#2A-5/5/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF CAYUGA

CASE NOS. E-1232
and E-1240

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

ROEMER AND FEATHERSTONHAUGH, P.C. (CLAUDIA R. McKENNA, ESQ., of Counsel), for Cayuga County Unit, Cayuga County Local 806, Civil Service Employees Association, Inc.

BERNARD J. DONOGHUE, for County of Cayuga

BOARD DECISION AND ORDER

The County of Cayuga (Employer) has filed applications, pursuant to §201.10 of the Rules of this Board to designate certain of its employees as managerial or confidential in accordance with the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act).

The Cayuga County Unit, Cayuga County Local 806, Civil Service Employees Association, Inc. (CSEA), the bargaining representative for the unit which, it asserts, includes the in-issue titles, opposed the designations sought. With regard to certain of the titles, the Employer disputed CSEA's claim that they were in the bargaining unit represented by CSEA. The Acting Director, however, made no determination with regard to this aspect of the dispute.

During the course of the proceeding, the Employer withdrew the application for certain titles and the CSEA stipulated that two titles were not within its unit and withdrew objection to the designation of three other positions as managerial and one as confidential. In his decision, the Acting Director dealt with seven positions sought to be designated as managerial and one sought to be designated as confidential. He dismissed the Employer's application with regard to six of the positions sought to be designated managerial, granted such designation with regard to one position and granted the application with regard to the designation of one position as confidential.

The Employer has filed exceptions with regard to three of the positions denied managerial designation by the Acting Director. CSEA has filed exceptions to the Acting Director's designation of one position as managerial.

In addition, an employee, David Williams, has filed separate exceptions to the Acting Director's decision that he is not a managerial employee. The Employer has not excepted to the Acting Director's decision with regard to Williams' position. The Employer and CSEA disagree as to whether Williams' position is included in the negotiating unit represented by CSEA. In view of his disposition of the application relating to Williams, the Acting Director did not find it necessary to determine the unit status of his position.

EXCEPTIONS

The Employer has filed exceptions with regard to the following positions: Jill Fandrich, Motor Vehicle Bureau Supervisor; Betty Palega, WIC Program Coordinator; and Robert Sanders, Park Maintenance Supervisor. With regard to all three, the Employer argues that each has a sufficient role in the formulation of policy to satisfy the statutory standard. CSEA's exceptions relate to the position held by Vijay Mital, Assistant Director, Cayuga County Planning Board. CSEA argues that Mr. Mital does not have a sufficient role in the formulation of policy to warrant his designation as managerial.

In support of its exceptions, the Employer has submitted affidavits of Fandrich, Palega and Sanders which purport to contain a "more detailed statement" of their duties and responsibilities. These affidavits were signed and sworn to after the Acting Director's decision. All three had testified at the hearing conducted in this proceeding. These affidavits cannot be considered since our decision must be based solely on the testimony and exhibits elicited at the hearing.[1/]

1/ Margolin v. Newman, 20 PERB ¶7007 (Sup. Ct. Alb. Co. 1987).

DISCUSSION

Both parties rely upon the decision of the Director and this Board in City of Binghamton, 12 PERB ¶4022, aff'd in pertinent part, 12 PERB ¶3099 (1979). In that case the Director wrote, at 4038, that "only those employees who have 'a direct and powerful influence on policy formulation' at the highest level will be determined managerial under the formulation of policy criteria." We affirmed the Director's interpretation of the statutory phrase "to formulate policy." We stated, at 3185, that, in our view, the phrase means the following:

> To formulate policy is to participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the government. The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.

Jill Fandrich, Motor Vehicle Bureau Supervisor

The record evidence with regard to this position is accurately summarized by the Acting Director. It shows that she is responsible for the day-to-day operations of the Motor Vehicle Bureau and supervises a staff of approximately ten employees. Insofar as policy making is concerned, Fandrich testified that primarily she ensures the County's compliance with the Motor Vehicle Law and the rules and regulations promulgated thereunder. She provides information as a

resource person to the judicial committee of the County legislative body regarding matters that pertain to her bureau. Her activities in personnel and contract administration are those of a high-level supervisor. The record does not indicate that Fandrich participates in the determination of the goals and objectives of the County. Neither does the record show that her participation in the determination of the methods of operation of her bureau is more than merely of a technical nature.

We affirm the decision of the Acting Director that the duties and responsibilities of Fandrich do not constitute the formulation of policy within the meaning of §201.7(a) of the Act.

Betty Palega, WIC Program Coordinator

The record evidence with regard to this position likewise has been accurately summarized by the Acting Director. Palega testified that she is the coordinator of the WIC (Women, Infants and Children) Program which the County contracts with the New York State Health Department to operate. Palega reports to Catto, the Public Health Director, concerning the day-to-day operation of the program and to the Health Department's Regional office regarding program implementation. Regarding her role in policy making as well as personnel and contract administration, her testimony establishes a role that is substantially identical

to that of Fandrich. She is not involved in developing the objectives of the agency or the methods and means by which such objectives will be achieved, since the Federal and State guidelines are specific and give little latitude in terms of nutritional criteria for the program.

We affirm the decision of the Acting Director that the duties and responsibilities of Palega do not constitute the formulation of policy within the meaning of §201.7(a) of the Act.

Robert Sanders, Park Maintenance Supervisor

The record evidence with regard to this position has also been accurately summarized by the Acting Director. Sanders reports to the Park Commission which is comprised of members of the County Legislative Board. According to Sanders, the exercise of virtually all of his responsibilities are subject to review by the Commission and by the County Legislature. As to his role in the formulation of policy, Sanders stated: "They [the Commission] set up policy and I carry it out." His role with regard to personnel and contract administration appears to be identical to those of Fandrich and Palega.

We affirm the decision of the Acting Director that the duties and responsibilities of Sanders do not constitute the formulation of policy within the meaning of §201.7(a) of the Act.

Vijay Mital, Assistant Director, Cayuga County Planning Board

The record evidence with regard to this position has been accurately summarized by the Acting Director. Although the Director of the Cayuga County Planning Board (Director), to whom Mital reports, runs the overall operations of that Board, the record shows that Mital is in charge of general City planning and all economic development activities for Cayuga County and the City of Auburn. The Acting Director found that Mital should be designated as a managerial employee because of the policy making responsibilities which have been delegated to him. The Director testified that, as to the City planning aspect of the County's operation, he has "pretty well turned that over to [Mital]." Mital spends the majority of his time at his office in the Auburn City Hall, while the Director spends the bulk of his time at his office at the Cayuga County Office Building. Mital has exercised a great deal of independence. The Acting Director found that "he conceives a project, develops it, implements it, assigns work to individuals working on the project and exercises control over the project." Thus, he participates "with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the government."

We affirm the decision of the Acting Director that the

duties and responsibilities of Mital do constitute the formulation of policy within the meaning of §201.7(a) of the Act.

David Williams, Building Maintenance Supervisor

The record does not establish whether Williams, as Building Maintenance Supervisor, is a member of the bargaining unit represented by CSEA. Only if he is not in the unit will he have standing as a party in this proceeding and, as such, have the right to file exceptions to the decision.[2/] Rather than prolong this proceeding by referring this question back to the Acting Director to determine Williams' status, we have determined to decide the managerial question on the merits.

We have reviewed the record, the exceptions filed by Williams, which we shall treat as an offer of proof, and CSEA's response thereto. The materials submitted with Williams' exceptions do not significantly add to the record evidence. That evidence is accurately summarized by the Acting Director. Williams is the Building Maintenance Supervisor for the County Nursing Home. Williams did not testify, but Oropallo, who is the Nursing Home administrator

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[2/] §201.10(a)(2) of our Rules of Procedure states: "The parties are the applicant and the persons who are within any of the job titles which the public employer is seeking to have designated as managerial or confidential; provided, however, that if any such persons are represented by a recognized or certified employee organization, such employee organization is a party in their stead."

testified as to his duties and responsibilities. Williams interviews prospective maintenance employees and makes recommendations to her as to whether they should be hired. Williams is also expected to recommend and initiate disciplinary charges and to receive grievances and forward them to her. His role in the budget process is merely to submit his needs to the Controller, who develops the overall nursing home budget. Williams establishes "policies and procedures with respect to maintenance at the nursing home." In his exceptions, Williams states that he participates in regularly scheduled department head meetings "in which the home formulates its policies." Oropallo testified that Williams schedules work and determines the manner in which such activities as equipment maintenance, snow removal, parking and groundskeeping will be carried out.

We conclude that the evidence submitted establishes only that Williams has supervisory responsibilities and makes departmental decisions for the purpose of implementing policy which is set at higher managerial levels. Accordingly, we affirm the decision of the Acting Director that the duties and responsibilities of Williams do not constitute the formulation of policy within the meaning of §201.7(a).[3/]

[3/] It should be noted that our decision does not constitute a determination as to whether Mr. Williams' position is in or out of the bargaining unit represented by CSEA. We only determine that Mr. Williams' position may not be designated managerial within the meaning of that term as used in the Act.

NOW, THEREFORE, WE ORDER that the decision of the Acting Director is, in all respects, affirmed.

DATED: May 5, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF NASSAU COUNTY,

Employer,

-and-

CASE NO. C-3185

NASSAU BOCES CENTRAL COUNCIL OF TEACHERS, LOCAL 2551, 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 Nassau BOCES Central Council of Teachers, Local 2551, NYSUT, AFT, 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.

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Unit: Included: All physical therapists and occupational therapists who are employed for 15 or more hours per week.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Nassau BOCES Central Council of Teachers, Local 2551, NYSUT, AFT, AFL-CIO. To negotiate collectively is the performance of their mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question rising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 5, 1987
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

Jerome Lefkowitz
Jerome Lefkowitz, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATION BOARD

CERTIFICATION

I, Harold R. Newman, Chairman of the Public Employment Relations Board, hereby certify that the attached amendment to Parts 200, 201, 203, 204, 205, 206, 207, 210 and 215 of Title 4 of the Official Compilation of Codes, Rules and Regulations of the State of New York was duly adopted pursuant to authority vested in the Board by Article 14 of the Executive Law, by the unanimous vote of the Board members present at a meeting held in Albany, New York, on May 5, 1987.

As there were no substantive changes in the rules, these amendments are effective upon filing with the Department of State.

A notice of proposed agency action was published in the Register on March 18, 1987. No other prior notice of this action was required by statute.

May 5, 1987
Dated

Harold R. Newman
Chairman

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As adopted 5/5/87

1. A new Part 210 of the Rules of the Public Employment Relations Board, Chapter VII, 4 NYCRR, is hereby adopted to read:

PART 210 DECLARATORY RULINGS

210.1 Petition; filing. (a) Filing of Petition. Any person, employee organization or employer may file with the director an original and four copies of a petition for a declaratory ruling with respect to the applicability of the act to it or any other person, employee organization or employer, or with respect to the scope of negotiations under the act.

(b) Contents of petition. The petition shall include the following:

(1) The name, address and affiliation, if any, of the petitioner, and the title of any representative filing the petition.

(2) A complete statement of the relevant facts and the grounds prompting the petition, including a full disclosure of the petitioner's interest.

(3) A statement whether, if the petition raises a question with respect to the scope of negotiations under the act, such question is the subject of a charge brought under Part 204 of these rules.

(4) The names and addresses of any other persons, employee organizations or public employers whose interests are reasonably likely to be affected by the ruling.

(5) At the option of the petitioner, a proposed ruling.

210.2 Processing by the director. (a) The director will determine whether the issuance of the declaratory ruling would be in the public interest as reflected by the policies underlying the act. If his determination is in the negative, he shall dismiss the petition. Such a dismissal shall merely constitute a refusal to issue a declaratory ruling, and not the denial of any position proposed by the petitioner. A decision of the director to refuse to issue a declaratory ruling may be made at any stage of the proceeding until a declaratory ruling has been made by him or by an administrative law judge designated by him.

(b) The director shall send a copy of the petition to any persons, employee organizations or public employers, in addition to those listed in the petition, whom he deems to have interests that are reasonably likely to be affected by the ruling, together with a notice that they may choose to become parties to the proceeding by filing a response to the petition within ten working days from their receipt thereof. Such response may challenge any of the allegations in the petition and, whether or not petitioner has done so, it may propose a ruling.

(c) The matter shall be processed further by the director. Such processing shall be in accordance with the procedures set forth in section 204.4 through section 204.9 of the rules except that the director shall issue a recommended ruling instead of a decision and recommended order.

210.3 Appeal to the board. The dismissal of a petition or a recommended declaratory ruling will become final unless within fifteen working days from receipt thereof a party files an appeal with the board. The procedures for the filing and processing of such an appeal shall be those set forth in section 204.10 through section 204.14 of these rules.

2. Section 200.2 is hereby amended to read as follows:

Director; administrative law judge. The term director, as used in this Chapter, shall mean the agent of the board designated as director of public employment practices and representation; the term administrative law judge as used in this Chapter shall mean an agent of the board so designated.

3. Section 201.2 is hereby amended to read as follows:

Petition; filing; objection. (a) A petition for investigation of a question concerning representation of public employees under the act (hereinafter called a petition for certification), or a petition alleging that an employee organization which has been certified or is being currently recognized should be deprived of representation status as to all or part of a unit (hereinafter called a petition for decertification), may be filed by one or more public employees or any employee organization acting in their behalf, or by a public employer, provided that individual employees may not file a petition for certification.

(b) Notwithstanding [sections 201.3 and] section 201.4 of this Part, a petition may be filed by a public employer or a recognized or certified employee organization to clarify whether a new or substantially altered position is encompassed within the scope of an existing unit (hereafter called a unit clarification petition), or to determine the unit placement of a new or substantially altered position (hereafter called a unit placement petition). A unit clarification petition may be filed either upon the consent of the parties or upon a showing that petitioner could not have filed a timely petition pursuant to section 201.3 of this Part. A unit placement petition may only be filed upon a showing that petitioner could not have filed a timely petition pursuant to section 201.3 of this Part. The filing and processing of the petition shall be in accordance with sections 201.5(c), 201.7(a) and (d), 201.8, 201.9(a)-(f) and 201.11 of this Part. In determining the unit placement of any new or substantially altered position, the director shall consider whether the placement would be consistent with the criteria set forth in section 207 of the act. The director may decline to make any clarification or placement not otherwise consistent with the purposes or policies of the act. Exceptions to any determination of the director may be filed pursuant to section 201.12 of this Part.

(c) Petitions under this section shall be on a form provided by the board for this purpose, and signed. Four copies of the petition shall be filed with the director. Petition forms will be supplied by the director upon request. Prior to the issuance of a decision by the director pursuant to section 201.11 of this Part, a petition may be withdrawn only with the consent of the director. After the issuance of a decision by the director, the petition may be withdrawn only with the consent of the board. Whenever the director or the board, as the case may be, approves withdrawal of any petition, the case shall be closed.

(d) Objection. A party who objects to the processing of a petition on the ground that it was filed earlier than the times provided for filing under section 201.3 of this Part may file an original and four copies of such objection, with proof of service upon all other parties, within ten working days after receipt from the director of a copy of the petition. The objection shall include a specific, detailed statement of why the petition is untimely. Such objection to the processing of the petition, if not duly raised, may be deemed waived.

4. Subdivision (a) of section 201.7 is hereby amended to read as follows:

(a) One or more public employees, an employee organization acting in their behalf, or a public employer may be permitted, in the discretion of the board, of the director, or of the designated [trial examiner] administrative law judge, to intervene in a proceeding. The intervenor must make a motion on notice to all parties in the proceeding. Supporting affidavits establishing the basis for the motion may be required by the board, the director or the designated [trial examiner] administrative law judge.

5. Paragraph (2) of subdivision (a) of section 201.9 is hereby amended to read as follows:

(2) Hearing. The director may direct a hearing, in which event he or his agent shall prepare and cause to be served upon the parties a notice of hearing before [a trial examiner] an administrative law judge at a time and place fixed therein. A copy of the petition shall be served with the notice of hearing.

6. Paragraphs (1) and (2) of subdivision (b) of section 201.9 are hereby amended to read as follows:

(b) Conduct of hearings. (1) Hearings shall be open to the public unless otherwise ordered by the [trial examiner] administrative law judge. At any time, [a trial examiner] an administrative law judge may be substituted for the [trial examiner] administrative law judge previously assigned. It shall be the duty of the [trial examiner] administrative law judge to inquire fully into all matters at issue and to obtain a full and complete record.

(2) The [trial examiner] administrative law judge may, at his discretion, continue the hearing from day to day or adjourn it to a later date or another place, by announcement thereof at the hearing or by other appropriate notice.

7. Paragraphs (2) and (3) of subdivision (c) of section 201.9 are hereby amended to read as follows:

(2) Motions before or after a hearing. All motions other than those made during a hearing shall be made in writing to the director, shall briefly state the relief

sought, and shall be accompanied by affidavits setting forth the grounds upon which they are based. The moving party shall serve a copy of all motion papers on all other parties and shall, within three working days thereafter, file with the director the original and three copies thereof with proof of service. Answering affidavits, if any, must be served on all parties and the original thereof, together with three copies and proof of service, shall be filed with the director within five working days after service of the moving papers, unless the director directs otherwise. The director may rule upon motions filed with him or he may refer motions to the [trial examiner] administrative law judge. He may decide to hear oral argument or testimony thereon, in which case he shall notify the parties of such fact and of the time and place of such argument or for the taking of such testimony. All such motions and rulings and orders thereon shall be part of the record of the proceedings.

(3) Review. Unless expressly authorized by the board, rulings by the director or by [a trial examiner] an administrative law judge shall not be appealed directly to the board, but shall be considered by the board when it considers such exceptions to the decision of the director as may be filed.

8. Subdivisions (d) and (e) of section 201.9 are hereby amended to read as follows:

(d) Waiver. An objection not duly urged before the [trial examiner] administrative law judge or the director shall be deemed waived unless the failure to urge such objection shall be excused by the director or board because of extraordinary circumstances.

(e) Introduction of evidence; the rights of parties at hearings. (1) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the [trial examiner] administrative law judge shall have the power to call and examine witnesses, and to introduce into the record documentary and other evidence. A party shall, upon offering an exhibit into evidence at a hearing, simultaneously furnish copies to all other parties, unless excused by the [trial examiner] administrative law judge. Witnesses shall be examined orally under oath. Compliance with the technical rules of evidence shall not be required. Stipulations of fact may be introduced in evidence with respect to any issue.

(2) The refusal of a witness at any hearing to answer any question which has been ruled to be proper shall, at the discretion of the [trial examiner] administrative law judge, be grounds for striking all testimony previously given by such witness on related matters.

(3) Misconduct at any hearing before [a trial examiner] an administrative law judge, the director or the board shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the board or its agents after due notice and hearing.

9. Subdivisions (e) and (g) of section 201.10 are hereby amended to read as follows:

(e) Intervention. One or more persons or an employee organization acting in their behalf may be permitted, in the discretion of the board, or of the director or the designated [trial examiner] administrative law judge, to intervene in the proceeding. The intervenor must make a motion on notice to all parties in the proceeding. Supporting affidavits establishing the basis for the motion may be required by the board, the director or the designated [trial examiner] administrative law judge. If intervention is permitted, the person or employee organization becomes a party for all purposes.

(g) Hearing. The director may direct a hearing, in which event he or his agent shall prepare and cause to be served upon the parties a notice of hearing before [a trial examiner] an administrative law judge at the time and place fixed therein. A copy of the application shall be served with the notice of hearing.

10. Subdivisions (d) and (h) of section 201.12 are hereby amended to read as follows:

(d) A request for an [extention] extension of time within which to file exceptions and briefs shall be in writing and filed with the board at least three working days before the expiration of the required time for filing, provided that the board may extend the time during which to request an extension of time because of extraordinary circumstances. A party requesting an extension of time shall notify all the parties to the proceeding of its request and shall indicate to the board

the position of each other party with regard to such request.

(h) The board may designate an employee organization as the exclusive representative of public employees within a negotiating unit if the employee organization has demonstrated that it represents a majority of the employees within the negotiating unit and there has been prior agreement between the public employer and [the] such employee organization [or organizations representing a substantial majority of the public employees in the unit that the majority representative] that such organization should be accorded exclusive rights of representation.

11. Subdivision (g) of section 203.8 is hereby amended to read as follows:

(g) Investigation and hearing. (1) The board shall direct an investigation of any questions raised by the petition. In conducting such an investigation, the board or its agent may require affidavits or direct a hearing. If a hearing is directed, the board or its agent shall prepare and cause to be served upon petitioner and all other parties a notice of hearing before the board or [a hearing officer] an administrative law judge at a time and place fixed therein.

(2) Conduct of hearings. (i) Hearings shall be open to the public unless otherwise ordered by the board or [a hearing officer] an administrative law judge, as the case may be. At any time, [a hearing officer] an administrative law judge may be substituted for the [hearing officer] administrative law judge previously assigned. It shall be the duty of the board or the [hearing officer] administrative law judge to inquire fully into all matters at issue and to obtain a full and complete record.

(ii) The board or [hearing officer] administrative law judge may, at its discretion, continue the hearing from day to day or adjourn it to a later date or another place, by announcement thereof at the hearing or by another appropriate notice.

(3) Motions. (i) All motions made during a hearing shall be made part of the record of the proceedings.

(ii) Motions before or after a hearing. All motions other than those made during a hearing shall be made in

writing to the board, shall briefly state the relief sought, and shall be accompanied by affidavits setting forth the grounds upon which they are based. The moving party shall serve a copy of all motion papers on all other parties and shall, within three working days thereafter, file with the board the original and three copies thereof with proof of service. Answering affidavits, if any, must be served on all parties and the original thereof, together with three copies and proof of service, shall be filed with the board within five working days after service of the moving papers, unless the board directs otherwise. The board may rule upon motions filed with it or it may refer motions to the [hearing officer] administrative law judge, if any. It may decide to hear oral argument or testimony thereon, in which case it shall notify the parties of such fact and of the time and place of such argument or for the taking of such testimony. All such motions and rulings and orders thereon shall be part of the record of the proceedings.

(iii) Review. Unless expressly authorized by the board, rulings by the [hearing officer] administrative law judge, if any, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision.

(4) Waiver. An objection not duly urged before the [hearing officer] administrative law judge, if any, shall be deemed waived unless the failure to urge such objection shall be excused by the board because of extraordinary circumstances.

(5) Introduction of evidence; the rights of parties at hearings. (i) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the board or [hearing officer] administrative law judge shall have the power to call and examine witnesses, and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. Compliance with the technical rules of evidence shall not be required. Stipulations of fact may be introduced in evidence with respect to any issue.

(ii) The refusal of a witness at any hearing to answer any question which has been ruled to be proper shall, at the discretion of the board or [hearing officer] administrative law judge, be grounds for striking all testimony previously given by such witness on related matters.

(iii) Misconduct at any hearing before the board or [hearing officer] administrative law judge shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the board or its agents after due notice and hearing.

12. Subdivisions (c) and (d) of section 204.1 are hereby amended to read as follows:

(c) Scope of negotiations cases. Where the primary basis of the dispute between the parties is alleged to be a disagreement as to the scope of negotiations under the act, either party may request of the director or an assigned [hearing officer] administrative law judge that the matter be accorded expedited treatment.

(d) Amendment and withdrawals. The director or [hearing officer] administrative law judge designated by the director may permit a charging party to amend the charge before, during, or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process. The charge may be withdrawn by the charging party before the issuance of a final order based thereon upon approval by the director. Whenever the director approves the withdrawal of a charge, the case will be closed.

13. Section 204.2 is hereby amended to read as follows:

Initial processing by director. (a) Notice of hearing. After a charge is filed, the director shall review the charge to determine whether the facts as alleged may constitute an improper practice as set forth in section 209-a of the act. If it is determined that the facts as alleged do not, as a matter of law, constitute a violation, or that the alleged violation occurred more than four months prior to the filing of the charge, it shall be dismissed by the director subject to review by the board under section 204.10(c) of this Part; otherwise, except where section 204.2(b) of this Part is applicable, a notice of hearing shall be prepared by the director or a designated [hearing officer] administrative law judge, and, together with a copy of the charge, shall be delivered to the charging party and each named respondent. The notice of hearing shall fix the place of hearing at a time not less than 15 working days from issuance thereof.

(b) Scope of negotiations cases. If, upon review of the charge, the director determines that it involves primarily a dispute between the parties as to the scope of negotiations under the act, he or an assigned [hearing officer] administrative law judge shall forthwith schedule a conference for the purpose of inquiring further into the matter. Such an administrative determination is a ministerial act and will not be reviewed by the board.

14. Subdivison (b) of section 204.3 is hereby amended to read as follows:

(b) Motion for particularization of the charge. If the charge is believed by a respondent to be so vague and indefinite that it cannot reasonably be required to frame an answer, the respondent may, within 10 working days after receipt from the director of a copy of the charge, file an original and four copies of a motion with the [hearing officer] administrative law judge for an order directing the charging party to file a [vertified] verified statement supplying specified information. The filing of such motion will extend the time during which the respondent must file and serve his answer until 10 working days from the ruling of the [hearing officer] administrative law judge on the motion, or until such later date as the [hearing officer] administrative law judge may set. Such a motion must be served upon the charging party simultaneously with its filing with the [hearing officer] administrative law judge; proof of service must accompany the filing of the motion with the [hearing officer] administrative law judge. The failure of a party to timely comply with an order of particularization may, in the discretion of the administrative law judge, constitute ground for precluding the party from offering any evidence as to the matters dealt with by the order.

15. Paragraph (2) of subdivision (c) of section 204.3 is hereby amended to read as follows:

(2) The answer shall include a specific, detailed statement of any affirmative defense including, but not limited to an allegation that the violation occurred more than four months prior to the filing of the charge. A clear and concise statement of the facts supporting any affirmative defense, including the names of the individuals involved and the time and place of occurrence of each particular act alleged, shall be set forth.

16. Subdivisions (d) and (e) of section 204.3 are hereby amended to read as follows:

[(d)](e) Amendment. The [hearing officer] administrative law judge may permit the respondent to amend the answer for good cause shown at any time before or during the hearing, or at any time prior to the issuance of the [hearing officer's] administrative law judge's decision and recommended order.

[(e)](f) Admission by failure to answer. If the respondent fails to file a timely answer, such failure may be deemed by the [hearing officer] administrative law judge to constitute an admission of the material facts alleged in the charge and a waiver by the respondent of a hearing.

17. A new subdivision (d) is hereby added to section 204.3 to read as follows:

(d) Motion for particularization of the answer. If the statement of facts supporting any affirmative defense is believed by a charging party to be so vague and indefinite that such charging party cannot reasonably be expected to address them in an expeditious manner at a hearing, such charging party may, within ten working days after receipt of the answer, file with the administrative law judge an original and four copies of a motion for an order directing the respondent to file a verified statement supplying specified information. Such a motion must be served upon the respondent simultaneously with its filing with the administrative law judge; proof of service must accompany the filing of the motion with the administrative law judge. The failure of a party to timely comply with an order of particularization may, in the discretion of the administrative law judge, constitute ground for precluding the party from offering any evidence as to the matters dealt with by the order.

18. Section 204.4 is hereby amended to read as follows:

(a) Immediately subsequent to the conference referred to in section 204.2(b) of this Part, and if one or more of the parties have made a request that a dispute involving primarily a disagreement as to the scope of negotiations under the act be processed expeditiously, or if the director shall deem it appropriate to do so upon his own initiative, the director shall so notify the board and transmit the papers to the board. The board shall then

inform the parties as to whether it will accord expedited treatment to the matter. If the board determines that the matter will be expedited, it will also notify the respondent of the due date for its answer, and the parties of the due date for briefs. The board may also direct that oral argument be held before it, or that a hearing be held before the full board, one of its members, or a [hearing officer] administrative law judge. If the board determines that expedited treatment will not be accorded, the matter will be handled in accordance with sections 204.2(a), 204.3, and 204.5 through 204.14 of this Part.

(b) If a hearing is held:

(1) Any objections to the conduct of a hearing, including objections to the introduction of evidence, may be oral or written, must be accompanied by a short statement of the grounds for such objection, and shall be included in the record.

(2) There shall be no intermediate report from a board member or a [hearing officer] administrative law judge who may be assigned to hold the hearing. Upon the completion of the hearing, such board member or [hearing officer] administrative law judge shall transmit the record to the full board for a determination without making any recommendations.

19. Section 204.5 is hereby amended to read as follows:

Intervention. One or more public employees, an employee organization acting in their behalf, or a public employer may be permitted, in the discretion of the board, of the director, or of the designated [hearing officer] administrative law judge, to intervene in a proceeding. The intervenor must make a motion on notice to all parties in the proceeding. Supporting affidavits establishing the basis for the motion may be required by the board, the director, or the designated [hearing officer] administrative law judge. If the intervention is permitted, the person, employee organization, or public employer becomes a party for all purposes.

20. Section 204.6 is hereby amended to read as follows:

Pre-hearing conference. At least five working days prior to the scheduled date for the formal hearing, the [hearing officer] administrative law judge designated by the director shall hold a pre-hearing conference for the

purpose of clarification of issues. The failure of a party to appear at the pre-hearing conference may, in the discretion of the director or the designated administrative law judge, constitute ground for dismissal of the absent party's pleading.

21. Subdivisions (a), (b), (c), (d), (i), (j), (k) and (l) of section 204.7 are hereby amended to read as follows:

(a) A formal hearing for the purpose of taking evidence upon the charge shall be conducted by [a hearing officer] an administrative law judge designated by the director. At any time, [a hearing officer] an administrative law judge may be substituted by the director for the [hearing officer] administrative law judge previously assigned.

(b) The hearing will not be adjourned unless good and sufficient grounds are established by the requesting party, who shall submit to the [hearing officer] administrative law judge an original and four copies of his application, on notice to all other parties, setting forth the factual circumstances of the application and the previously ascertained position of the other parties to the application. The failure of a party to appear at the hearing may, in the discretion of the designated administrative law judge, constitute ground for dismissal of the absent party's pleading.

(c) The hearing shall be open to the public unless otherwise ordered by the [hearing officer] administrative law judge.

(d) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the [hearing officer] administrative law judge shall have the power to call and examine witnesses, and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. It shall be the duty of the [hearing officer] administrative law judge to inquire fully into all matters at issue to obtain a full and complete record.

(i) The refusal of a witness to answer any question which has been ruled to be proper shall, at the discretion of the [hearing officer] administrative law judge, be grounds for striking all testimony previously given by such witness on related matters.

(j) Misconduct at any hearing before [a hearing officer] an administrative law judge shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the board after due notice and hearing.

(k) At the discretion of the [hearing officer] administrative law judge, the hearing may be continued from day to day or to a later day or another place, by announcement thereof at the hearing or by other appropriate notice.

(l) A motion may be made to dismiss a charge, or the [hearing officer] administrative law judge may do so at his own initiative on the ground that the alleged violation occurred more than four months prior to the filing of the charge, but only if the failure of timeliness was first revealed during the hearing. An objection to the timeliness of the charge, if not duly raised, shall be deemed waived.

22. Section 204.8 is hereby amended to read as follows:

Briefs and proposed findings. Any party shall be entitled upon request made before the close of a hearing conducted by [a hearing officer] an administrative law judge designated by the director, to file an original and four copies of a brief or proposed findings of fact and conclusions of law, or both, within such time as fixed by the [hearing officer] administrative law judge, who may direct the filing of briefs when he deems the submission of briefs warranted by the nature of the proceeding or the particular issue therein. Any such brief or proposed findings of fact and conclusions of law filed with the [hearing officer] administrative law judge must be accompanied by proof of service of a copy thereof upon all other parties.

23. Section 204.9 is hereby amended to read as follows:

Decision and recommended order by [hearing officer] administrative law judge. Upon completion of a proceeding before [a hearing officer] an administrative law judge designated by the director, he shall issue a decision and recommended order and submit the record of the case to the board.

24. Section 204.10 is hereby amended to read as follows:

Exceptions to [hearing officer's] administrative law judge's decision and recommended order.

(a) Within 15 working days after receipt of the decision and recommended order, a party may file with the board an original and four copies of a statement in writing setting forth exceptions thereto or to any other part of the record or proceedings, including rulings upon motions or objections, and an original and four copies of a brief in support thereof shall be filed with the board simultaneously; at the same time, copies of such exceptions and briefs shall be served upon all other parties and proof of such service shall be filed with the board.

(b) The exceptions shall:

(1) set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken;

(2) identify that part of the [hearing officer's] administrative law judge's [report] decision and recommended order to which objection is made;

(3) designate by page citation the portions of the record relied upon; and

(4) state the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

(c) Within 15 working days after receipt of a decision of the director dismissing a charge because the facts alleged do not, as a matter of law, constitute a violation of the Act, the charging party may file with the board an [orignal] original and four copies of a statement in writing setting forth his appeal from the decision, together with proof of service of a copy thereof upon each respondent. The statement shall set forth the reasons for the appeal.

25. Section 204.14 is hereby amended to read as follows:

Board action. (a) Upon receipt of the case, the board may adopt, modify or reverse the director's or [hearing officer's] administrative law judge's decision and recommended order.

(b) Unless a party files exceptions to the decision and recommended order of the director or [hearing officer] administrative law judge within 15 working days after receipt thereof, the decision and recommended order, or any part thereof, which concludes that a charge should be dismissed, in whole or in part, will be final.

(c) Unless a party files exceptions to the decision and recommended order of the director or [hearing officer] administrative law judge within 15 working days after receipt thereof, the decision and recommended order, or any part thereof which concludes that a charge has merit and that remedial action should be required, will be final, except that the board may, on its own motion, decide to review the remedial action [recomended] recommended within 20 working days after receipt by the parties of the decision and recommended order.

26. Subdivision (b) of section 205.1 is hereby amended by renumbering paragraph (4) to be paragraph (9) and by adding five new paragraphs to read as follows:

(4) The number of employees in the negotiating unit, together with a list of the job titles represented in that unit.

(5) The public employer's fiscal year and the expiration date of the present agreement.

(6) A clear and concise history of negotiations leading to the impasse including the number and dates of the negotiation sessions.

(7) A list of all presently unresolved issues.

(8) A statement that a copy of the notification has been served upon the other parties to the collective negotiations.

(9) A clear and concise statement of any other relevant facts.

27. Subdivision (a) of section 205.6 is hereby amended to read as follows:

(a) Objections to arbitrability. Objections to the arbitrability of any matter set forth in the petition or response may only be raised by the filing of an improper practice charge or a declaratory ruling petition pursuant to the requirements of this section. Objections as to arbitrability may include, but not be limited to, the following circumstances:

(1) a matter proposed is not a mandatory subject of negotiations;

(2) a matter proposed was not the subject of negotiations prior to the petition;

(3) a matter proposed had been resolved by agreement during the course of negotiations.

28. Subdivision (c) of section 205.6 is hereby amended to read as follows:

[(c)] (d) The public arbitration panel shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge or a declaratory ruling petition, until final determination thereof by the board or withdrawal of the charge; the panel may make an award on other issues.

29. A new subdivision (c) is hereby added to section 205.6 to read as follows:

(c) The proposed arbitration of any matter set forth in the petition or response may be objected to by either party as not being within the scope of mandatory negotiations by filing a declaratory ruling petition pursuant to Part 210 of these rules. If filed by the respondent, such a petition may not be filed after the date of the filing of the response filed in accordance with section 205.5 of these rules; if filed by the petitioner, such a petition may not be filed more than 10 working days after its receipt of the response.

30. Subdivision (b) of section 205.7 is hereby amended to read as follows:

(b) If the parties are unable to agree upon the public member within 10 days, either party may request the board to submit a list of qualified persons for selection of the public member. Within seven days after receipt of such request, the board shall submit to each party an identical list of [seven] nine arbitrators from its panel of arbitrators. A resume of each arbitrator on such list shall be enclosed for the parties' review. The parties shall be required to meet and make their selection in the following manner. Each party shall alternately strike from the list one of the names with the order of striking determined by lot until the remaining one person shall be designated as the public member. If either party so desires, a representative of the board will be present

during the name-striking process. The name-striking process must be completed within five days of receipt of the list from the board. The board must be immediately notified of the person selected as the public member. Upon the failure of one party to participate in the selection process, all names on the list shall be deemed acceptable to it.

31. Section 206.6 is hereby amended to read as follows:

Hearing. (a) The board may designate [a hearing officer] an administrative law judge to conduct a hearing.

(b) Conduct of hearing.

(1) Hearings shall be open to the public unless otherwise ordered by the board or the [hearing officer] administrative law judge, as the case may be. At any time, another [hearing officer] administrative law judge may be substituted for the [hearing officer] administrative law judge previously assigned. It shall be the duty of the [hearing officer] administrative law judge, if any, to inquire fully into all matters and issues and to obtain a full and complete record.

(2) The [hearing officer] administrative law judge or the board may, in his or its discretion, continue the hearing from day to day or adjourn it to a later date or another place, by announcement thereof at the hearing or by other appropriate notice.

(3) If the answer alleges that the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike, and the employee organization has also filed a charge pursuant to section 204.1(a)(2) of this Chapter alleging that the public employer or its agents has engaged in or is engaging in an improper practice by virtue of those alleged facts which constitute extreme provocation, then, if practicable, the improper practice charge and the strike charge shall be heard upon a single record.

(c) Motions.

(1) All motions made after the designation of [a hearing officer] an administrative law judge and prior to the submission of the [hearing officer's] administrative law judge's report and recommendations to the board, shall be made to the [hearing officer] administrative law judge. All motions made prior to the designation of [a hearing

officer] an administrative law judge or after the submission of the [hearing officer's] administrative law judge's report and recommendations to the board, shall be made to the board. All such motions, except those made during a hearing, shall be made in writing, shall briefly state the relief sought, and shall be accompanied by affidavits, when required, setting forth the facts in support of such motion. The moving party shall serve a copy of all motion papers on all other parties and shall, within three working days thereafter, file with the [hearing officer] administrative law judge or the board the original and three copies thereof with proof of service. Answering affidavits, if any, must be served on all parties and the original thereof, together with three copies and proof of service, shall be filed with the [hearing officer] administrative law judge, if any, or the board within five working days after service of the moving papers, unless the [hearing officer] administrative law judge or the board directs otherwise. The board may decide to hear oral argument or hear testimony on motions made to it, in which case it shall notify the parties of such fact and of the time and place of such argument, or for the taking of such testimony. All such motions and rulings and orders thereon shall be part of the record of the proceedings.

(2) Review. Unless expressly authorized by the board, rulings by the [hearing officer] administrative law judge, if any, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision.

(d) Waiver. An objection not duly urged before [a hearing officer] an administrative law judge, if any, or before the board, shall be deemed waived unless the failure to urge such objection shall be excused by the board because of extraordinary circumstances.

(e) Introduction of evidence; the rights of parties at hearings.

(1) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the board or [hearing officer] administrative law judge, as the case may be, shall have the power to call and examine witnesses, and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. Compliance with the technical rules of evidence shall not be required. Stipulations of fact may be introduced in evidence with respect to any issue.

(2) The refusal of a witness at any hearing to answer any question which has been ruled to be proper shall, at the discretion of the board or the [hearing officer] administrative law judge, as the case may be, be grounds for striking all testimony previously given by such witness on related matters.

(3) Misconduct at any hearing before [a hearing officer] an administrative law judge or the board shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the board or its agents after due notice and hearing.

32. Section 206.7 is hereby amended to read as follows:

Submission to the board. (a) After completion of the hearing, or upon the consent of the parties, the [hearing officer] administrative law judge, if any, shall submit the case, including his report and recommendations, to the board. The record shall include the charge, notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence and any briefs or other documents submitted by the parties. The board shall cause the report and recommendations of the [hearing officer] administrative law judge, if any, to be delivered to all parties to the proceeding. Briefs may be filed by any party within seven working days after receipt of the report and recommendations of the [hearing officer] administrative law judge, if any; provided, however, that the board may extend the time during which briefs may be filed because of extraordinary circumstances. An original and four copies of the briefs shall be filed with the board.

(b) Upon receipt of the case from [a hearing officer] an administrative law judge, the board shall proceed either forthwith upon the record and briefs, or, if it so determines, after oral argument or further hearings to decide the issues and make such disposition of the matter as it deems appropriate in accordance with section 210.3(f) of the act.

(c) If no [hearing officer] administrative law judge was designated, upon completion of the case before it, the board shall decide the issues and make such disposition of the matter as it deems appropriate in accordance with section 210.3(f) of the act.

33. Subdivision (a) of section 207.4 is hereby amended to read as follows:

(a) Demand for arbitration (Request made by one party to the other). Petitioner shall serve on the respondent a demand for arbitration which shall serve as notice of intention to arbitrate pursuant to CPLR section 7503. Such notice shall be served in the same manner as the summons or by registered or certified mail, return receipt requested. In addition, [three] two copies of the demand for arbitration shall be filed with the director of conciliation together with proof of service on the respondent.

34. A new section 215.3 is hereby adopted to read as follows:

215.3 Confidential communication. Communications in collective negotiations between a party to such negotiations and its negotiator(s) shall be deemed confidential to the extent that such communications would be subject to an attorney-client privilege if the negotiator(s) were an attorney. No administrative law judge shall accept evidence regarding such communications during any proceeding subject to these rules except under circumstances where it would be admissible if the negotiator(s) were an attorney.