STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-8/22/84

In the Matter of

STATE OF NEW YORK (OFFICE OF GENERAL SERVICES) and COUNCIL 82, LOCAL 2458, AFSCME,

Respondents,

-and-

CASE NO. U-6846

CHARLES MOORE,

Charging Party.

MAURICE L. MILLER, ESQ., for State of New York (Office of General Services)

CHRISTOPHER H. GARDNER, ESQ., for Council 82, Local 2458, AFSCME

CHARLES MOORE, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Charles Moore, who is employed by the Office of General Services of the State of New York (OGS) as a Security Services Assistant, a position which is within the Security Services Unit. He objects to the decision of an Administrative Law Judge (ALJ) dismissing his charge that Council 82, Local 2458, AFSCME (Council 82) violated its duty of fair representation by not providing him with proper representation in an appeal from an employee performance evaluation which stated that improvement was needed.[1/]

[1/] It appears that Moore was also dissatisfied with the failure of OGS to produce as witnesses certain fellow employees whose attendance at the hearing he had requested, but his charge does not allege any facts which would constitute a violation of the Taylor Law by the State. Accordingly, the ALJ dismissed so much of the charge as complains about the State. No exception was taken to this aspect of the case.

The record shows that, unlike grievances, appeals from employee performance evaluations are the responsibility of the individual rather than Council 82, although "if the employee so chooses" he may be represented by it. The ALJ found that Moore never sought representation by Council 82 at the appeal and did not even inform it as to when the appeal was being heard. In his exceptions, Moore challenges this finding.

Having reviewed the record, we conclude that it supports the finding of the ALJ. Moreover, Moore merely points out that he had asked OGS to summon witnesses on his behalf, but this would not establish notice to Council 82.

Moore also takes exception to the ALJ's credibility determination not to believe his testimony that McCarthy, the president of Local 2458 of Council 82, first promised to support him in the grievance, and then retracted the promise because of pressure from his superiors. He argues that the ALJ could not refuse to believe the testimony because Council 82 did not call McCarthy as a witness to refute it. The ALJ's determination was based in part upon Moore's demeanor at the hearing and, to that extent, is entitled to great weight.[2/] It was also based upon inconsistencies in Moore's testimony, he having testified elsewhere that he never sought Council 82's assistance in the presentation of his appeal.

2/Fashion Institute of Technology v. PERB, 44 AD2d 550, 7 PERB ¶7005 (1st Dept., 1974); City of New York, 8 PERB ¶3051, at p. 3094 (1975).

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

DATED: August 22, 1984
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-8/22/84

In the Matter of

COUNTY OF ALLEGANY, ALLEGANY COUNTY SHERIFF, and ALLEGANY COUNTY LEGISLATURE,

Respondents,

-and-

CASE NOS. U-7082 & U-7334

LOCAL 2574, COUNCIL 66, AFSCME,

Charging Party.

DANIEL J. GUINEY, ESQ., for Respondent

JOEL M. POCH, ESQ., for Charging Party

BOARD DECISION AND ORDER

The two charges herein were filed by Local 2574, Council 66, AFSCME (AFSCME). They emanate from the negotiations between AFSCME and the County of Allegany and the Allegany County Sheriff for a collective bargaining agreement to succeed one that expired on December 31, 1983. The first charge (U-7082) complains about conduct that occurred before a fact finder appointed by the Director of Conciliation of this Board rendered his report and recommendations. The second charge (U-7334) complains

about conduct that occurred after the issuance of the fact finder's report and recommendations. Although the two charges name the County of Allegany, Allegany County Sheriff, and Allegany County Legislature as respondents, both charges complain only about conduct of the Allegany County Board of Supervisors,[1/] which is also known as the Allegany County Board of Legislators (Board of Supervisors).

The first charge (U-7082) complains that the Board of Supervisors interfered with AFSCME's negotiations with the County of Allegany and the Allegany County Sheriff. The relevant facts are that Jack Rosell, the County's Personnel Director, represented the County and the Sheriff in negotiations and was given authority to reach an agreement. On September 8, 1983, he made a counterproposal to AFSCME's prior demand. AFSCME did not accept Rosell's offer but made yet another counterproposal. On September 26, 1983, the Board of Supervisors, constituting itself a "committee of the whole", considered and rejected the union's last

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[1/]For the constitution of a County Board of Supervisors, see County Law, Article IV; for the general powers of such a board, see County Law, Article V.

counterproposal. Subsequently, negotiations resumed and "both parties altered their positions in the continuing negotiating process".[2/]

On these facts, the Administrative Law Judge (ALJ) concluded that Rosell had been delegated sufficient authority to negotiate on behalf of the County/Sheriff[3/] and that the Board of Supervisors did not interfere with those negotiations. Underlying his decision is the conclusion that the Board of Supervisors is both the executive and legislative body of Allegany County, and it, therefore, was entitled to consider proposals made to the County's negotiator. Accordingly, he dismissed this charge.

The second charge complains that the Board of Supervisors met in executive session and voted to reject the recommendations of the fact finder. The charge contains two specifications. The first is that the Board of Supervisors acted ultra vires in rejecting the fact finder's recommendations. The second is that the meeting

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2/Stipulation of the parties.

3/A public employer does not satisfy its duty to negotiate in good faith if it denies its negotiator authority to make any concessions or counterproposals. Vestal Teachers Assn., 3 PERB ¶3057 (1970).

of the Board of Supervisors should not have been held in executive session but should have been open to AFSCME.

The first specification is based upon the proposition of law that the Board of Supervisors functions exclusively as a legislative body. Rejecting this proposition, the ALJ dismissed this specification of the charge. The second specification is based upon the proposition of law that the action of the Board of Supervisors in rejecting a fact finder's recommendation is the equivalent of its holding of a legislative hearing for the purpose of issuing a legislative determination, a public hearing being required prior to the issuance of such a determination by §209.3(e) of the Taylor Law. The ALJ rejected this proposition as well and dismissed the second specification of the charge.

The matters now come to us on the exceptions of AFSCME. It makes four arguments in support of its exceptions. First, it complains that the ALJ erred in dismissing the charges against the Sheriff. It argues that he is a party to the negotiations and therefore jointly responsible for any violations of the County's Board of Supervisors. The decision of the ALJ, however, found no violation by the County's Board of Supervisors and his dismissal of the charge against the Sheriff correctly indicates that there is no evidence in the record that the Sheriff violated the Taylor Law independently.

AFSCME's second argument is that it never consented to the role exercised by the County's Board of Supervisors. That is true but it is irrelevant. Given the fact that the Board of Supervisors is both the County's legislative and executive body, its authority to consider proposals of AFSCME and recommendations of the fact finder derives from the Taylor Law and not from AFSCME's consent.

The third argument is that the ALJ erred in not finding a per se violation of §209-a.1(a). Having properly found that the Board of Supervisors did nothing that was inherently wrong, there is no basis for finding such a violation.

AFSCME's last argument is that the action of the Board of Supervisors was particularly inappropriate because it constituted a prejudgment of the negotiation issues that might come before it for a legislative determination. The charge does not allege and the record presents no facts which suggest that the Board of Supervisors ever made a legislative determination or, if so, that it acted inappropriately in connection therewith. The argument must therefore be seen as asserting that the mere exercise of an executive responsibility by the Board of Supervisors undercut its ability to fairly perform a legislative function imposed upon it by the Taylor Law, and is

therefore a per se violation of the Taylor Law's obligations to negotiate in good faith.

We find this argument without merit. There are many public employers which are covered by the Taylor Law for which a single body performs both executive and legislative functions.[4/] This Board has expressed its concern that the blurring of executive and legislative roles might complicate the Taylor Law negotiation process, but we found the exercise of both roles by a single agency to be consistent with the statute.[5/] The State Legislature, too, was aware of the problem when, in 1974, it enacted §209.3(f) of the Taylor Law which precluded legislative determinations by school boards. However, neither that amendment, nor any other provision of the Taylor Law, restricts the performance of both the executive and legislative functions enjoined by that Law upon County Boards of Supervisors or other parliamentary structured governments.

[4/]This is generally true, for example, of Public Authorities.

[5/]County of Broome, 3 PERB ¶3103 (1970).

NOW, THEREFORE, WE AFFIRM the decision of the ALJ, and WE ORDER that the charges herein be, and they hereby are, dismissed.

DATED: August 22, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2C-8/22/84

TOWN OF BROOKHAVEN,

Respondent,

-and-

CASE NO. U-6896

BROOKHAVEN HIGHWAY UNIT OF SUFFOLK LOCAL 852, CSEA, LOCAL 1000, AFSCME, AFL-CIO,

Charging Party.

COOPER, ENGLANDER & SAPIR, P.C. (DAVID M. COHEN, ESQ., of Counsel), for Respondent

ROEMER AND FEATHERSTONHAUGH, P.C. (DONA S. BULLUCK, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Brookhaven Highway Unit of Suffolk Local 852, CSEA, Local 1000, AFSCME, AFL-CIO (CSEA) to the decision of an Administrative Law Judge (ALJ) dismissing its charge that the Town of Brookhaven (Town) improperly subcontracted security services.

Over an extended period of time, the Town had employed four persons to furnish nighttime security at Coram Yard, its primary storage facility, and to provide other, laborer-type services at that facility. These four

employees had been in the negotiating unit represented by CSEA.

There was a chronic problem of missing inventory at Coram Yard while it was guarded by the four employees, none of whom had been trained in security work, and, on June 9, 1983, the Town entered into a contract with Patriot Security Services, Inc. to provide the services that had been provided by the four employees. The Town placed the four employees in laborer positions and continued to pay them the same wages and benefits as before, except for a 10% night work premium. After the charge was filed, the Town offered to assign the four employees as guards at less sensitive storage facilities where they would earn the night work premiums, but CSEA rejected the offer.

The record shows that the subcontractor made some technical changes in the performance of the guard work but, as the ALJ found, there was no essential change in the duties performed by its employees from that of their predecessors. He dismissed the charge, however, because the Town's reason for making the change was "related to its decision to alter the level of service it provides to its constituency."

The above quoted language comes from our decision in West Hempstead UFSD, 14 PERB ¶3096 (1981), in which we held that a school distict could assign disciplinary responsibilities to teachers notwithstanding the fact that

they had previously been the exclusive work of employees in a unit of teacher aides because the evidence indicated that the district believed that the teachers could perform the work more effectively.

In its exceptions, CSEA contends that West Hempstead is inapplicable here because it involved the reassignment of unit work to other employees of the employer while here, the work was reassigned to employees of a subcontractor. We hold that this is not a valid basis for a distinction between the cases. The essential factor, which is common to both cases, is that the employers set higher qualification standards for those who would perform tasks that had been performed inadequately in the past, and the setting of such qualification standards is a management prerogative.

CSEA also relies upon our decision in Wappinger CSD, 5 PERB ¶3074 (1972), which prohibits unilateral action even when there are compelling reasons unless the parties have first negotiated to an impasse. Wappinger, however, is inapposite to the case before us. It deals with the question of when, if ever, a public employer is free to act unilaterally with respect to a mandatory subject of negotiation. The instant case, like West Hempstead, deals with the circumstances under which a managerial decision to replace unit employees with nonunit employees need not be negotiated at all.

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

DATED: August 22, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EAST GREENBUSH CENTRAL SCHOOL DISTRICT,

#2D-8/22/84

Employer/Petitioner,

-and-

CASE NO. C-2718

EAST GREENBUSH TEACHERS' ASSOCIATION,
NEW YORK STATE UNITED TEACHERS,

Intervenor.

TABNER AND CARLSON, ESQS. (C. THEODORE CARLSON, ESQ., of Counsel), for Employer/Petitioner

RONALD M. PERETTI, for Intervenor

BOARD DECISION AND ORDER

The petition herein was filed by the East Greenbush Central School District (District) which seeks to exclude 15 supervisory titles from a negotiating unit of teachers represented by the East Greenbush Teachers' Association, New York State United Teachers (Association). The Association opposes the petition, and it brings the matter to us by its exceptions to a decision of the Director of Public Employment Practices and Representation (Director) granting the petition.[1/]

[1/]The Director placed the 15 supervisory titles in a new unit along with four unrepresented supervisory titles. The Association's position is that if the supervisors are removed from the current unit, the proposed unit would be appropriate and it would seek to represent that unit.

The Director based his decision on a finding that Kolakoski, the Association president, had attempted to "exert pressure on Walker [one of the supervisors] in order to change the manner in which he exercised supervisory control over his department." He concluded that Kolakoski's conduct constituted a general warning to all the supervisors to temper their exercise of supervisory responsibility over the teachers and, accordingly, "warrants the removal of supervisors from the teachers unit."

The Association argues that the record merely shows a single incident of a possible attempted subversion of supervisory responsibility and, in the context of its years of representation of both supervisors and rank-and-file employees, this incident should be treated as being de minimis.

We affirm the findings of fact and conclusions of law of the Director. We first rejected a petition to remove supervisors from a long-standing unit of rank-and-file employees in Buffalo Board of Education, 14 PERB ¶3051 (1981). In that decision, we indicated that the a priori assumption that such a unit is inconsistent with the standards specified in §207.1 of the Taylor Law for the definition of a negotiating unit could be overcome by evidence that such a unit has been in existence for a long period of time and the conditions designed to be protected by

the statutory standards have not been compromised. Given the inherently questionable nature of supervisory/rank-and-file employee units, a union that represents such a unit must be exceedingly prudent in refraining from conduct that casts doubt upon the appropriateness of its unit. The Association has not done so here. On the contrary, by attempting to subvert the exercise of supervisory responsibility, it has done something that the statutory unit standards are designed to prevent. Similar conduct has already been the basis for our separating supervisors and rank-and-file employees in City of White Plains, 16 PERB ¶3096 (1983).

NOW, THEREFORE, WE ORDER that the exceptions herein be, and they hereby are, dismissed.

WE FURTHER ORDER:

1. that there shall be a supervisory negotiating unit, as follows:

Included:

Supervisor of Music K-12, Supervisor of Business Education 9-12, Supervisor of Guidance 7-12, Reading Consultant K-6, Supervisor of Home Economics 7-12, Supervisor of Social Studies 9-12, Supervisor of Mathematics 9-12, Acting Supervisor of Science 9-12, Supervisor of School Nurse Teachers and Health Teachers K-12, Supervisor of Industrial Arts 7-12, Supervisor of English 9-12, Supervisor of Foreign Language 7-12, Supervisor of Art K-12, Supervisor of Libraries K-12, Specialist in Educational Communications K-12, Director of

Physical Education and Athletics K-12, Coordinator of English and Social Studies K-8, Supervisor of Reading K-12, and Administrative Assistant for Mathematics K-8.

Excluded:

All other employees.

2. that an election by secret ballot shall be held under the supervision of the Director among the employees of the unit determined above to be appropriate and who were employed on the payroll date immediately preceding the date of this decision, unless the Association submits to the Director within fifteen (15) days from the date of receipt of this decision evidence to satisfy the requirements of §201.9(g)(1) of the Rules for certification without an election.

3. that the District shall submit to the Director and to the Association within fifteen (15) days from receipt of this decision, an alphabetized list of all employees within the unit determined above to be appropriate who were

employed on the payroll date immediately preceding the date of this decision.

DATED: August 22, 1984
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2E-8/22/84

In the Matter of

FORT ANN CENTRAL SCHOOL DISTRICT

Employer,

-and-

CASE NO. C-2642

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME,

Petitioner,

-and-

FORT ANN CSD NON-INSTRUCTIONAL ASSOCIATION,

Intervenor.

BOARD DECISION AND ORDER

On June 8, 1983, the Civil Service Employees Association, Inc., Local 1000, AFSCME (CSEA) filed a timely petition seeking the decertification of the Fort Ann CSD Non-Instructional Association and its certification as the representative of a unit of noninstructional employees employed by the Fort Ann Central School District (District). As there was no appearance by the incumbent, CSEA and the District entered into a consent agreement establishing the following unit:

Included: All noninstructional employees.

Excluded: Superintendent's secretary, principal's secretary/payroll clerk, District treasurer/business manager, ad-hoc substitute bus drivers, and all others.

A secret ballot election was held on September 20, 1983, with the following results:

Eligible voters	35
CSEA - Yes	16
CSEA - No	16
Valid votes counted	32
Challenged ballots	5

Since the challenged ballots were sufficient in number to affect the results of the election, an investigation was conducted. By decision dated December 23, 1983,[1/] the Director of Public Employment Practices and Representation (Director) sustained the challenges to four ballots, finding that those employees were properly excluded from the eligibility list provided by the District. The fifth challenge, by CSEA, was denied, and the subject ballot was counted. As a result, the final tally of ballots was concluded on January 6, 1984, as follows:

Eligible voters	35
CSEA - Yes	16
CSEA - No	17
Valid votes counted	33

On January 12, 1984, CSEA filed timely objections to the conduct of the election or conduct affecting the results of the election.[2/] By decision dated July 11, 1984,[3/] after a hearing, the Director dismissed the

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1/ 16 PERB ¶4090 (1983).

2/ §201.9(h)(2), PERB's Rules of Procedure (Rules).

3/ 17 PERB ¶4047 (1984).

objections in their entirety. No exceptions to that decision have been filed.

The results of the election indicate that a majority of eligible voters in the agreed-upon unit who cast ballots do not desire to be represented for purposes of collective bargaining by CSEA. THEREFORE, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

Dated: August 22, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2F-8/22/84

CITY OF BUFFALO (FIRE DEPARTMENT),

Respondent,

-and-

CASE NOS. U-6955 & U-7052

BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., LOCAL 282, I.A.F.F., AFL-CIO,

Charging Party.

SAMUEL F. IRACI, JR., for Respondent

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, ESQS. (CARMIN R. PUTRINO, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the charging party to a decision of an Administrative Law Judge (ALJ) which dismissed its improper practice charges.

The charging party filed charges alleging that the respondent violated §209-a.1 of the Public Employees Fair Employment Act (Act).[1/] The charges asserted that the City changed its practice of permitting its fire inspectors to use their own cars for work and compensating them at the same rate paid to them under the parties' contract when they

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[1/] The charges alleged violations of subdivisions (a), (c) and (d) of the Act but only evidence in relation to subdivision (d) (refusal to negotiate) was presented. The ALJ dismissed the claimed violations of (a) and (c) for this reason. Exceptions were not filed with respect to the dismissal of these parts of the charge.

are required to use them. At first, the City directed its fire inspectors to use public bus transportation. It then directed that they be driven to and from the inspection sites by firefighters in City-owned vehicles.

The respondent raised as one of its defenses before the ALJ that the matter is contractual and, therefore, beyond PERB's jurisdiction. In raising this defense, it relied on the provision of the contract between the parties which entitles the unit employees to a specific payment when they are required to use their cars for City business. The identical claim was rejected by PERB in City of Buffalo, 13 PERB ¶3093 (1980), which involved another unit with the same contract clause, on the basis that the contract clause related to required use. In that case, PERB found a noncontractual past practice of permitting the employees to use their own cars for work and reimbursing them at the same rate provided in the contract when the City required them to use their cars. The City attempted to distinguish that case by claiming that, prior to the change herein, it had required the employees to use their own cars. This claim is not supported by the record.

After a hearing and the submission of briefs, the ALJ noticed another clause in the contract, which provides:

> XXVII
>
> Maintenance of Benefits
>
> All conditions or provisions beneficial to employees, now in effect which are not

> specifically provided for in this agreement or which have not been replaced by provisions of this agreement, shall remain in effect for the life of this agreement, unless mutually agreed otherwise between the City and the Union.

The ALJ then wrote to the parties, asking for their views on whether Article XXVII is dispositive of the issues raised by the charge.

The charging party, which had filed a grievance relying on Article XXVII (which it did not pursue), made two assertions in its response. First, it stated that PERB found a violation in the prior Buffalo case despite the existence of this same clause. In this regard, it asked the hearing officer to check the record of the prior proceeding. Its second assertion was that the benefit was not a contractual one and, therefore, the existence of a maintenance of benefits clause was irrelevant.

In its response, the City claimed that the applicability of Article XXVII to its conduct should be resolved through arbitration.

The ALJ, finding the clause to be applicable, dismissed the claimed violation of §209-a.1(d) of the Act on the ground that PERB is precluded by statute and decisional law from enforcing agreements or remedying their violation.[2/] Charging party's exceptions are directed to this decision.

[2/]See Act, §205.5(d); St. Lawrence County, 10 PERB ¶3058 (1977).

The situation presented herein is a novel one. Article XXVII, a maintenance of benefits clause, appears to be applicable to the changes made by the City. Such a clause may, with respect to a mandatory subject of negotiation, as is the case here, create a contractual right that complements the statutory right to the maintenance of past practices. The contractual right, however, does not extinguish the statutory right. PERB therefore has jurisdiction over this proceeding.

We note, however, that the statutory rights claimed by the charging party in this proceeding and the contractual right afforded by Article XXVII of the contract parallel each other. We further note that it is the public policy of this State to encourage public employers and employee organizations to agree upon procedures for resolving disputes.[3/] Finally, we note that the collective bargaining agreement between charging party and respondent contains such procedures, including arbitration. Accordingly, we defer to the parties' procedures for resolving disputes. We therefore dismiss the charge, subject to its reinstatement should the City interpose objections to arbitrability or should an arbitration award not satisfy the standards for deferral which we delineated in New York City Transit Authority (Bordansky), 4 PERB ¶3031 (1971).

3/Section 200 of the Act.

NOW, THEREFORE, WE ORDER that the charges herein be, and they hereby are, dismissed.

DATED: August 22, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2G-8/22/84

LEVITTOWN UNION FREE SCHOOL DISTRICT,

Employer,

-and- CASE NO. C-2756

LEVITTOWN UNITED TEACHERS, LOCAL 1383, NYSUT, AFT,

Petitioner.

In the Matter of

LEVITTOWN UNION FREE SCHOOL DISTRICT,

Respondent,

-and- CASE NO. U-7361

LEVITTOWN UNITED TEACHERS, LOCAL 1383, NYSUT, AFT,

Charging Party.

COOPER, ENGLANDER & SAPIR, P.C. (DAVID M. COHEN, ESQ., of Counsel), for Levittown Union Free School District

WILLIAM X. GIMELLO, for Levittown United Teachers, Local 1383, NYSUT, AFT

BOARD DECISION AND ORDER

The petition herein was filed by Levittown United Teachers, Local 1383, NYSUT, AFT (Local 1383) and is for certification as a representative of a unit of per diem substitute teachers employed by the Levittown Union Free School District (District). The charge herein was also filed by Local 1383. It alleges that the District refused a demand

of Local 1383 for a list of names and addresses of its per diem substitute teachers. Not having such a list, Local 1383 filed the petition without any showing of interest.

The District argued, in both proceedings, that it was not required to give Local 1383 a list of names and addresses of per diem substitutes. It further argued in the representation proceeding that the petition should be dismissed because it was not accompanied by any showing of interest. These arguments were rejected by the Acting Director of Public Employment Practices and Representation (Acting Director) in the representation proceeding and by the Administrative Law Judge (ALJ) in the improper practice case. The Acting Director declined to dismiss the petition, ordered the District to provide Local 1383 with a list of the names and addresses of the unit employees,[1/] and directed that an election be held if a sufficient showing of interest is produced "within 30 working days from the opening of school for the 1984-85 school year." The ALJ also ordered the District to provide Local 1383 with a list of the names and addresses of the unit employees. He further ordered it to "[c]ease and desist from refusing to honor any future demands by employee organizations for the type of lists of

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[1/] The definition of the unit was stipulated by the parties.

per diem substitute teachers" and to sign and post a notice informing unit employees that it will comply with the substantive requirements of the order. Both matters now come to us on the District's exceptions,[2/] and we consolidate them for decision.

The District contends that the Acting Director and the ALJ erred in ordering it to provide Local 1383 with a list of the names and addresses of unit employees. It also asserts that the Acting Director erred in not dismissing the petition on the ground that it was not supported by any showing of interest. Finally, it argues that, in any event, the Acting Director erred in that he granted Local 1383 an excessive extension of time in which to file its showing of interest.

We find no merit in any of these positions. There is a clear precedent for the decisions of the Acting Director and the ALJ on the lists. It is Bethpage UFSD, 15 PERB ¶3094 (1982). In that case we held that a school district is

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[2/]Subsequent to the submission of its exceptions the District advised the Board that it had "decided to turn over the list of per diem substitute teachers which had been requested by the union . . . . This particular issue is therefore moot."

There is no indication that the District has actually provided Local 1383 with the lists. Moreover, it does not withdraw its exceptions and, as the exceptions contest the ALJ's order directing the District to cease and desist from refusing to honor further demands for lists of unit employees and their addresses, all the legal issues raised by the exceptions as originally filed are before us.

required to provide a list of the names and addresses of per diem substitute teachers who are eligible for Taylor Law representation upon the demand of an employee organization which seeks to represent them. The basis of our decision was that:

> the intermittent nature of the employment of per diem substitutes makes it unlikely that the employee organization could obtain this information [without such lists] . . . . It would therefore be unduly burdensome for the organization to obtain the support necessary for a showing of interest. The employees might thus be deprived of the rights that the Legislature specifically sought to accord them. (at p. 3143)

The District contends that we decided Bethpage erroneously. It argues that, at the very least, a union's difficulty in communicating with unit employees is a question of fact and not of law. Thus, Local 1383 should have been required to attempt to communicate with unit employees and to have shown that, notwithstanding a good faith effort, it failed to do so before being entitled to a Bethpage list. This argument was considered by us and rejected in Bethpage.

In declining to dismiss the petition on the ground that it was not supported by a showing of interest, the Acting Director relied on our decision in County of Erie, 13 PERB ¶3105 (1980), confirmed, Eiss v. PERB, 14 PERB ¶7004 (Sup. Ct., Alb. Cty., 1981) in which we gave a challenging union an opportunity to submit a late showing of interest when the employer's conduct had denied it a fair opportunity to obtain

such a showing. The District would distinguish that case on the ground that the extension was to remedy an improper practice, the employer's conduct having interfered with the efforts of the petitioning union to obtain a showing of interest. Based upon its position that Bethpage is wrong, it contends that there has been no such improper practice here. As we hold here that the District has interfered with the efforts of Local 1383 to obtain a showing of interest, this argument of the District fails.

The District argues that the extension of time in which to submit a showing of interest is, in any event, excessive in that, in Bethpage, we merely granted a 30-day extension from the time of the union's receipt of the list. The Acting Director granted a longer period of time because his order was issued shortly before the school summer vacation commenced, and he determined that vacation time is particularly unpropitious for seeking a showing of interest. We rule that this determination reflects a reasonable exercise of discretion.

NOW, THEREFORE, WE ORDER:

1. The District to submit to the Director of Public Employment Practices and Representation within 15 days of its receipt of this decision, with a copy to Local 1383, an alphabetized list of the names and home addresses of all per diem

substitute teachers who received from the District a reasonable assurance of continuing employment for the 1983-84 school year and a separate list of all per diem substitute teachers who received from the District a reasonable assurance of continuing employment for the 1984-85 school year;

2. That an election be held by mail ballot in the stipulated unit, if within 30 working days from the opening of school for the 1984-85 school year, Local 1383 files a showing of interest in support of its petition which, in all other respects, complies with the requirement specified by the rules,[3/] unless the submission is sufficient for certification without an election pursuant to §201.9(g)(1) of the rules of this Board;

3. The District to cease and desist from refusing to honor any future demands by employee organizations for lists of the

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[3/] If a sufficient showing of interest is not made, the petition shall be dismissed.

names and home addresses of per diem substitute teachers who receive a reasonable assurance of continued employment; and

4. The District to sign and post a notice in the form attached in all buildings at which per diem substitute teachers work in locations ordinarily used to post notification to that class of employees.

DATED: August 22, 1984
Albany, New York

Harold R. Newman, Chairman

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 employees of the Levittown Union Free School District (District) that the District:

1. Will immediately provide the Levittown United Teachers, Local 1383, NYSUT, AFT with an alphabetized list of the names and home addresses of all per diem substitute teachers who received from the District a reasonable assurance of continuing employment for the 1983-84 school year and a list of per diem substitute teachers who are issued by the District a reasonable assurance of continuing employment for the 1984-85 school year;

2. Will not refuse to honor any future demands by employee organizations for the type of lists of per diem substitute teachers above described .

Levittown Union Free School District

.....

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 #2H-8/22/84

CITY OF BINGHAMTON,

Employer,

-and- CASE NO. C-2772

TEAMSTERS LOCAL UNION 693, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

-and-

LOCAL UNION 826, AFSCME, AFL-CIO,

Intervenor.

DAVID M. DUTKO, ESQ., for Employer

BEINS, AXELROD & OSBORNE, P.C. (HUGH J. BEINS, ESQ., of Counsel), for Petitioner

ROWLEY, FORREST & O'DONNELL, P.C. (BRIAN J. O'DONNELL, ESQ. and RONALD G. DUNN, ESQ., of Counsel), for Intervenor

BOARD DECISION AND ORDER

The petition herein was filed by Teamsters Local Union 693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) to represent a unit of rank-and-file employees of the City of Binghamton's Departments of Public Works and Parks, Bureau of Water, and its Signal Bureau (Binghamton). These employees had been

represented by Local Union 826, AFSCME, AFL-CIO (AFSCME), which intervened in the proceeding. The matter now comes to us on the exceptions of AFSCME to an interim decision of the Acting Director of Public Employment Practices and Representation (Acting Director) finding the petition of the Teamsters timely.[1/]

FACTS

The City's collective bargaining agreement with Local 826 expired on December 31, 1983, and, under §201.3(e) of our Rules, it had 120 days to conclude a successor agreement before the Teamsters could file a timely petition.

AFSCME reached such an agreement with Binghamton on March 9, 1984, covering the three-year period from January 1, 1984 through December 31, 1986. Subsequently, two groups of employees asserted that the agreement was a sham and was concluded for the sole purpose of imposing a contract bar, and they commenced actions in the State Supreme Court against AFSCME and Binghamton. The Court granted a temporary restraining order ex parte on March 16, 1984, which, inter alia, stayed AFSCME and Binghamton from executing their agreement.

[1/] The Acting Director issued a consolidated decision covering this matter and Case C-2771, a related matter. We separated these matters for decision when, on July 19, 1984, we issued a decision in C-2771 before we completed our deliberations in the instant matter.

Four days later, the Court vacated its order on the ground that this Board had exclusive jurisdiction over the conduct complained about in the lawsuits and, on March 26, AFSCME ratified and executed the agreement. On April 26, the Appellate Division, Third Department reversed the vacation of the temporary restraining order on the ground that the lower court was in error when it ruled that it lacked concurrent jurisdiction with PERB over the conduct complained about in the lawsuit. Binghamton appealed that decision and, under the mistaken impression that its appeal removed the stay, it executed the agreement.

The matter next came to the Appellate Division on April 30 on the Teamsters' motion to punish Binghamton for contempt. The Court ruled that the "actions of the City officials were in violation of the temporary restraining order and the subject contract is, therefore, invalid." (emphasis supplied) It noted, however, that it had not considered the merits of the action before it, having only ruled on the jurisdictional question, and it remitted the matter to Special Term for determination on the merits. Subsequently, Special Term vacated the temporary restraining order on the ground that none was required because the Teamsters would not, in any event, suffer irreparable harm. There has not yet been any determination on the merits by any court.

The decision by the Acting Director is based upon the language of the Appellate Division that AFSCME's contract with Binghamton is invalid. It is also based upon decisions in Farmingdale UFSD, 7 PERB ¶3073 (1974), and Lakeland CSD, 12 PERB ¶3017 (1979), holding that an unsigned collective bargaining agreement does not bar a representation petition.

DISCUSSION

The matter comes to us on the exceptions of AFSCME. It asserts that it and Binghamton had fully agreed upon a bona fide contract, the sole impediment to the execution of which "was a series of stays obtained by the Teamsters through their efforts blocking the City from executing the contract based on a fraudulent claim that the agreement was a sham." It then argues that the Teamsters should not be permitted to rely upon Binghamton's failure to properly execute the agreement because its actions had prevented that execution.

Having reviewed the record and considered the arguments of the parties, we affirm the decision of the Acting Director. He correctly determined that the motives of the plaintiffs in bringing the lawsuits is not relevant to his or our inquiry, that inquiry being whether there is a valid, executed collective bargaining agreement between AFSCME and Binghamton which would bar the Teamsters petition. His determination that there is no such agreement is also correct.

NOW, THEREFORE, WE REMAND the matter to the Director of Public Employment Practices and Representation for further proceedings consistent with this decision.

DATED: August 22, 1984
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#3A-8/22/84

BINGHAMTON CITY SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-2726

BROOME EDUCATIONAL LOCAL 866, CIVIL SERVICE EMPLOYEES ASSOCIATION, 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 the Broome Educational Local 866, Civil Service Employees Association, 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 teacher aides, study hall and lunch room monitors.

9232

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Broome Educational Local 866, Civil Service Employees Association, Local 1000, AFSCME and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 22, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#3B-8/22/84

VILLAGE OF GRANVILLE,

Employer,

-and-

CASE NO. C-2776

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

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

Unit: Included: Working foreman, heavy equipment operators, water and sewage treatment operator, auto mechanic, and sewage treatment plant operator and deputy superintendent of public works.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 22, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#3C-8/22/84

SMITHTOWN CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-2760

ASSOCIATION OF SMITHTOWN PROFESSIONAL NURSES,

Petitioner,

-and-

SMITHTOWN SCHOOL 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,[1/]

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

IT IS HEREBY CERTIFIED that the Association of Smithtown Professional Nurses 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.

[1/]The Smithtown School Employees Association chose not to seek certification in the stipulated unit.

Unit: Included: All registered professional nurses employed by the District.

Excluded: School nurse teacher, clerical, custodial, cafeteria and food service, clerk, mechanic, building and ground, teacher aide, bus driver.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Association of Smithtown Professional Nurses and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 22, 1984
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

David C. Randles
David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#3D-8/22/84

COUNTY OF DUTCHESS and DUTCHESS COUNTY SHERIFF,

Joint Employer,

-and-

CASE NO. C-2781

NEW YORK STATE FEDERATION OF POLICE, INC.,

Petitioner,

-and-

DUTCHESS COUNTY DEPUTY SHERIFF'S UNIT OF THE DUTCHESS COUNTY LOCAL 814, THE CIVIL SERVICE EMPLOYEES ASSOCIATION, 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 New York State Federation of Police, Inc. 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 employees in the titles listed in attached Appendix A.
	Excluded:	All other employees of the joint employer.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Federation of Police, Inc. and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 22, 1984
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

David C. Randles
David C. Randles, Member

APPENDIX "A"

Accountant (SH)
Account Clerk (SH)
Chief Court Attendant
Clerk (SH)
Correction Corporal
Correction Officer
Correction Officer-Building Maintenance Mechanic
Correction Officer-Building Maintenance Supervisor
Correction Officer-Cook
Correction Officer-Cook Manager
Correction Sergeant
Court Attendant
Deputy Sheriff
Deputy Sheriff Lieutenant
Deputy Sheriff Sergeant
Education Program Coordinator
Inmate Activities Coordinator
Principal Account Clerk (SH)
Registered Professional Nurse (SH)
Senior Account Clerk (SH)
Senior Account Clerk-Typist (SH)
Senior Building Maintenance Mechanic
Senior Stenographer (SH)
Senior Typist (SH)
Sheriff Aide
Stenographer (SH)
Supervisor of Nurses (SH)
Typist (SH)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #3E-8/22/84

COUNTY OF ONONDAGA,

Employer,

-and- CASE NO. C-2794

ALLIANCE OF REGISTERED NURSES, LOCAL 200, SEIU,

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Intervenor,

-and-

CSEA, LOCAL 1000, AFSCME, AFL-CIO,

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 New York State Nurses 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.

Unit: Included: Registered nurses and persons authorized by temporary permit to practice as registered nurses employed by the County in the following titles: Registered Nurse, Assistant Head Nurse, Head Nurse, Community Health Nurse, Hemodialysis Instructor, Nursing Supervisor, Community Health Nursing Supervisor, Nursing Supervisor-Training, Nurse Practitioner (Gerontology), Nurse Practitioner (Primary Care), Nurse Practitioner (Pediatrics), Patient Evaluation Supervisor and Community Health Nurse Clinician.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Nurses Association and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: August 22, 1984
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member