STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK CITY TRANSIT AUTHORITY,

Respondent,

-and-

CASE NO. U-8054

NEW YORK CITY TRANSIT PATROLMEN'S BENEVOLENT ASSOCIATION,

Charging Party.

ALBERT C. COSENZA, ESQ. (RICHARD DREYFUS, ESQ., and CARLA LOWENHEIM, ESQ., of Counsel), for Respondent

KLIEGERMAN & FRIESS, ESQS. (ALAN I. FRIESS, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the New York City Transit Patrolmen's Benevolent Association (PBA) to the decision of the Administrative Law Judge (ALJ) dismissing its improper practice charge filed in Case U-8054 against the New York City Transit Authority (TA).[1/] The charge alleged that TA had violated §209-a.1(a), (d) and (e) of the Public Employees' Fair Employment Act (Act) by the unilateral

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1/The PBA has not filed exceptions to that part of the decision of the ALJ which dismissed for failure of proof and prosecution an improper practice charge filed by the PBA in Case U-8397.

"deployment of New York City Police Officers to perform Transit Police Officer duties." The charge was subsequently amended to allege similar violations in the deployment of police officers of the New York City Housing Authority (HA).

In or about January 1985, representatives of TA were summoned to a meeting at the office of the Deputy Mayor of New York City and informed that the City would institute a program, called "Operation High Visibility", whereby uniformed police officers of the City and TA, and later HA, would be placed on an overtime basis on the trains and platforms of the subway system operated by TA. TA representatives were informed at that meeting that the City would provide both the City's police department and TA's police department with $1,000,000 per month each for the cost of such overtime deployment. The amount was reduced to $500,000 per month to each in August; the funding and the program were discontinued early in 1986. The program was instituted to combat what the City understood to be a public perception of an unsafe subway system in the City.

Staff from the TA's and City's police departments thereafter met to work out the details of how the program was to be implemented. At the inception of the program approximately 350 police officers were assigned to the program, roughly half from the New York City police department and half from TA. A relatively small number

of HA police officers were also included in the program.

The ALJ found that there is no record evidence that TA had any role whatsoever in the operative decision to adopt the program. In this connection, he concluded that TA cooperation in implementing the City's program did not negate the finding that TA neither took nor authorized that action, and therefore, TA cannot be held accountable for it. He also found that, although TA police have had the primary responsibility for patrolling the subway system, this has not been an exclusive responsibility, the City and HA police having also done so in the past, albeit on a far less extensive basis than under the current program.

The ALJ dismissed the allegation of a violation of §209-a.1(e) of the Act on the ground that there is no evidence that the in-issue action was governed by any term of the parties' expired agreement. Finally, the ALJ rejected PBA's argument that TA violated §209-a.1(d) of the Act in that it refused to negotiate the impact of the utilization of City and HA employees on the subways. His reason was that this argument was not related to any allegation in PBA's charge and was not litigated.

DISCUSSION

In its exceptions, the PBA challenges the ALJ's decision on several grounds.

PBA argues that it was error for the ALJ to find that the

City and HA police have also patrolled the subway system. PBA alleges that its members have exclusive "work place jurisdiction", at least to the extent of performing routine patrols in the subways.

Having reviewed the record, we find that it supports the ALJ's finding that the work performed by the City and HA police officers during the existence of the in-issue program had not been performed exclusively by TA unit employees in the past. Accordingly, the assignment of City and HA police cannot constitute a violation of §209-a.1(d) of the Act by TA.[2/]

PBA also objects to the ALJ's finding that there was no evidence that the in-issue action was governed by any term of the parties' expired agreement. It relies on the decision of an arbitrator in a contract grievance arbitration, which concluded that the parties' agreement reserved patrol of the subways to TA employees in the PBA unit. The question before

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2/Otselic Valley CSD, 19 PERB ¶4575, aff'd, 19 PERB ¶3065, mot. to reopen denied, 19 PERB ¶3072 (1986); Niagara Frontier Transportation Authority, 18 PERB ¶3083 (1985).

PBA points to evidence of an active role by TA in the implementation of the City's program, and asserts that without TA's consent and cooperation, the program could not have been inaugurated. Thus, PBA argues TA should be held responsible for acquiescing in the program. TA responds that it cannot be responsible for the assignment by the City of City and HA employees to patrol the subways because, as a matter of law, it could not prevent such patrols. In view of our determination that the patrols had not been exclusive work for the PBA unit, it is unnecessary for us to resolve the legal question of TA's right to exclude City and HA police from patrolling its property.

the arbitrator was whether TA violated the agency shop fee provision of the parties' existing contract, by assigning or permitting the assignment of the patrol work to City and HA employees. We find no basis for deferring to this determination as to the meaning of the parties' agreement and thus finding a violation of §209-a.1(e) of the Act. The arbitrator's conclusion is repugnant to the Act and, therefore, does not satisfy our standards for deferral as set forth in New York City Transit Authority, 4 PERB ¶3031 (1971).

Finally, the PBA claims that the ALJ erroneously found that the PBA did not allege or litigate a claim that the TA refused to negotiate the impact of the decision to institute the program. PBA, however, relies on documents which show only a demand to negotiate the decision itself, not the impact of that decision.

NOW, THEREFORE, we affirm the decision of the ALJ and WE ORDER that the charge herein be, and it hereby is, dismissed in its entirety.

DATED: May 8, 1987
New York, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member