collective bargaining agreement by reassigning physical education classes previously held by Ms. Cheryl Forbes". The arbitrator concluded that the disputed assignment accompanying a layoff did not constitute a change in the District's past practice of assigning some teaching duties to nonunit administrators.

On October 20, 1982, the Association's president sent the superintendent of schools a written demand to negotiate the "assignment of bargaining unit work to persons outside of the bargaining unit". The demand alleged that such assignments with coincidental layoffs of bargaining unit members "adversely impacts on the terms and conditions of employment of members of the bargaining unit". The demand also specifically sought the reinstatement of Forbes with back pay and benefits retroactive to September 1982, pending the negotiations. On the same day the District declined to negotiate. Subsequently, the instant charge was filed.

DISCUSSION

The hearing officer construed the October 20 demand as not being limited "to the reinstatement of the laid-off teacher and a halt to the assignment of unit work to nonunit employees". Otherwise, he stated, Article XXIV of the parties' current agreement might constitute a waiver of any right to negotiate such subjects. Similarly, he agreed

that that article of the agreement might also constitute a waiver of any right to negotiate the impact of the District's decision on Forbes. Nevertheless, he concluded that the layoff and coincidental work assignment to a nonunit employee could have created an impact on terms and conditions of employment, concerning which the Association demanded to negotiate.

Contrary to the hearing officer, we conclude that the written demand of October 20, 1982 was not a demand to negotiate impact but was, as the Association itself described it in its improper practice charge, "specifically, a demand to negotiate the assignment of bargaining unit work to persons outside the bargaining unit since such assignment involved a coincidental layoff of a bargaining unit member" (Improper Practice Charge, paragraph J). In the context of the events revealed by this record, we can only conclude that the sole purpose of the demand was to reverse the unilateral action taken by the District during the previous spring. Having first sought to challenge the assignment of unit work through the contract grievance procedure, the Association then sought to negotiate the substance of that unilateral action after the arbitrator rejected its contract claim. In essence, what it sought was a halt to the assignment of unit work to nonunit employees and the reinstatement of Forbes.

Since the October 20 demand can only be construed as a demand to negotiate the unilateral action of the District taken on or about March 31, 1982, it is clear that the instant charge filed on November 17, 1982 is not timely.[1/] In view of this conclusion the other arguments of the parties need not be considered.

Accordingly, WE HEREBY ORDER that the charge herein be, and it hereby, is in all respects dismissed.

DATED: October 12, 1983
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

[1/] The Association's argument that the unilateral action was not effective until the opening of school on September 7, 1982, and that its charge is therefore timely, must be rejected under the circumstances of this case. The District's decision to lay off Forbes and reassign some of her classes was made on or about March 31, 1982, and the Association was notified at that time. The decision was sufficiently certain to warrant the filing of the grievance by the Association on April 2, 1982. That date must be considered the latest date from which the timeliness of the improper practice charge can be judged. See Monroe County, 10 PERB ¶3104 (1977).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2D-10/12/83

CARTHAGE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-2539

CARTHAGE TEACHERS ASSOCIATION,
LOCAL 2542, NYSUT, AFT,

Petitioner.

CARL McLAUGHLIN, for Employer

BERNARD G. PERRY, for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Carthage Central School District (District) to a decision of the Acting Director of Public Employment Practices and Representation (Acting Director) granting the petition of the Carthage Teachers Association, Local 2542, NYSUT, AFT (Association) and adding the title of school nurse to the unit represented by the Association. The Acting Director concluded that the nurses share a community of interest

with the unit employees and that they are unrepresented employees who have no history of negotiating with the District. The District takes no exception to the first of these conclusions, but challenges the second.

The history of negotiations involving nurses is relevant. In Chautauqua County BOCES, 15 PERB ¶3126 (1982), we would not place nurses in a unit of professional employees with whom they shared a community of interest because the nurses had been in a noninstructional unit for six years and there was no evidence that the representation was ineffective. Noting that history of negotiations, we declined to change the unit placement of those nurses because "no acceptable reason has been shown for disturbing the stability of the existing unit structure . . . ."

The District herein employed one nurse teacher and four nurses at the time when the petition was filed. It had created the position of school nurse three and a half years earlier to perform some of the assignments that had previously been performed by nurse teachers. Although the nurse teachers were in the Association's unit, the nurses were not.

The record shows that the District has negotiated written agreements with the nurses for the 1980-81,

1981-82 and 1982-83 school years. There was some give and take at these negotiations, and they resulted in changes in wages, personal leave, sick leave, the wearing of uniforms, payment for lunch time, and dental insurance.

These negotiations took place between the District and the nurses acting as a group but without any formal organization. No employee organization was certified to represent the nurses. Neither has the recognition of any such organization been publicized in the manner specified in §201.6 of our rules.

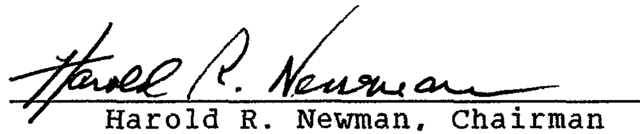
We determine that the informal bargaining relationship between the nurses and the District does not have the stability that we sought to preserve and protect in Chautauqua. We also observe that the conclusion of the Acting Director that the nurses and the teachers share a community of interest is unchallenged. Finally, we note that the showing of interest in support of the petition represents a majority of the current unit employees and a majority of the nurses.

ACCORDINGLY, WE AFFIRM the decision of the Acting Director; and

WE ORDER that the title of school nurse

be, and it hereby is, added to the existing unit represented by the Association.

DATED: October 12, 1983
Albany, New York


Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2E-10/12/83

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and-

CASE NO. U-6419

CHARLES R. IDEN,

Charging Party.

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

CHARLES R. IDEN, *pro se*

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Charles R. Iden to a hearing officer's decision dismissing his charge that United University Professions (UUP) violated its duty of fair representation by denying him an opportunity to participate in the ratification of a collective bargaining agreement specifying the terms and conditions of employment of his negotiating unit.[1] The charge was dismissed on the ground that it failed to state a cause of action.

Iden argues that the hearing officer erred in determining that his charge did not state a cause of action, and that she

[1] The hearing officer also dismissed a specification of Iden's charge that UUP acted improperly in failing to inform unit employees who are not members of UUP of the content of the proposal. Iden has not filed exceptions to that part of the hearing officer's decision.

should have held a hearing at which he could have shown that UUP's conduct was intended to pressure him to join UUP. He contends that two recent decisions of the federal courts and of the California Public Employment Relations Board support his position.

We affirm the decision of the hearing officer that nonmembers of an employee organization need not be given an opportunity to participate in a ratification vote. Moreover, we agree with the hearing officer that no hearing was required to explore UUP's motivation in denying nonmembers an opportunity to participate in the ratification vote.

Teamsters Local 310 v. NLRB, 587 F2d 1176, 98 LRRM 3186 (DC Cir., 1978), the only one of the cases cited by Iden that is relevant, supports our conclusion that nonmembers of an employee organization need not be given an opportunity to participate in a ratification vote.[2/] Elsewhere the National Labor Relations Board has stated even more explicitly that contract ratification is an internal union matter that may be reserved to members only. For example, in Branch 6000, National Association of Letter Carriers, 232 NLRB 263, 96 LRRM 1271 (1977), the

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[2/] The other federal case, Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, 453 F2d 1018, 79 LRRM 2272 (9th Cir., 1972), concerned a charge of wrongful discharge of a union member who brought a duty of fair representation charge against the union. The California case, SEIU, Local 99, 3 Cal. PERC ¶10134 (1979), holds that a union did not violate its duty of fair representation by appointing members of its negotiating team at a meeting that could not be attended by employees working night shift.

NLRB said:

> [T]he ratification of an otherwise agreed-upon contract, in which the required ratification is an integral part of the union's representation process . . . [is] an internal union matter properly determinable by union members alone, for the same reasons the members alone may choose the negotiators.

This view was affirmed by the District of Columbia Circuit of the U.S. Court of Appeals in Letter Carriers, Branch 6000 v. NLRB, 595 F2d 808, 100 LRRM 2346 (DC Cir., 1979).

That court ruled:

> A union ratification procedure is consistent with negotiation of a tentative contract by the bargaining agent, acting in a representative capacity, and with observance of the duty of fair representation.

Stating the basis for this ruling, it said:

> The general presumption is that the representative obligation has been performed in good faith.

Following these decisions, the Pennsylvania Commonwealth Court has also held that a union may restrict the ratification of a collective bargaining agreement to its members.[3/]

We agree with the decisions cited herein that there is a general presumption that the representative function of an employee organization has been performed in good faith even though the participation in a contract ratification procedure has been restricted to union members. Iden asserts, however, that the hearing officer should have held a hearing in order

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[3/] See PLRB v. East Lancaster School District, 58 Pa. Comm. 85, 110 LRRM 3009 (1981).

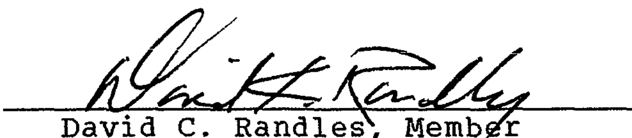
to afford him the opportunity to submit evidence that would have rebutted that presumption by demonstrating improper motivation on the part of UUP. This assertion, however, is not supported by any offer of proof that would require a hearing. Rather, it appears to be based on the mere fact of the denial of participation in the ratification vote. Thus, Iden is arguing for the adoption of a *per se* rule that denial to nonmembers of an employee organization of the opportunity to participate in a ratification vote is an improper practice. No hearing is required to evaluate this argument. It is rejected as being contrary to the presumption that we have found to be applicable.

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

DATED: October 12, 1983
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member



David C. Randles, Member