#2A-11/25/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF MONROE and MONROE COUNTY SHERIFF,

Respondents,

-and-

CASE NO. U-7376

SECURITY AND LAW ENFORCEMENT EMPLOYEES, AFSCME COUNCIL 82 AND MONROE COUNTY DEPUTY SHERIFFS LOCAL 2964 OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Charging Party.

BERNARD WINTERMAN, for Respondent County of Monroe

CHARLES R. VALENZA, ESQ., COUNTY ATTORNEY (CHARLES MILLER, ESQ., of Counsel) for Respondent Monroe County Sheriff

PETER HENNER, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Security and Law Enforcement Employees, AFSCME Council 82 and Monroe County Deputy Sheriffs Local 2964 of the American Federation of State, County, and Municipal Employees, AFL-CIO (Local 2964) to a decision of an Administrative Law Judge (ALJ) dismissing so much of its charge as alleged that the County of Monroe and Monroe County Sheriff (Joint Employer) violated §§209-a.1(a), (c) and (d) of the Taylor law.[1/]

[1/]The ALJ also dismissed a specification of the charge that the Joint Employer violated §209-a.1(e) of the Taylor Law, but no exceptions were filed to that part of her decision.

The alleged violation of §209-a.1(d) is that the Joint Employer unilaterally assigned civil duties to those of its employees who were not in its Civil Bureau. The alleged violation of §§209-a.1(a) and (c) is that such action of the Joint Employer was improperly motivated, the Joint Employer's intention being the frustration of its employees' rights of organization and representation as guaranteed by §§202 and 203 of the Taylor Law.

FACTS

The Joint Employer employs, and Local 2964 represents, four different groups of deputy sheriffs. Respectively, these employees are in the Police Bureau, the Jail Bureau, the Civil Bureau, and Court Security. Local 2964 and the Joint Employer have been parties to a series of collective bargaining agreements. On March 15, 1984, when the charge herein was filed, the parties were subject to a collective bargaining agreement that covered the period of January 1, 1982 through December 31, 1984. That agreement contains a salary schedule which provides higher pay to Police and Jail Deputy Sheriffs than to Civil and Court Security Deputies. It also contains a clause, applicable to all unit employees, prohibiting removal "except for just cause shown only after a departmental hearing upon stated charges."

Notwithstanding this job security clause, a new sheriff may decide to demote or dismiss one of the deputies appointed

by his predecessor so long as that deputy's office requires him to perform some civil obligations.[2/] This is because State law makes a sheriff personally liable for the actions of his Civil Deputies and the courts have held that a sheriff therefore "cannot be denied his right to employ only those Civil Deputies of his own choosing."[3/]

After taking office on January 1, 1980, Monroe County Sheriff Andrew Meloni dismissed Deputy Sheriff Fagan, and Local 2964 filed a grievance alleging a violation of the job security clause contained in the parties' agreement covering the period January 1, 1978 through December 31, 1979. The Supreme Court, Monroe County, issued an order staying arbitration on the ground that Sheriff Meloni had the right, as a newly elected sheriff, to dismiss Fagan. This decision was appealed to the Appellate Division, Fourth Department, which, on November 9, 1982, remanded the matter to the lower court for the purpose of ascertaining whether Deputy Sheriff Fagan was a Civil Deputy.[4/]

On November 25, 1980, while this matter was pending in court, a deputy in the Police Bureau performing road patrol duties was given the assignment of serving a civil paper

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[2/] Reese v. Lombard, 46 N.Y. 2d 904 (1979).

[3/] County of Monroe v. AFSCME Council 82, 90 A.D. 2d 968, 969 (4th Dep't 1982).

[4/] Id.

during the course of his routine patrol. Local 2964 filed a grievance alleging a violation of §2.3.1 of the parties' collective bargaining agreement. In pertinent part, that section states:

> [U]nder no circumstances may . . . changes be made in the specifications for any existing position, until such changes have been discussed with the Union . . . . Upon consultation with the Union, the Employer may then designate the new job classification . . . .

The grievance was brought to arbitration and, on August 7, 1981, the arbitrator found that the service of civil papers was not part of the regular duties of deputies in the Police Bureau and that the assignment complained about was therefore a unilateral action of the Joint Employer. He held that this unilateral action violated the parties' collective bargaining agreement, then in force, because the Joint Employer had not discussed the change with Local 2964. In this connection, he stated:

> [A]ll that the contract requires is that previous discussion be had with the Union before the Sheriff changes the specifications (content) of the Road Patrol position. In such regard, he is not foreclosed from making the change but merely must await its implementation until after such discussion.

The above quoted language of §2.3.1 of the parties' collective bargaining agreement, as it existed in November 1980, was carried forward, without change, into the parties' 1982-1984 agreement, the period relevant to the charge herein.

Eleven months after the arbitration award, on July 9, 1982, a representative of the Sheriff initiated a discussion during the course of a labor-management meeting regarding the service of civil papers by deputies who are regularly assigned road patrol responsibilities. She stated that the Sheriff would exercise his discretion to make such assignments. A representative of Local 2964 objected and expressed his opinion that the Sheriff could not do so without an agreement on the matter. No such assignments were actually made until March 1983, and Local 2964 was not aware of the twelve such assignments made during the balance of that year.

In November 1983, after the Appellate Division remanded the Fagan matter to Special Term, and before the matter was decided there, the Joint Employer delivered to Local 2964 an amended job description of all deputies not in the Civil Bureau specifying that each "performs civil duties as required." The Joint Employer discussed this change with Local 2964 at a Joint Labor-Management Committee meeting held in December 1983 or January 1984, at which time Local 2964 expressed its objection to the change. It is the amendment of the job description that precipitated the charge herein.

The Joint Employer's witnesses testified that it changed the job description of the deputies in order to afford the Sheriff greater flexibility in performing his civil duties.

More particularly, they indicated that this was needed in order to facilitate the service of civil papers at times other than the regular working hours of Civil Deputies, without paying premium wages to the Civil Deputies and under conditions where service of papers might incur risks for which Civil Deputies were not trained.

The record shows, however, that while approximately 6,000 civil papers are served each year by the Sheriff's staff, between March 23, 1983 and May 17, 1984, only 17 were sent to deputies performing road patrol functions for service and, of these, 11 were served during the regular working hours of Civil Deputies. Moreover, there is no record evidence that any civil papers were sent to deputies in the Jail Bureau for service. The record also shows one instance when the service involved a risk. On that occasion, the assignment was given to a civil deputy and a deputy in the Police Bureau was sent as an escort.

A witness for Local 2964 testified that at a pre-hearing conference on the improper practice charge, the Manager of Labor Relations for the County of Monroe stated that the Sheriff "intended to preserve the rights of the office and pass on to his successor the same rights that he came into the office with." This testimony was not addressed in cross-examination nor by any other witness; the County's Manager of Labor Relations was present at the hearing, but did not testify.

DISCUSSION

We affirm the determination of the ALJ that the Joint Employer's conduct did not violate §209-a.1(d) of the Taylor Law. It did not constitute a refusal to negotiate in good faith. The parties' agreement, as interpreted by an arbitrator, contemplated changes in the job content of deputy sheriffs so long as the Sheriff first discussed the changes with Local 2964. The complaint here is that the job content of deputy sheriffs was changed unilaterally. The specific issue raised by this specification of the charge is whether the discussions that took place at the Joint Labor-Management Committee meeting of December 1983 or January 1984 were sufficient to satisfy the Joint Employer's contractual obligation. This is an issue of contract enforcement and not of good faith negotiations. Accordingly, even if there is merit in Local 2964's complaint, it does not rise to the level of a violation of §209-a.1(d).[5/]

We also affirm the determination of the ALJ that the Joint Employer's conduct did not violate §209-a.1(c) of the Taylor Law. It provides that a public employer may not "discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization." The record is devoid of any evidence of such intent.

5/Section 205.5(d) of the Taylor Law and St. Lawrence Co., 10 PERB ¶3058 (1977).

We reverse the decision of the ALJ insofar as she found no violation of §209-a.1(a) of the Taylor Law. It provides that a public employer may not "interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in §202 for the purpose of depriving them of such rights." Section 202 assures public employees of the right to form, join and participate in an employee organization. This is intimately related to the §203 right to be represented by an employee organization. Action taken for the purpose of frustrating the right of representation necessarily has a chilling effect on the §202 right of organization and is inherently destructive of that right.[6/]

Considering the totality of the evidence, we find that the action taken by the Joint Employer was intended to effectively annul a key provision of the collective bargaining agreement affecting all unit employees other than those in the Civil Bureau, to wit, job security. Moreover, it was intended to evade the Joint Employer's duty to negotiate job security to the extent that such a provision might be otherwise applicable to a successor Sheriff.

6/Thus, in County of Suffolk, 15 PERB ¶3021 (1982), we found a violation where the public employer granted a benefit to unit employees without negotiating its action with the employees' representative. See also Fashion Institute of Technology, 5 PERB ¶3018 (1972), rev'd on other grounds, Fashion Institute of Technology v. Helsby, 44 A.D. 2d 550, 7 PERB ¶7005 (1st Dep't 1974).

By changing the job description of Deputy Sheriff for this purpose, the Joint Employer's action constituted improper coercion. Our decision in Board of Education of the City School District of the City of New York,[7/] is a relevant precedent. There, we found a violation of §209-a.1(a) in that a public employer took steps to reclassify the positions of some of its employees in order to frustrate their organization, even though there was no evidence that the public employer bore any animus towards the union that was seeking to organize those employees. We noted that the public employer could have undertaken the reclassification for bona fide business reasons; however, it violated the statute because the record established that it would not have undertaken that reclassification but for the employees' exercise of rights protected by the Taylor Law.

The circumstances herein parallel those in the cited case. In Board of Education, it was a right of the public employer, sanctioned by law, to reclassify its employees for bona fide business reasons. Here, it was a right of the public employer, sanctioned by contract, to change the content of unit positions for bona fide business reasons so long as it followed contractually dictated procedures. The

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[7/] 18 PERB ¶3068 (1985).

gravamen of the violation of §209-a.1(a) of the Taylor Law in both cases is that the public employer was improperly motivated in taking actions that would otherwise be permitted.

We do not find that the Association consented to the Joint Employer's conduct by agreeing to the continuation of §2.3.1 of the parties' collective bargaining agreement after the arbitrator interpreted it as permitting the Joint Employer to change the job content of deputy sheriffs so long as it complied with the contractual process. The issue before the arbitrator was one of contract interpretation; how the Joint Employer could change job content. The Taylor Law question -- may the Joint Employer change job content for the purpose of constricting its duty to negotiate job security -- was not before the arbitrator. Thus, the Association's agreement to continue §2.3.1 of the contract did not constitute a waiver of its right to challenge the motivation behind the Joint Employer's action. Neither did the agreement constitute a waiver of the negotiated job security clause.[8/]

8/Although the violation of a collective bargaining agreement does not, by itself, constitute an improper practice, §205.5(d) of the Taylor Law provides that we shall "exercise jurisdiction over an alleged violation of such an agreement that would . . . otherwise constitute an improper employer or employee organization practice." It is therefore appropriate for us to interpret the agreement and determine that Local 2964 did not consent to the Joint Employer's conduct herein.

There is a further parallel between Board of Education and the instant case. In both, the affected employee interests were potential rather than immediate rights. In Board of Education, no employee organization had yet been recognized or certified to represent the employees when the improper conduct occurred. In the instant case, the Joint Employer's change can affect employees only when, at some future time, a new Sheriff will take office. As noted in Board of Education, however, the potential injury diminishes present rights of public employees.

Having reversed the determination of the ALJ that the Joint Employer's conduct herein was consistent with its obligations under §209-a.1(a) of the Taylor Law, we must consider the Joint Employer's affirmative defense that the charge was not timely. The basis of this defense is the Joint Employer's contention that the conduct complained about in the charge occurred on July 9, 1982, when the Sheriff first announced his intention of assigning civil duties to police deputies, or, at the latest, during March 1983 when the Sheriff actually did so. In either case, this was more than four months prior to the filing of the charge.[9/]

We find that the four months during which to file the charge began to run in November 1983 when the Sheriff

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9/Section 204.1(a)(1) of the Rules of this Board permits the filing of a charge within four months of the conduct complained of.

delivered to Local 2964 the amended job description for titles not in the Civil Bureau. The announced intention of the Sheriff on July 9, 1982 was not the operative event constituting the violation. After Local 2964 expressed its objection, nothing further was done by the Sheriff for nine months. This could well have indicated to Local 2964 that the Sheriff was not going ahead with his plan and therefore no charge was necessary. The institution of the plan in March 1983 was also not the operative event triggering a charge. Local 2964 had no actual knowledge of it. Neither did the few assignments made give it constructive knowledge.[9/] Accordingly, we find the charge timely.

NOW, THEREFORE, to remedy its violation of §209-a.1(a) of the Taylor Law, WE ORDER the Joint Employer to:

1. cease and desist from assigning civil duties to deputy sheriffs who are not in the Civil Bureau for the purpose of rendering them subject to demotion or dismissal at the discretion of a successor Sheriff;
2. remove the language "performs civil duties as required" from the job descriptions of deputy sheriffs;

9/The time to file a charge runs from when charging party knew or should have known of the violation. City of Yonkers, 7 PERB ¶3007 (1974); County of Ulster, 14 PERB ¶3008 (1981).

3. post the attached notice at all locations normally used for communicating with deputy sheriffs.

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

DATED: November 25, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, 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 County of Monroe and Monroe County Sheriff, a joint employer, represented by the Security and Law Enforcement Employees, AFSCME Council 82 and Monroe County Deputy Sheriffs Local 2964 of the American Federation of State, County, and Municipal Employees, AFL-CIO, that the Joint Employer:

1. will not assign civil duties to deputy sheriffs other than those in the Civil Bureau for the purpose of rendering them subject to demotion or dismissal at the discretion of a successor Sheriff.

2. will remove the language "performs civil duties as required" from the job descriptions of deputy sheriffs.

County of Monroe and Monroe County Sheriff

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.

10057

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,

Respondent,

-and-

CASE NO. U-8121

NIAGARA FRONTIER TRANSPORTATION AUTHORITY PUBLIC SAFETY OFFICERS BENEVOLENT ASSOCIATION.

Charging Party.

DAVID F. MIX, ESQ., for Respondent.

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

BOARD DECISION AND ORDER

The charge herein was brought by the Niagara Frontier Transportation Authority Public Safety Officers Benevolent Association (Association) on behalf of a unit of safety officers. It complains that the Niagara Frontier Transportation Authority (Authority) unilaterally assigned unit work to nonunit employees. The Administrative Law Judge (ALJ) dismissed the charge without a hearing on the ground that it failed to allege facts sufficient to constitute a violation of the statute.[1/] More

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1/The ALJ also considered the Association's particularization of its charge.

specifically, he determined that the charge is defective because it does not allege any material detriment to the unit employees. The matter comes to us on the exceptions of the Association.

The Association alleges that unit employees had performed various security duties, including crash and fire rescue, medical treatment, checkpoint security, as well as road patrol security, night security, bomb security and hijack security. It further alleges that on May 1, 1985, the Authority restricted the unit employees to crash and fire rescue, medical treatment and checkpoint security, the other police and/or security work being transferred "to the Airport Transport Police Agency, who are not represented by the Association."

It did not allege that this transfer of unit work had caused any direct, immediate or specifically identifiable detriment to the unit employees' terms and conditions of employment. According to the ALJ, such an allegation is an essential element of a valid charge complaining about the transfer of unit work to nonunit employees.

Apparently there is some ambiguity in our previous decisions regarding this point. In Scarsdale PBA, 8 PERB ¶3075, at 3133 (1975), this Board held that "job content of current employees is a mandatory subject of negotiations so long as the negotiations demand would not narrow the inherent nature of the employment involved." There, without reaching the question of detriment or benefit to individual

employees, we found a demand that police not be assigned to repair police patrol vehicles to be mandatory because such repair work was not part of the inherent nature of the work of police. The Association argues that it has alleged that the security duties which the Authority has removed from the unit employees has been part of the inherent nature of the work, and that it therefore established a prima facie case when it alleged that the Authority narrowed that employment unilaterally.

The ALJ, however, relied upon this Board's three "civilianization" decisions for the proposition that unilateral action by an employer diminishing the job duties of unit employees is not improper, absent a detriment to the unit employees' terms and conditions of employment. In those cases this Board dismissed complaints that public employers improperly assigned some duties of police officers to civilian employees.

The first of the civilianization decisions is County of Suffolk, 12 PERB ¶3123 (1979). In that case we found that the employer's action related primarily to the qualifications of the employees "assigned to certain record maintenance, teletype and training tasks." We ruled that a public employer might determine that the qualifications applicable to police officers were not necessary for the performance of those duties. However, we proceeded to indicate that the mere reassignment of duties previously

performed by police officers to employees who do not meet the qualifications of police officers would not ordinarily mean that the jobs cease to be unit work. Rather, we indicated that the question whether the jobs continue to be unit work could not be decided by the employer unilaterally.[2/] Thus, in Avoca CSD, 15 PERB ¶3128 (1982), we found that a public employer violated the Taylor Law by abolishing a nurse/teacher's position and replacing it with the position of school nurse because it treated the new position as being outside the unit. Noting that the qualifications were different but the job duties were the same, we said, at p.3200:

> When an employer simply alters the qualifications for a unit position without substantially altering the position itself through a significant change in duties, it may not, in conjunction therewith, treat the position as lying outside the unit and unilaterally change the terms and conditions of employment of the position's incumbent. To allow such unilateral action would be to allow an employer to circumvent and undermine an employee organization's representative status.

The sole discussion in County of Suffolk regarding civilianization as a possible detriment to unit employees was in a footnote in which we noted that there was no such

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2/There, the parties had defined the unit not in terms of tasks, but in terms of the qualifications of the employees who performed them. The implication of this was that the parties agreed that if the tasks were not performed by police officers, it would not be unit work.

detriment.[3/] The other two civilianization decisions, City of Albany, 13 PERB ¶3011 (1980), and City of New Rochelle, 13 PERB ¶3045 (1980), are based upon Suffolk County, but in deciding them, we gave further emphasis to the absence of detriment to individual unit employees by noting that this absence was a "significant" factor.

In two other decisions this Board permitted a public employer to reassign unit work to nonunit employees under circumstances when the public employer had changed the qualifications of those assigned. In West Hempstead UFSD, 14 PERB ¶3096 (1981), we did so notwithstanding a significant impact upon the unit employees' terms and conditions of employment, while in Town of Brookhaven, 17 PERB ¶3087 (1984), there was no such impact because the employer had offered the unit employees alternative assignments which carried with them the same terms and conditions of employment. The basis of our decision in these two cases was a balancing test which indicated that management interests related to its mission predominated over the employee interests in their terms and conditions of employment.

[3/]There was a significant impact upon the terms and conditions of the nurse/teacher in Avoca CSD, and this was emphasized in our decision.

In reviewing our past decisions, we wish to eliminate any possible ambiguity suggesting that the Taylor Law permits a public employer to transfer unit work to nonunit employees unilaterally so long as its action does not impose a detriment upon the terms and conditions of employment of individual unit employees. Even if no individual employees suffer a direct, immediate and specifically identifiable detriment to their terms and conditions of employment, their rights of organization and representation may be diminished if the scope of the negotiating unit is reduced. There may be a qualitative difference between individual detriments that are direct and immediate, and group benefits. The former may be more consequential, but the Taylor Law is clearly concerned with the latter as well.[4/] Thus, if a balancing test is required, the nature of the detriment would be taken into consideration.

With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively[5/] and whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of

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4/See §§202 and 203 of the Taylor Law.

5/See Guilderland CSD, 16 PERB ¶3038 (1983)

§209-a.1(d), unless the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation. If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other.

Finding that the charge, as particularized, alleges facts that may constitute an improper practice,

WE REVERSE the decision of the ALJ dismissing the charge for failure to establish a cause of action, and WE REMAND the matter for further proceedings consistent herewith.

DATED: November 25, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

#2C-11/25/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INCORPORATED VILLAGE OF ROCKVILLE CENTRE,

Respondent,

-and-

CASE NO. U-8008

ROCKVILLE CENTRE VILLAGE EMPLOYEES CIVIL SERVICE ASSOCIATION,

Charging Party.

SEWARD & SEWARD, ESQS. (JAMES J. SEWARD, ESQ., of Counsel), for Respondent

SCHLACHTER AND MAURO, ESQS., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Incorporated Village of Rockville Centre (Village) to the decision of an Administrative Law Judge (ALJ) holding that it violated §209-a.1(d) of the Taylor Law by unilaterally changing a term and condition of employment of some of its employees in a negotiating unit represented by the Rockville Centre Village Employees Civil Service Association (Association). The alleged unilateral change is that during January 1985, it restricted unit employees who worked at the Village Hall to taking their coffee breaks at the Village Hall whereas they had previously been permitted to leave the premises of the Village Hall during their coffee breaks.

All the record evidence is contained in a stipulation prepared by the ALJ and consented to by the parties.[1/] It provides:

1. Unit members employed at the Village Hall have been allowed to take coffee breaks away from the Village Hall since, at least, 1978.

2. By memo dated January 11, 1985 (attached to the charge), William Cook, Village Administrator, announced that henceforth Village Hall employees must take their coffee breaks in the employee lounge in the Village Hall.

3. Other than this memo, the only notice of the Village's intent to impose the rule occurred on January 9, 1985 at which time Cook called a general staff meeting of Village Hall employees to discuss the Village's rationale for implementing the rule. No objections or questions were raised by the Village Hall employees in attendance.

4. While many Village Hall employees are Association members, the Association president was neither a Village Hall employee nor called by Cook to attend the meeting.

5. No negotiations were held prior to the Village's imposition of the rule and the Association has demanded none since its imposition or since the meeting of January 9, 1985.

6. Until the imposition of the rule, only Village Hall unit members and employees who work out doors were not required to take their coffee breaks in designated areas.

[1/] The Village explicitly stated in its brief to the ALJ that this stipulation had set forth the undisputed facts. It nevertheless referred to other alleged facts both in that brief and in its brief to us in support of its exceptions. We are foreclosed from relying upon those alleged facts for decision.

7. Since 1976, the Village Hall has had an employee lounge containing a sink, stove, refrigerator, table and chairs. While it was relocated in 1982, the lounge contained these facilities until late 1983 or early 1984 at which time the Village installed instant hot water and a microwave oven.

8. The Village's rationale for imposing the rule is that, in its opinion, "to allow employees out of the Village Hall during coffee breaks subjects the Village to an increased and unwarranted risk of injury and adversely affects the operations of the Village Hall".

The ALJ found that until mid-January 1985, unit employees assigned to the Village Hall had been free to leave the premises during their coffee breaks, and that during that month, the Village unilaterally denied them that freedom. He proceeded to determine that the right of an employee to leave the work site during a coffee break is comparable to other forms of paid time off and is a term and condition of employment which is a mandatory subject of negotiation. He further determined that a public employer may not lawfully alter such a term or condition of employment unilaterally.

The Village makes four arguments in support of its exceptions.

1. The ALJ erred in finding "that the leaving of the Village Hall during coffee breaks constituted a past practice . . . . "

With reference to this argument, the stipulation provides: "Unit members employed at the Village Hall have been allowed to take coffee breaks away from the Village

Hall since, at least, 1978", but that the Village terminated this practice on January 11, 1985. It also shows that the Village Hall had an employee lounge since 1976 and that the lounge was upgraded by the addition of instant hot water facilities and a microwave oven in late 1983 or early 1984. Finally, it shows that except for employees assigned to Village Hall and those who work out doors, all unit members have been required to take their coffee breaks in designated areas.

The Village argues that the past practice was that unit employees assigned to indoor locations had been required to take coffee breaks on the premises except where there were no adequate facilities on the premises. Thus, according to the Village, a temporary exception had been made for Village Hall employees because there had not been adequate facilities for them at Village Hall. There is no record support for this argument.[2/]

[2/] In making this argument the Village's brief cites evidence, not in the record, that the Village Hall had been renovated, and argues that this was the reason for the temporary exception. Even the extra-record evidence relied upon by the Village does not support its position. Its own brief indicates that the renovations were completed in 1978. Thus, the Village's extra-record evidence shows that the past practice continued for six years after the alleged renovations of the Village Hall were completed.

Citing record evidence, the ALJ noted that the past practice continued for one year after the lounge facilities had been upgraded to their present level.

2. The ALJ erred in finding "that the right of an employee to leave his work site during a coffee break was a term and condition of employment . . . ."

The Village appears to be applying a balancing test in support of this proposition. It would have us find that the impact of its new work rule upon unit employees was slight because there are lounge facilities at Village Hall. Against this allegedly slight impact, it argues that it would suffer more severe harm in that it would be subjected to public criticism by reason of employees being seen on the streets during working hours, be inconvenienced in the event that the employees were needed to deal with an emergency, and be exposed to greater risk of injury to its employees.

Coffee break time, as noted by the ALJ, is nonworking time, and the freedom of employees to go where they please during nonworking time is of sufficient importance to them to be deemed a mandatory subject of negotiation unless there is a very serious management interest at stake.[3/] There is no such management interest here.

3/See State of New York, 18 PERB ¶3064 (1985), in which we found that the need to reduce pilferage is a management interest of sufficient magnitude to render the institution of a parcel inspection program a nonmandatory subject of negotiation even though it involved a significant employee interest.

3. The ALJ erred in finding "that the right of an employee to leave the work site during a coffee break [is] equated to other forms of paid time off . . . ."

The Village argues: "There is a significant difference in that the coffee break is during the regular work day and was conceived as a short break, rest period or the like during which an employee could stretch their legs, get a refreshment, etc."

This description of a coffee break does not support the Village's proposition. Furthermore, the nature of a coffee break, as described by the Village, is itself subject to negotiation.

4. The ALJ erred in finding "that the failure of the Association to demand negotiations did not constitute a waiver."

The Village gives a very narrow reading of §209-a.1(d). It says that unilateral action cannot constitute a violation; a violation, if any, occurs only if a union seeks to negotiate with respect to a unilateral change and the employer refuses.

As noted by the ALJ, this is not the Board's interpretation of §209-a.1(d). On the contrary, the duty to negotiate in good faith means that a public employer may not unilaterally change terms and conditions of employment with respect to which it is required to negotiate.[4/]

4/County of Cattaraugus, 8 PERB ¶3062 (1975); County of Schenectady and Sheriff, 18 PERB ¶3038 (1985).

NOW, THEREFORE, WE ORDER the Incorporated Village of Rockville Centre to:

1. rescind the memo issued by its Village Administrator on January 11, 1985, to the extent it involves unit members;
2. restore its practice of allowing unit members employed at the Village Hall to take their coffee breaks at locations other than the building in which they work;
3. cease and desist from refusing to negotiate in good faith with the Association concerning terms and conditions of employment; and
4. sign and post the attached notice at all locations customarily used to post communications to unit members.

DATED: November 25, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, 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 Incorporated Village of Rockville Centre (Village) within the unit represented by the Rockville Centre Village Employees Civil Service Association (Association) that the Village

1. will rescind the memorandum issued by its Village Administrator dated January 11, 1985, to the extent it involves unit members; and

2. will restore its practice of allowing unit members employed at the Village Hall to take their coffee breaks at locations other than the building in which they work; and

3. will negotiate in good faith with the Association concerning terms and conditions of employment.

INCORPORATED VILLAGE OF ROCKVILLE CENTRE

.....

Dated..... By.....
(Representative) (Title)

10072

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.

#3A-11/25/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF OLEAN HOUSING AUTHORITY,

Employer,

-and-

CASE NO. C-2911

OLEAN HOUSING AUTHORITY EMPLOYEE ASSOCIATION,

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 Olean Housing Authority Employee Association has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Projects Coordinator, Maintenance Supervisor, Maintenance Mechanic, Tenant Selection Clerk, and Assistant Maintenance Mechanic.

Excluded: Executive Director.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Olean Housing Authority Employee 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: November 25, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

10074

#3B-11/25/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF ALFRED,

Employer,

-and-

CASE NO. C-2980

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS LOCAL UNION, NO. 65,

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 Chauffeurs, Teamsters, Warehousemen & Helpers Local Union, No. 65 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 of the Town Highway Department.

Excluded: Highway superintendent, guards, clerical and supervisory personnel and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Chauffeurs, Teamsters, Warehousemen & Heplers Local Union, No. 65 and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: November 25, 1985
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

Walter L. Eisenberg

Walter L. Eisenberg, Member

10076

#3C-11/25/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LAKE SHORE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-2881

TEAMSTERS LOCAL 264, I.B.T.

Petitioner,

-and-

LAKE SHORE CENTRAL UNIT, CIVIL SERVICE EMPLOYEES' ASSOCIATION,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 264, I.B.T. has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All nonteaching staff employed by the District. Job classifications of bargaining unit employees include: registered professional nurses, teacher aides, attendance officer, monitors, maintenance, custodians, laborers, groundsmen, senior custodians, watchmen, mechanics, cleaners/laborer, driver trainer, bus drivers, bus attendants, garage foreman/head mechanic, clerk typist, senior clerk typist, senior account clerk, senior clerk stenographer, account clerk/mini computer operator, switchboard, senior library clerk, senior account clerk typist, clerk stenographer, and principal stenographer, and audio visual technician.

Excluded: Nonteaching staff in other bargaining units and substitutes.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 264, I.B.T. 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: November 25, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

#3D-11/25/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUANESBURG CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CASE NO. C-2978

DUANESBURG TEACHERS ASSOCIATION,
NYSUT, AFT, 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 Duanesburg Teachers Association, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive representative for

the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All noninstructional personnel, including the following positions: aide, bus driver, cook, food service helper, cleaner, account/clerk typist, laborer, typist, clerk, auto mechanic helper, cleaner, auto mechanic, custodian, senior account/clerk typist, nurse.

Excluded: Superintendent, business administrator, building principals, supervisor of buildings and grounds, an auto mechanic (Bruce Schaeffer), transportation supervisor, a cook (Kathryn Hillman), an account/clerk typist (Betty Hawkes), a typist (Theresa Luksa), typist/secretary to the superintendent, school nurse teacher, a clerk (Vick Merbler).

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Duanesburg Teachers Association, NYSUT, AFT, 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: November 25, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

#3E-11/25/85

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MAMARONECK UNION FREE SCHOOL DISTRICT,

Employer,

-and- CASE NO. C-2963

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 employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All school aides.

Excluded: All other employees.

10082

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: November 25, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

10083