STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and- CASE NO. U-8922

CITY OF BUFFALO (POLICE DEPARTMENT),

Respondent.

DIXON, DE MARIE & SCHOENBORN, P.C. (ANTHONY J. DE MARIE, ESQ., of Counsel), for Charging Party

SAMUEL F. HOUSTON, ESQ. (FLORA MILLER SLIWA, ESQ., of Counsel), for Respondent

LOUIS N. KASH, CORPORATION COUNSEL (BARRY K. WATKINS, ESQ., of Counsel) for City of Rochester, Amicus Curiae

HARVEY and HARVEY, MUMFORD & KINGSLEY (JAMES B. TUTTLE, ESQ., of Counsel) for Police Conference of New York, Inc., Amicus Curiae

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Buffalo [Police Department] (City) to an Administrative Law Judge (ALJ) decision which found that the City had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally ordered probationary police officers represented by the Buffalo Police Benevolent Association (PBA) to submit to random drug testing. In essence, the ALJ held that, whether random drug testing constitutes an unreasonable search and seizure

prohibited by the Fourth Amendment of the United States Constitution and/or the New York State Constitution, or (if random drug testing is not unconstitutional) whether a balancing test between the employer's interest in a drug free environment and the employee's interest in protection of his privacy applies, the result is the same: an employer may not unilaterally impose a random drug testing program on its employees, whether probationary or permanent. Because the ALJ found that random testing is unconstitutional, however, he concluded that it is a permissive subject of bargaining only, subject to the consent of the employees' bargaining agent. The agent can properly refuse, under the Act, to engage in negotiations leading to waiver of a constitutional right, but has the power to do so if it deems appropriate. As a result of his holding, the ALJ directed return to the status quo and the reinstatement with back pay and benefits of an employee terminated pursuant to the unilaterally imposed random drug testing procedure. The City excepts to the holdings of the ALJ in virtually all respects.

STATEMENT OF FACTS

In the spring of 1986, the PBA, which represents City police officers, and the City commenced negotiations for a successor agreement to their then-existing agreement. During the course of negotiations, the City proposed a new

contractual provision which would authorize the Police Commissioner to order any unit employee to submit to testing to determine whether the employee was under the influence of alcohol or controlled substances. On August 28, 1986, it withdrew that proposal, and, on the following day, the Police Commissioner issued a directive, ordering all probationary police officers to submit to drug testing. The directive provides that all probationary employees will be required to submit, without advance notice, to drug testing, and that a positive test results in dismissal. Refusal to submit to testing will, according to the directive, constitute grounds for dismissal. In a September 24, 1986 letter further explaining the directive, the Police Commissioner stated that testing would be performed at least twice during the probationary term by urine sample, which "is to be done with as much consideration as possible to avoid embarrassing the individual being tested, while maintaining observation and chain of evidence control." Following institution of the drug testing program, one probationary officer, as a result of the test, was dismissed from his employment. The instant improper practice charge ensued.

DISCUSSION

I. Review of ALJ Holding

When the ALJ issued his decision on March 30, 1987, the New York Court of Appeals had not yet ruled on the question

of whether random drug testing for governmental employees was a constitutionally permissible practice. Shortly after the ALJ issued his decision, the Court of Appeals ruled on the question, at least in part, in Matter of Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, 70 N.Y.2d 57, June 9, 1987. In that case, the Court of Appeals held that a school district policy compelling all probationary teachers to submit to urinalysis to determine potential drug abuse constituted an illegal search and seizure under the Fourth Amendment of the United States Constitution and under Article I, §12 of the New York State Constitution. This holding is, we believe, dispositive of a number of the issues raised by the City in its exceptions and brief to this Board.

For example, the City excepted to the finding of the ALJ that it has been "clearly" established that "random drug testing . . . infringes upon employees' constitutional rights." (p. 6 of ALJ decision). Whether the law of the State of New York was clear at the time the ALJ decision was issued or not, it is now manifestly clear, based upon the ruling of the highest court of this State, that random drug testing, at least of teachers, does indeed infringe upon employees' constitutional right to protection from unreasonable searches and seizures under the United States

and New York State Constitutions. Based upon the holding of the Court of Appeals in Patchogue-Medford we conclude that in the State of New York, random testing for drugs of governmental employees is unconstitutional.[1/] Accordingly, the ALJ's holding is affirmed in this regard.

Furthermore, because the Court of Appeals held that the constitutional protection afforded to probationary teachers in Patchogue-Medford derived from the constitutional protection against unreasonable searches and seizures, rather than from a due process right, the status of the employees as probationary rather than permanent was apparently immaterial. Since the Court of Appeals' ruling actually applies to probationary teachers, there appears to be no basis for the City's contention that the probationary, as compared to permanent, status of the police officers is of any significance with respect to the constitutionality of random drug testing.

[1/] Other state and federal courts have also found that random drug testing is unconstitutional as to governmental employees. See, e.g., Fraternal Order of Police, Newark Lodge 12 v. City of New York, NJ Super. Ct., App. Div. No. A-4788-85T5 4/3/87, in which it was held that random testing of narcotic bureau officers was unconstitutional; Amalgamated Transit Union Local 1277 v. Sunline Transit Agency, US DC C Calif. No. 86-8270, 7/7/87, in which the District court made a similar finding as to random testing of bus drivers and maintenance workers.

Having concluded that random drug testing infringes upon employees' constitutional rights, it clearly follows that waiver of such constitutional rights can only occur upon consent. Since the police officers employed by the City are represented by a bargaining agent pursuant to the Act, the bargaining agent may act in the place of individual employees to grant or withhold consent. See Antinore v. State of New York, 49 A.D.2d 6, 8 PERB ¶7513 (4th Dep't 1975), aff'd, 40 N.Y.2d 921, 9 PERB ¶7528 (1976).

It is our conclusion, however, that a bargaining agent cannot be compelled to negotiate concerning a waiver of constitutionally protected rights.[2/] Thus, the employer not only is prohibited from unilaterally engaging in random drug testing, but it cannot compel the union to bargain with it concerning implementation of random drug testing. The issue of random drug testing is, therefore, held to be a permissive subject of bargaining: the employer may not implement it without negotiation, and the union does not have the duty to, but may, negotiate it with the employer.

2/See New York City Board of Education, 19 PERB ¶3015 (1986), in which we reviewed several cases dealing with various aspects of the effects of statutory and decisional law and public policy on the duty to bargain.

Turning to the issue of the remedial order recommended by the ALJ, we affirm the order of the ALJ which directs the reinstatement of the police officer terminated from his position as a result of the unilateral implementation of the drug testing program. Since a disciplinary penalty of termination was imposed pursuant to a procedure which was implemented in violation of the Act, reinstatement is the appropriate remedy. This is especially so in view of the fact that the record does not reveal nor has the City asserted any facts as to the work performance of the one identified officer who was dismissed which might render reinstatement an inappropriate remedy. Accordingly, the order of the ALJ is affirmed in this respect also.

II. Review of Remaining Exceptions

The City also excepts to the ALJ's comment that "in negotiations for prior contracts, the City had also made drug testing proposals", contending that there is no evidence in the record to support it. However, our review of the record indicates that, by letter dated January 21, 1987, Counsel for the City of Buffalo asserted to the ALJ that "attached to the stipulation are Exhibits 'A' and 'B' which are copies of proposals the Buffalo Police Department has presented through Lt. William J. McLean at previous collective bargaining sessions between the PBA and the City of Buffalo." In a February 5, 1987 letter confirming the

understandings and agreements of the parties, the ALJ stated, without any objection from the parties, that "Exhibits A and B which were attached to the stipulation are proposals that were put forth by the City of Buffalo during previous collective bargaining negotiations between the PBA and the City of Buffalo. The PBA never agreed to accept any of these proposals and the City of Buffalo ultimately dropped them." In view of the stipulations of the parties incorporating this correspondence into the record, we find that the ALJ's footnote statement is supported by the record, and the City's exception in this regard is accordingly dismissed.

The City also excepts to a comment made by the ALJ that drug testing is "done, without notice, at least twice during the probationary period". Although, as asserted by the City, the record shows that the parties stipulated that the drug test of August 29, 1986 "was the first time employees had ever been ordered to submit to such testing", a September 24, 1986 letter to the president of the Buffalo PBA from the Commissioner of Police, which is part of the record, describes in detail the drug testing procedure implemented by the City. In that letter, Commissioner Degenhart stated: "At least twice during the Basic Recruit Training, the Officer is subjected to drug testing, and he may be tested further before the end of his probationary

period, via urine sample." Based upon the foregoing record evidence, Exception No. 2 of the City is also dismissed in its entirety.

Exception No. 3 asserts that there is no record evidence to support the statement of the ALJ that "the City asserts that drug testing goes hand-in-hand with its managerial right to discipline its employees for misconduct and/or for inability to perform their functions." However, the City's answer asserts as an affirmative defense the following: "that the Commissioner of Police, Ralph V. Degenhart, had the absolute right to order testing of probationary police officers, in that he has the absolute right to dismiss probationary police officers as he sees fit for acts of misconduct and/or the inability of a policeman to perform his duties". In our view, the ALJ's decision fairly describes the assertions made in the City's answer, and in particular, the second affirmative defense contained in its answer. Furthermore, a review of the notice issued by the police department of the drug testing program clearly indicates that the purpose of the drug testing is to discipline and discharge employees if the test results are positive. The notice of the program provides, in relevant part, as follows:

> During your recruit training and throughout your probationary term, you will be tested, without advance notice, to determine if you have in fact used drugs. If the tests are positive, you will be dismissed. A refusal to submit to the testing will be reason for dismissal. Any attempt to impede, alter, or in any way hamper the testing procedure will be basis for dismissal. (See Exhibit B annexed to the parties' stipulation of fact dated January 6, 1987.)

It is, based upon the foregoing record evidence, our conclusion that the ALJ's characterization of the City's position was clearly supported by the record, and the third exception to the ALJ decision is accordingly also dismissed. Similarly, in light of the foregoing, so much of Exception No. 8 as objects to the finding made by the ALJ that "the random testing here relates solely to employee discipline . . . " is also dismissed.

The remainder of Exception No. 8 appears to relate to a conclusion of law reached by the ALJ that, because the testing related "solely to employee discipline", it is mandatorily negotiable. However, it is not necessary to reach the question of whether the random testing here in issue is mandatorily negotiable, because we have determined, for the reasons set forth herein, that the unconstitutionality of the testing places it in the category of permissive subjects of bargaining. Were a final judicial decision to be made that random testing as to probationary police officers (as compared to probationary teachers) is not unconstitutional

in New York, we would at that point in time consider the question of whether the balancing test referred to by the ALJ would require a finding that the subject of random testing is a mandatory subject of bargaining. In light of our reading of the Patchogue-Medford decision, supra, we need not reach that issue in this case.

The remaining exceptions to the ALJ decision, to the extent that they are not specifically reviewed here, are dismissed.

Based upon the foregoing, the exceptions filed by the City are dismissed and the decision of the ALJ is affirmed.

IT IS ORDERED, THEREFORE, that the City of Buffalo (Police Department):

1. Cease and desist from unilaterally requiring that all probationary police employees submit to drug testing;
2. Immediately remove and destroy all reports and documents maintained in City files relating to employees who were required to submit to such drug testing;
3. Immediately offer reinstatement to his or her former position to any probationary police officer who was dismissed from employment as a result of such drug testing and pay such officer any lost

wages and benefits resulting from such dismissal, plus interest at the maximum legal rate, less any interim outside earnings;

4. Negotiate in good faith with the Buffalo Police Benevolent Association concerning any random drug testing program it seeks to implement; and

5. Sign and post the attached notice at all locations customarily used to communicate with unit employees.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

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 all employees in the unit represented by the Buffalo Police Benevolent Association, that the City of Buffalo (Police Department):

1. Will refrain from unilaterally requiring that all probationary police employees submit to drug testing;

2. Will immediately remove and destroy all reports and documents maintained in City files relating to employees who were required to submit to such drug testing;

3. Will immediately offer reinstatement to his or her former position to any probationary police officer who was dismissed from employment as a result of such drug testing and pay such officer any lost wages and benefits resulting from such dismissal, plus interest at the maximum legal rate, less any interim outside earnings;

4. Will negotiate in good faith with the Buffalo Police Benevolent Association concerning any random drug testing program it seeks to implement.

City of Buffalo (Police Department)

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

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

-and- CASE NO. U-7618

STATE OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL CONSERVATION) and OLYMPIC REGIONAL DEVELOPMENT AUTHORITY,

Respondents.

RICHARD E. CASAGRANDE, ESQ. (JEFFREY G. PLANT, ESQ., of Counsel), for Charging Party

JOSEPH M. BRESS, ESQ. (RICHARD J. DAUTNER, ESQ., of Counsel), for Respondent State of New York (Department of Environmental Conservation)

RICHARD A. PERSICO, ESQ., for Respondent Olympic Regional Development Authority

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Public Employees Federation, AFL-CIO (PEF) to the decision of the Administrative Law Judge (ALJ) dismissing, in its entirety, its charge against the State of New York (Department of Environmental Conservation) (State) and the Olympic Regional Development Authority (ORDA).

PEF's charge arises out of the transfer of the operation and management of the Gore Mountain Ski Center (Gore) from the State to ORDA. By its charge, PEF asserts the right to continue to represent the job titles at Gore of Ski Center Maintenance Supervisor (full-time), Ski Instructor I, II and III (seasonal) and Ski School Director (seasonal), which titles were included in the Professional, Scientific and Technical Unit (PS&T Unit) represented by PEF prior to the transfer.

The charge alleges that the respondents violated §§209-a.1(a), (b), (c) and (d) of the Public Employees' Fair Employment Act (Act): 1) by failing to include the 1982-85 collective bargaining agreement between the State and PEF in the agreement between the State and ORDA transferring the operation and management of Gore; 2) in failing to transmit to PEF dues and agency fees of the employees PEF asserts the right to represent; 3) in redefining the unit designation of the ski instructors and reclassifying the full-time position of Ski Center Maintenance Supervisor; 4) in refusing to recognize and negotiate with PEF as representative of the job titles formerly in the PS&T Unit; and 5) in deliberately interfering with the rights of PEF and the members of the PS&T Unit at Gore.

FACTS

The parties entered into a stipulation of fact which, with certain other stipulated documents, constitutes the record in this case. The findings of fact set forth in the ALJ's decision are based on the parties' stipulations, and no question is raised by PEF in its exceptions regarding those findings. Accordingly, we adopt the findings of fact of the ALJ.

Prior to April 1, 1984, the State operated Gore. The job titles of Ski Instructor I, II and III, Ski School Director and Ski Center Maintenance Supervisor were included in the PS&T Unit represented by PEF and were covered by the 1982-85 collective bargaining agreement between the State and PEF. ORDA was created by Chapter 404 of the Laws of 1981 (codified as Public Authorities Law, Title 28) as a public benefit corporation empowered to operate Olympic facilities in and around Lake Placid, New York, including the Whiteface Mountain Ski Center, the Mount Van Hoevenberg Recreation Area and other facilities. ORDA recognized Local 059, Civil Service Employees Association, Inc. (CSEA) as bargaining representative of all ORDA employees, including Ski Instructor I, II and III and clerical and maintenance employees. ORDA and CSEA entered into a collective bargaining agreement for the term of January 27, 1984 through March 31, 1987.

Pursuant to Chapter 99 of the Laws of 1984, effective April 1, 1984, the State and ORDA entered into an agreement, also effective April 1, 1984, transferring the operation, maintenance and management of Gore to ORDA. The State abolished all full-time titles at Gore, effective March 31, 1984. Incumbents in the Ski Instructor titles had been earlier terminated at the end of the previous ski season. In compliance with the enabling legislation, the transfer agreement provided that any State employees determined by ORDA to be essential to its operations could be transferred to comparable civil service positions with ORDA, without taking any further examination and with certain retirement benefits intact. ORDA hired certain annual salaried employees formerly employed by the State, including Richards, the former Ski Center Maintenance Supervisor, who was hired by ORDA as Mountain Manager, a title whose duties, ORDA claims, would warrant managerial designation. During the following winter season of 1984-85, ORDA employed at Gore 41 employees as ski instructors, of whom 36 had been employed by the State at Gore during the previous ski season. ORDA included all employees hired to work at Gore in the unit represented by CSEA, with the exception of the title of Mountain Manager. PEF alleges that the duties of Mountain Manager are the same as those of Ski Center Maintenance

Supervisor, formerly in the PS&T Unit, and that it should be grouped with the other former employees from the PS&T Unit.

Public Authorities Law §2614(2)(c) requires ORDA to "comply with all agreements executed by the state affecting the...facility existing at the time [of the transfer agreement] provided such existing agreements are listed in the agreement with the state". The State-PEF 1982-85 collective bargaining agreement was not one of the agreements listed in the transfer agreement.

ORDA employs approximately 500 employees at Whiteface, Gore and the other Olympic facilities in various titles. Approximately 46 ski instructors were employed at Gore for the 1985-86 season, and approximately 52 ski instructors were employed at Whiteface for the same season. The two facilities offer similar services and are located approximately one and one-half hours from each other. Pursuant to the current ORDA-CSEA contract, all employees share in the same salary schedule, leave provisions and other benefits, with some seasonal employees receiving a pro rata amount of leave. As a public benefit corporation, ORDA is granted the power to fix the duties, salaries and benefits of its employees. Its personnel functions are managed solely by ORDA, and the State exercises no direction or control over ORDA employees.

PEF never received dues from Richards after the State abolished his position. PEF requested dues deductions for Richards' title from ORDA and was refused. PEF requested and ORDA refused to transmit dues or agency fees for ski instructors. PEF demanded negotiations with ORDA regarding the former PS&T Unit employees at Gore and ORDA refused.

ALJ DECISION AND EXCEPTIONS

All of PEF's claims in this improper practice proceeding are based on its assertion of a continuing right to represent the PS&T Unit members hired by ORDA when ORDA assumed the operation of Gore. In effect, PEF asserts the right to represent a unit of ORDA employees consisting of seasonal ski instructors and one full-time supervisor employed at Gore. In support of its position, PEF argued before the ALJ, and argues in its exceptions from the ALJ's decision, that its representation and contract rights were not affected by the transfer of the Gore operations to ORDA because 1) ORDA is acting only as the "agent" of the State in the operation of Gore and the employment of the former PS&T Unit members, and, as agent and principal, ORDA and the State are required under the Taylor Law to continue PEF's representation status and comply with the State-PEF contract; or, alternatively, 2) ORDA should be found to be either the "alter ego" of the State or a "successor employer" of the State and, therefore, should be obliged to assume the State-PEF contract and

negotiate with PEF concerning terms and conditions of employment of the former PS&T Unit members.

PEF's "agency" argument rests entirely on the decision of the Appellate Division, Third Department, in Slutzky v. Cuomo.[1/] That decision held that the transfer agreement between the State and ORDA constituted ORDA as an agent of the State for the operation and management of Gore and was not a lease of property in violation of Article XIV, Section 1 of the State Constitution, which prohibits the leasing of "forever wild" sections of the forest preserve. The ALJ concluded that the holding in Slutzky was limited to an interpretation of the State Constitution and was not dispositive of the issues in this case. The ALJ determined that ORDA was a separate public employer under the Act and was not the agent of the State for the purposes of the Act.

The ALJ also determined that, although ORDA was a "successor employer" of the State in the operation of Gore, ORDA was not obligated to deal with PEF since the unit PEF seeks to represent cannot be considered the "most appropriate" unit.

In its exceptions, PEF reiterates the arguments rejected by the ALJ. It asserts that the Slutzky decision requires a

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[1/] 114 A.D.2d 116 (3d Dep't 1986).

finding that ORDA is merely the agent of the State in the operation of Gore. It urges that the State violated its negotiating obligations under the Act when it failed to include the State-PEF contract in the agreement transferring the operation of Gore to its agent and when it permitted ORDA to "destroy" the Taylor Law rights of PS&T Unit members. PEF also urges that we should find that ORDA is the successor employer of the State and, therefore, is bound to accord PEF continuing representation and contract rights. PEF asserts that our decision in City of Amsterdam[2/] requires such a holding.

DISCUSSION

We affirm the decision of the ALJ and dismiss PEF's charge in its entirety.

We agree with the ALJ that the decision in Slutzky v. Cuomo is not dispositive of the issues raised in this proceeding. We are here asked to determine whether, under the Taylor Law, the State or ORDA is legally obligated to comply with the contract between the State and PEF and to recognize and bargain with PEF concerning the terms and conditions of employment of the employees formerly in the PS&T Unit. For the purposes of other statutes and the State

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2/ 17 PERB ¶3045 (1984), petition to review dismissed, 17 PERB ¶7015 (Sup. Ct., Albany Co., 1984).

Constitution, certain public benefit corporations and "state public authorities"[3/] may be "agents" of the State in the performance of their statutory duties. For the purposes of the Taylor Law, however, all public benefit corporations and public authorities are defined as separate "public employers".[4/] The purposes and policies of the Taylor Law are best effectuated "if the employees' representatives negotiate directly with those who have authority over all the essential terms of employment".[5/] It is undisputed that ORDA now controls all essential terms of employment of the former PS&T Unit members. The State exercises no direction or control over such matters. In the absence of such direction and control, for the purposes of the Taylor Law, legal effect cannot be given to the holding that the State is the "principal" and ORDA the "agent" in the operation and management of Gore.

PEF asserts that the State, as part of its duty to negotiate in good faith, was obligated to insure that its "agent", ORDA, honor the 1982-85 State-PEF contract.

3/See CSL §201.8.

4/CSL §201.6(a).

5/Ulster County v. CSEA Unit of Ulster County Sheriff's Dept., et al., 37 AD2d 437, 439-40, 4 PERB ¶7015, p. 7100 (3d Dep't 1971).

Otherwise, PEF argues, the State could avoid its bargaining and contractual obligations at any time by transferring a State function to an agent.

To the extent that PEF's contention rests on ORDA's alleged status as "agent", it must be rejected in light of our conclusion that, for the purposes of the Taylor Law, ORDA is a separate public employer and not the agent of the State regarding the terms and conditions of employment of the affected employees. Furthermore, inasmuch as ORDA was created by legislative enactment specifically for the purpose of operating and managing Gore and other Olympic facilities, and the transfer agreement effectuated that statutory purpose, we cannot find that the State, as public employer, transferred the Gore operation for the purpose of avoiding its obligations under the Act. In the absence of such a finding, the decision not to include the State-PEF contract in the transfer agreement cannot itself be a violation of the State's duty to negotiate in good faith. We have previously held that an employer is under no mandatory obligation to negotiate a demand that it agree to bind a successor employer to its collective bargaining agreement.[6/] Under the circumstances disclosed by this record, therefore, we

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[6/] Monroe Woodbury Teachers Ass'n, 10 PERB ¶3029 (1977).

conclude that the State did not violate its bargaining obligations under the Act when it determined not to bind ORDA to the State-PEF 1982-85 contract.[7/]

For the foregoing reasons, we must also reject PEF's claim that ORDA is the "alter ego" of the State and must, therefore, be bound by the bargaining obligations of the State.

We come now to PEF's claim that ORDA is a "successor employer" of the State in the operation of Gore and, as such, should be obligated to negotiate with PEF and assume the State-PEF contract.

The cases are legion in the private sector concerning the rights and obligations mandated by the National Labor Relations Act when a new employer succeeds an employer who is a party to an existing collective bargaining agreement and relationship. The U. S. Supreme Court's most significant holdings and analyses of the "successor employer" problem are found in John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); NLRB v. Burns International Security Services, 406 U.S. 272 (1972); Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249 (1974); and, most recently, Fall River Dyeing &

7/A contrary conclusion would be inconsistent with our view of ORDA's obligations under the Act, as hereinafter discussed.

Finishing Corp. v. NLRB, ___ U.S. ___ (decided June 1, 1987). Generally, questions regarding the obligations of the successor employer fall into two general categories: 1) its duty, if any, to continue the substantive provisions of any existing or expired agreements which were negotiated by its predecessor in interest, and 2) its duty, if any, to continue negotiations with the existing negotiating representatives of its predecessor's employees.

In Wiley, the Supreme Court appeared to hold that a successor employer could be required to arbitrate a dispute arising under the contract entered into by its predecessor. The Court subsequently held, however, in Burns, that while a company which took over the operation and employees of another could be ordered to bargain with the predecessor's union, it could not be ordered by the NLRB to assume the obligations of the predecessor's collective bargaining agreement. Two years later, in Howard Johnson, the Court held that where there is a sufficient discontinuity between the signatory predecessor employer and the successor, the latter is free of any obligation to arbitrate a dispute arising under the labor agreement.

In determining whether a new company is indeed the successor to the old for purposes of defining obligations under the federal statute, the focus has been on whether there is "substantial continuity" between the enterprises.

In general, the NLRB and the courts will inquire whether a majority of the new employer's employees were employed by the old and whether the employees perform substantially the same work under the same working conditions. In addition, the obligations of successorship must also be predicated on the finding that the predecessor's bargaining unit remained substantially intact under the successor and continued to be an appropriate unit.[8/]

While we have cited these private sector cases here and in previous decisions,[9/] we do so only as for the purpose of comparison and not because we consider them controlling.[10/] The results reached in these cases are based on the policies of the national labor laws. The treatment of the "successor employer" problem under the Taylor Law, on the other hand, must be fashioned on the basis of the policies and provisions of that Law and other statutes relevant to the conduct of the affected public employers.

In particular, the legal obligations of "successor" public employers must be consistent with our long-standing

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[8/] NLRB v. Burns, supra; Border Steel Rolling Mills, Inc., 204 NLRB 814, 83 LRRM 1606 (1973); NLRB v. Security-Columbian Banknote Co., 541 F2d 135, 93 LRRM 2049 (1976).

[9/] See, e.g., City of Amsterdam, 17 PERB ¶3045 (1984); Monroe Woodbury Teachers Assn., 10 PERB ¶3029.

[10/] C.S.L. §209-a.3.

interpretation of the Act that the criteria set out in CSL §207.1 requires us to certify only the "most appropriate" units and that these are ordinarily the largest units consistent with the Act's standards.

Furthermore, most successorship questions in the public sector arise by virtue of operational changes made pursuant to statutory authorization. Transfers, mergers and consolidations of governmental operations, made pursuant to statute, do not involve policy concerns peculiar to the private sector, such as those relating to entrepreneurial freedom, transfer of capital and rejuvenation of failing businesses, which policies significantly influenced the decisions in Burns and Howard Johnson.

We are persuaded that ORDA's legal obligations, if any, to PEF cannot be decided simply on the basis of labeling ORDA as a "successor employer". The real question is whether, on the particular facts of the case, and in light of the policies of the Act and those implicit in the Public Authorities Law, ORDA is obligated to recognize and negotiate with PEF for a unit of employees consisting of seasonal ski instructors and one supervisor employed at Gore, and is bound by the State-PEF contract. Unquestionably, under the "continuity of enterprise" test, ORDA is a "successor employer" in the sense that it succeeded to the operations of

Gore, formerly operated by the State, and performs those operations essentially in the same manner. Nevertheless, ORDA has recognized a unit of all employees at its various facilities, including the seasonal ski instructors at both Gore and Whiteface. There is no basis for a finding that a unit consisting solely of former PS&T Unit titles at Gore is a "most appropriate" unit. For reasons entirely unrelated to the operations of ORDA, these positions were included in a Statewide unit of the Executive Branch of the State of New York. While these positions may have been appropriately placed in the PS&T Unit, there is no basis relating to ORDA's operations for concluding that these employees should continue to have separate unit status.

PEF urges that our decision in City of Amsterdam, supra, requires a different result. We there found that the City was the successor of two separate employers in the operation of its water and sewer plants and was required to deal with the unions that represented the employees of its two predecessors in the pre-existing negotiating units. In that case we dealt with the transfer of discrete, complete units. We concluded that these former units, taken over in whole by the City, represented the most appropriate unit structure. The uniting question presented here, however, is vastly different. This case does not involve consideration

of a discrete unit of employees transferred from one employer to another. PEF seeks here to follow some 40 members of the PS&T Unit, and asks us to ignore the standards of CSL §207.1 insofar as ORDA is concerned. PEF clearly misapprehends its rights under the Taylor Law. Nothing in the Act guarantees continuing representation rights under the circumstances disclosed by this record.[11/]

Finding no legal obligation by the State or ORDA to recognize or negotiate with PEF concerning the former PS&T Unit employees nor any obligation on the part of ORDA to comply with the State-PEF contract, we cannot sustain any of the alleged improper practices set forth in PEF's charge.

ACCORDINGLY, WE ORDER that that charge must be, and it hereby is, dismissed in its entirety.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

11/We need not reach the issue whether, if ORDA had assumed a substantial portion of the PS&T Unit, it would have had an obligation to negotiate with PEF.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MIRIAM SOFFER

Charging Party,

-and- CASE NO. U-9311

CITY UNIVERSITY OF NEW YORK (QUEENS COLLEGE) and PROFESSIONAL STAFF CONGRESS/CUNY,

Respondents.

MIRIAM SOFFER, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Miriam Soffer (charging party) to a decision of the Director of Public Employment Practices and Representation (Director), which dismissed an improper practice charge alleging a violation of §209-a.1(e) of the Public Employees' Fair Employment Act (Act) by the City University of New York (Queens College) (employer) and of §209-a.2(a) of the Act by the Professional Staff Congress/CUNY (PSC). The charge alleges that the employer and PSC violated the provisions of the Act by negotiating a modification of the workload provision of their September 1, 1984 to August 31, 1987

collective bargaining agreement mid-contract term without obtaining ratification thereof by the bargaining unit, which occasioned adverse effect on some members and, in particular, Soffer. The Director dismissed so much of the charge as alleged a violation of §209-a.1(e) of the Act upon two grounds. First, the collective bargaining agreement had not, at the time of filing of the charge, expired, such that §209-a.1(e) has no applicability to a mid-contract term renegotiation of a provision of the collective bargaining agreement.[1/] The second ground for dismissal of the §209-a.1(e) charge by the Director was that an individual employee has no standing to allege a violation of that provision of the Act, since the bargaining agent, and not an individual employee, is the party to the negotiating process which the section is designed to protect and, accordingly, only a bargaining agent would have standing to allege a violation of the Act in this regard.

For the reasons set forth in the decision of the Director, together with the cases cited therein, we affirm the dismissal of the charge against the employer, as not

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[1/] Section 209-a.1(e) of the Act makes it an improper practice for an employer to refuse to "continue all the terms of an expired agreement until a new agreement is negotiated . . . ." (Emphasis supplied)

constituting a violation of §209-a.1(e) of the Act.[2/]

In her exceptions to the Director's decision, charging party asserts that the issue before the Director, and the issue before us, is as follows: "Should a secretive modification of a workload provision which governs actual workload, be considered valid although a valid provision exists, and although none of the [approval mechanisms] to the ratification process were involved?" (exceptions, para. No. 3)

The Director found that §209-a.2(a) of the Act contains no per se requirement that ratification of either a collective bargaining agreement, or the modification of a collective bargaining agreement, take place. In other words, the Director found, and we agree, that ratification of a

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[2/]Although we have not previously addressed the question of whether an individual has standing to claim a violation of §209-a.1(e) of the Act, various Administrative Law Judge decisions have done so, citing as support therefor the fact that we have previously found that only bargaining agents, and not their individual members, have standing to charge a violation of §209-a.1(d), and the opinion that the principles underlying those decisions apply equally to cases involving §209-a.1(e). See, e.g. Clarkstown CSD, 17 PERB ¶4600 (1984), which relies upon our decisions in State of New York (Robinson), 13 PERB ¶3063 (1980) and East Ramapo CSD, 12 PERB ¶3121 (1979). We agree with the reasoning in these decisions and hereby adopt the finding that only bargaining agents, and not their individual members have standing to claim violations of §209-a.1(e) of the Act.

collective bargaining agreement is not a requirement of the Act. See Public Employees Federation, AFL-CIO (Muragali), 14 PERB ¶3036 (1981). In the absence of any claim by charging party of improper motivation or other impropriety in the manner in which PSC conducted or determined not to conduct a ratification vote, there can be no violation of §209-a.2(a) of the Act solely by virtue of the failure to conduct a ratification vote on a mid-contract term modification. The Director's decision is, accordingly, affirmed in this regard.

A second contention raised by charging party is that the PSC violated §209-a.2(a) just by negotiating a mid-contract modification of the existing collective bargaining agreement. Again, in the absence of any factual allegation of improper motivation for negotiating a contract modification, there is no prohibition under the Act against mid-contract term negotiations and contract modification. The decision of the Director is, accordingly, affirmed in this regard also. While the parties to the collective bargaining agreement may have had no duty to negotiate, mid-term, a contract modification, nothing in the Act precludes such negotiations and modification from taking place.

We have reviewed the remaining exceptions raised by charging party and they raise issues which have been properly addressed by the Director in his decision.

Affirming, as we do, the findings of the Director, together with his reasoning therefor, the exceptions are dismissed in their entirety, and the decision of the Director is hereby affirmed.

IT IS THEREFORE ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SAMUEL KIMMEL,

Charging Party,

-and- CASE NO. U-9135

UNITED FEDERATION OF TEACHERS,

Respondent.

SAMUEL KIMMEL, pro se

KATHERINE A. LEVINE, ESQ., for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Samuel Kimmel, charging party, to the dismissal of an improper practice charge filed by him against the United Federation of Teachers (UFT), alleging a violation of §209-a.2(a) of the Public Employees' Fair Employment Act (Act). Kimmel, a guidance counselor employed by the Board of Education of the City School District of the City of New York, alleges that his UFT representative failed to take action on his behalf concerning his supervision by other employees who, according to Kimmel, had not been properly appointed in a supervisory capacity. Additionally, Kimmel alleges that he was given insufficient assistance in his efforts to obtain a transfer to a school closer to his home.

The Administrative Law Judge (ALJ) requested and received two letters of clarification of the original charge from Kimmel. In these writings, Kimmel described the two separate problems which, he alleged, were inadequately addressed by UFT, in violation of its duty of fair representation.

Following receipt of Kimmel's letters of clarification, the ALJ determined that the charge failed to state a cause of action which, even if proven, would constitute a violation of §209-a.2(a) of the Act, and dismissed the charge without a hearing. Kimmel excepts to the ALJ dismissal on the grounds, among others, that it was based upon his admission that he did not request the filing of a grievance, but merely assumed it would be filed, when, in fact, it was not. Although he does not deny making the admission, Kimmel asserts in his exceptions that elsewhere in his submissions he also alleged to the ALJ that he specifically requested that a grievance be filed on his behalf, and that the dismissal of his charge was based upon a finding of fact which should only have been made after a hearing. He asserts a failure of the UFT to file a grievance on his behalf, coupled with a failure to communicate with him concerning his grievance or any decision not to file a grievance.

In connection with his claim that UFT failed to achieve his transfer to a school closer to his home, Kimmel acknowledged that he neither filed a grievance himself nor

requested that the union do so. Furthermore, UFT investigated the transfer request issue, and informed Kimmel that there were no openings in a school closer to his home to which he could transfer; that other, more senior, employees were ahead of him on the transfer list, who would be considered ahead of Kimmel if an opening existed; and that, in any event, transfers lie within the discretion of management and are not subject to the UFT's control. The ALJ determined that the charge set forth no basis upon which it could be claimed that the UFT's failure to proceed further with Kimmel's request for a transfer was grossly negligent, irresponsible or improperly motivated.[1/] She accordingly found that the claims made by Kimmel with regard to the transfer issue failed to state a charge which, even if proven, would constitute a violation of §209-a.2(a) of the Act. Kimmel's exceptions to this aspect of the ALJ decision provide no basis for disturbing the ALJ's finding and the dismissal of so much of the charge as alleges a breach of the duty of fair representation with respect to Kimmel's efforts to obtain a transfer is, accordingly, affirmed.

The second issue raised by Kimmel in his charge, and the clarifications thereof, relates to the claim that he was

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[1/] See Hauppauge Schools Office Staff Ass'n, 18 PERB ¶3029 (1985); Nassau Educational Chapter, Syosset CSD Unit, CSEA, Inc., 11 PERB ¶3010 (1978).

being supervised by persons not possessing the authority to supervise him. Kimmel cites no provision of the collective bargaining agreement between UFT and the employer as having been violated by this alleged improper supervision nor has he made any specific claim as to the reasons why he believes such supervision is improper. However, Kimmel asserts that he had correspondence with UFT in June 1986 concerning this issue. In the June correspondence, UFT informed Kimmel that, based upon its investigation, his supervisor possessed the necessary qualifications to act in a supervisory capacity. Kimmel, being dissatisfied with this response, met with Tom Pappas, a UFT representative, on July 10, 1986, and discussed the issue further. There is, in fact, a discrepancy in the written allegations made by Kimmel concerning whether, at the July 10 meeting, he actually requested that UFT file a grievance on his behalf in this regard, or whether he merely assumed that a grievance would be filed on his behalf concerning the issue.

In any event, Kimmel claims that at the July 10 meeting with Pappas, he requested additional investigation of the matter and/or a grievance, and that Pappas agreed to get back to him. Additionally, Kimmel claims that Pappas never did get back to him about a grievance or about additional information.

On the other hand, he does acknowledge, in his clarification of the charge, that he had a phone conversation with Pappas on September 10, 1986. Although denying that the supervision issue was discussed, Kimmel admits that shortly after the September 10 conversation, he "realized" that UFT would not be pursuing the issue further, by way of grievance or otherwise.

It is now well settled that a union may breach its duty of fair representation under §209-a.2(a) of the Act by refusing to process a grievance in a manner which constitutes an arbitrary, discriminatory or bad faith conduct. Smith v. Sipe, 67 N.Y.2d 928, 19 PERB ¶7507 (1986); UFT (Dubin), 18 PERB ¶3026 (1985). It is also well settled that a union may breach its duty of fair representation by failing to communicate with a unit member concerning matters affecting terms and conditions of employment. Nassau Ed. Chapter, Syosset CSD Unit, CSEA, Inc., supra. Whether either of these duties has been breached has yet to be determined in this case. Taking Kimmel's allegations in a light most favorable to him (as we must in considering whether dismissal prior to hearing should be ordered), we cannot say, however, as a matter of law, that Kimmel has so completely failed to state a cause of action in his charge and clarifications thereof as to require dismissal of the charge at this stage of the

proceedings. We agree with Kimmel that his claim that he requested that a grievance be filed should have been credited by the ALJ in determining whether dismissal prior to a hearing was warranted. We also agree that a finding is necessary to determine whether UFT improperly failed to respond or unduly delayed in responding to Kimmel's request for a grievance and/or additional investigation of his claim of improper supervision.

Based upon the foregoing, we reverse the ALJ's dismissal of the charge and remand it for further findings concerning, among other things, whether a grievance was requested and whether an improper failure to communicate with Kimmel concerning his complaint and/or grievance occurred.

IT IS THEREFORE ORDERED that the charge be, and it hereby is, remanded to the Director of Public Employment Practices and Representation for further proceedings not inconsistent with this decision and order.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

#2E-9/17/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HERKIMER COUNTY BOCES TEACHERS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-9160

HERKIMER COUNTY BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Respondent.

RICHARD L. BRUCE, Field Representative, NYSUT, for Charging Party

BLOOMBERG & CARRIG, ESQS. (BART M. CARRIG, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Herkimer County BOCES Teachers Association (Association) from the dismissal of its charge by the Administrative Law Judge (ALJ), upon the ground that the Public Employment Relations Board (PERB) is without jurisdiction over the charge, based upon §205.5(d) of the Public Employees' Fair Employment Act (Act). Section 205.5(d) prohibits PERB from exercising "jurisdiction over an alleged violation of [a collective bargaining] agreement that would not otherwise constitute an improper employer or employee organization practice."

In its charge, the Association alleges that the Herkimer County Board of Cooperative Educational Services (BOCES) violated §§209-a.1(a) and (d) of the Act when it increased unit employees' instructional duties by 24 minutes per day and decreased their free/unassigned time by an identical amount. BOCES, in its answer to the charge, asserts that the Association had already filed a contract grievance on behalf of its bargaining unit members, claiming that the increase in instructional duty time violated several provisions of the collective bargaining agreement between the parties.[1/] BOCES pointed out that, in its demand for arbitration of the grievance, the Association described the nature of the dispute as follows: "The BOCES increased teachers' work time without agreement with the Union and without additional pay to the affected teachers." The remedy sought in the demand for arbitration was "that the District immediately return to old

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[1/] The contract grievance, dated December 2, 1986, alleges that Articles XVI.A and XIV.2.4 were violated, and states the facts as follows:

> The District announced on September 2, 1986 that a new work schedule for occupational education teachers would go into effect immediately. This new work schedule required occupational education teachers to teach 117 additional hours per year and at the same time reduces by a similar amount their unscheduled time. The District should either reduce scheduled teaching time of those affected by 117 hours per year or pay a proportionate increase in pay for the increased teaching time.

schedule and compensate on a pro-rated basis all teachers whose work time was increased."

The Association's charge makes essentially the same allegation. It asserts that

> [t]he effective work time was increased by twenty-four (24) minutes per day, while free/unassigned time was decreased by twenty-four (24) minutes per day. The total length of the school day was unchanged.

As a remedy, the Association requests PERB to

> order the employer to: (a) cease and desist the implementation of the new work times; (b) restore the status quo (pre-September 2) until such time as the parties negotiate and reach agreement; (c) make whole all affected employees for the additional work time required by the unilateral schedule change.

In considering the jurisdictional defense raised by BOCES to the charge, the ALJ concluded that, because the factual basis for and remedy sought in both the grievance and in the improper practice charge were the same, PERB was without jurisdiction of the charge, and dismissed it. The dismissal was specifically without regard to the likelihood of success on the merits of the grievance and was based exclusively upon the fact that the charging party had, by filing a grievance, alleged a violation of its collective bargaining agreement and, by doing so, divested PERB of its jurisdiction [Act, §205.5(d)]. In dismissing the charge, the ALJ also found that the absence of any reference to the grievance by the charging party in its improper practice charge was of no moment in evaluating the question of whether

the contract grievance filed by the charging party constituted a bar to PERB's jurisdiction. The ALJ found that whether the existence of a contract grievance is revealed by the charge or in some other manner is immaterial to determining PERB's jurisdiction.

In our view, the ALJ properly refused to consider the merits of the contract grievance filed by the Association in assessing PERB's jurisdiction, and also properly considered the fact that a contract grievance had been filed without regard to which party raised it as an issue.

However, it remains to be determined whether, as found by the ALJ, the filing of a contract grievance automatically takes the action complained of outside the scope of PERB's jurisdiction. The mere act of filing a contract grievance by a charging party which alleges the same facts as an improper practice charge does not necessarily constitute an irrevocable and exclusive election of forums which divests PERB of jurisdiction. Whether a grievance filed under the collective bargaining agreement actually covers the subject addressed in the improper practice charge presents us with no reason to deal with any possible improper practice charge in this case at this time. Instead, examination into the question of whether the parties' agreement in fact covers the issue raised by the improper practice charge must be made before a jurisdictional question under §205.5(d) of the Act is reached. We believe that it is appropriate to defer

deciding whether §205.5(d) of the Act precludes the exercise of jurisdiction by PERB, pending the outcome of the grievance which has been filed. Presumably, if the arbitrator assigned to hear the grievance were to determine, on valid grounds, that the issue of extension of working time of employees, with commensurate reduction in their free time during the working day, is not covered by the collective bargaining agreement (as opposed to being not violative of the collective bargaining agreement), then PERB would have jurisdiction over the alleged unilateral change in terms and conditions of employment.[2/] While PERB would not be bound by a determination of an arbitrator insofar as its own jurisdiction is concerned, an award finding, on sound grounds, no contract coverage would be accorded substantial weight, assuming that the criteria contained in our decision in New York City Transit Authority, 4 PERB ¶3031 (1971), have been met. If, on the other hand, an arbitrator should rule either that the action complained of by the Association violates the collective bargaining agreement, or that the issue is covered by the parties' contract negotiations

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2/In fact, the Association argues that its grievance does not claim that the District is prohibited by "the agreement" from extending working time without extending the workday, but that it claims an obligation to increase teacher pay if it can and does increase work time. It therefore argues that the contract violation and charge differ as to the wrong alleged and the applicable remedy.

but does not violate the terms of their agreement, a finding of lack of jurisdiction may be appropriate. In either event, substantial weight, again assuming that the New York City Transit Authority criteria are met, would be given to the arbitration decision and PERB would find that it is without jurisdiction of the actions complained of in the improper practice charge.

It appears to us that deferral of the question of whether PERB has jurisdiction over an improper practice charge when there is a pending contract grievance is a more equitable result than outright dismissal of the charge with prejudice. This is so because the public policy against permitting a party to proceed in two separate forums on the merits of its claims would still be protected. A union seeking, in good faith, to protect its bargaining unit members from a perceived transgression of employee rights, whether they be contractual or Taylor Law rights, is an appropriate exercise of the duty of fair representation. As a practical matter, PERB would still, following issuance of an arbitration award, make its own independent determination as to whether it has jurisdiction of the pending charge. If an arbitrator rules that the issue was covered by the collective bargaining agreement, whether violative of it or not, PERB could then determine, based in part on the arbitration award, that it was without jurisdiction of the improper practice charge pursuant to §205.5(d) of the Act. If an arbitrator finds that an issue addressed in

a contract grievance is simply not covered by the collective bargaining agreement, the Association would not be precluded from proceeding on behalf of its bargaining unit members to attempt to persuade PERB that it does in fact have jurisdiction over the issue. Deferral of the determination of PERB's jurisdiction accordingly is an appropriate procedure which will not be unduly burdensome on an employer, while still providing some opportunity for a union to obtain a determination on the merits of a perceived adverse employment decision in those circumstances in which the contract coverage is unclear.

The Association also argues in its exceptions that the ALJ erred in dismissing the portion of the charge which alleged a violation of §209-a.1(a) of the Act. The ALJ dismissed that portion of the charge upon the ground that no separate allegation of improper motive or interference with Taylor Law rights was made and, therefore, the alleged violation derives wholly from the unilateral change allegation. Furthermore, the ALJ found that the increase in employees' assigned teaching time is not, as a matter of law, so inherently destructive of their exercise of statutory rights as to constitute a per se violation of §209-a.1(a) of the Act.

In Connetquot CSD, 19 PERB ¶3045 (1986), we considered the question of whether the granting of benefits in excess of the provisions of a collective bargaining agreement constitutes a violation of §209-a.1(a) as well as a possible violation of the

collective bargaining agreement. In that case, we concluded that a significant distinction exists between a breach of an agreement resulting in a lesser benefit to bargaining unit members, and a breach of an agreement resulting in a greater benefit than contained in the collective bargaining agreement. We stated the following:

> Where benefits are provided that are less than what is called for in a collective bargaining agreement, the appropriate remedy is an action in court or the initiation of a grievance. However, the provision of benefits that are more than what is called for in a collective bargaining agreement is inherently destructive of a union's representation rights. It can be construed to give a message that the unit employees would do better if they abandoned their union. An implicit promise of benefits in such terms would violate §209-a.1(a) of the Taylor Law.

In the instant case, the claim made by the Association is that bargaining unit members are now receiving a lesser benefit than the collective bargaining unit requires, and no claim is made that the employer's action was initiated with the purpose and intent of undermining the union in its representational capacity.

We view the facts and circumstances of the instant case as being readily distinguishable from the facts set forth in Connetquot CSD, id., and we find that the ALJ properly dismissed so much of the charge as alleged a violation of §209-a.1(a) of the Act because the charge failed to state a prima facie case. In view of our affirmance on this ground,

we need not address the other ground for his dismissal of the charge in this respect.

IT IS THEREFORE ORDERED THAT the dismissal of so much of the charge as alleges a violation of §209-a.1(a) of the Act is hereby affirmed, and that portion of the charge is dismissed with prejudice.

IT IS FURTHER ORDERED THAT the determination of PERB's jurisdiction over so much of the charge as alleges a violation of §209-a.1(d) of the Act is deferred, and the charge is conditionally dismissed, with opportunity to the Association to file a timely motion to the Director at the conclusion of the contract grievance procedure to reopen the charge upon the ground that the jurisdictional limitations contained in §205.5(d) of the Act do not apply to its charge.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INDIAN RIVER SCHOOL UNIT, JEFFERSON COUNTY LOCAL 823, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-8281

INDIAN RIVER CENTRAL SCHOOL DISTRICT,

Respondent.

MARJORIE E. KAROWE, GENERAL COUNSEL, CSEA LEGAL DEPARTMENT (WILLIAM V. O'LEARY, ESQ., of Counsel), for Charging Party

WILLMOTT, WISNER, SCANLON, SAUNDERS & HAAS (DANIEL SCANLON, JR., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Indian River School Unit, Jefferson County Local 823, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to the decision of an Administrative Law Judge (ALJ) dismissing its charge against the Indian River Central School District (District). The charge alleged that the District violated CSL §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally subcontracting its

entire transportation service effective July 1, 1985. The ALJ's decision, issued after a hearing, found that over the years the District had been contracting out part of its bus runs to private contractors, with the percentage of the routes that were contracted out steadily increasing from the 1982-83 school year through the 1984-85 school year. The ALJ also found that during the period that part of the work was contracted out, the contractors performed the same work as unit employees: they drove some regular routes and some special routes, the latter consisting of bussing students to and from private schools, BOCES, special education, and the bussing of handicapped students. This occurred without any loss of jobs by unit employees. The ALJ concluded that when the District contracted out the rest of its bus runs and terminated the employees who performed duties in relation to them, there was no violation because the work had not been exclusively unit work.

CSEA's exceptions assert that the ALJ erred in finding that the contractors in the past had performed the same work as that performed by District personnel. The exceptions claim that Charging Party's Exhibit 32, and the testimony of one witness, Campany, show that prior to the 1985-86 year, the contractors only drove the special routes.

Our review of the record, including Charging Party's Exhibit 32 and Carlyle T. Campany's testimony, shows that the

private contractors did drive regular bus routes as well as special bus routes, as found by the ALJ. Particularly, Charging Party's Exhibit 39, the exhibit upon which the ALJ's decision based its summary of routes driven by District employees and contractors, shows that a substantial number of routes which appear to be regular ones had been contracted out.[1/] Thus, as found by the ALJ, "there is no discernable boundary which would set apart the bus routes operated by the District employees from those operated by the private contractors" so as to enable us to conclude that the District employees perform particular work exclusively.[2/]

Since the transportation services furnished by the District were not exclusively unit work, we conclude, as did the ALJ, that the District's contracting out of the entire service was not improper.[3/]

1/We note that in its brief to the ALJ, CSEA relies on Charging Party Exhibit 39 and makes no claim that only special routes had been contracted out.

2/Town of West Seneca, 19 PERB ¶3028 (1986).

3/County of Erie, 17 PERB ¶4551, aff'd, 17 PERB ¶3067 (1984). See also Niagara Frontier Transportation Authority, 18 PERB ¶3083 (1985); Guilderland CSD, 16 PERB ¶3038 (1983); Deer Park UFSD, 15 PERB ¶3104 (1982).

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

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-9016

NEWBURGH ENLARGED CITY SCHOOL DISTRICT,

Respondent.

CSEA LAW DEPARTMENT (MARJORIE E. KAROWE, ESQ., General Counsel), for Charging Party

DAVID S. SHAW, ESQ. (DAVID S. SHAW, ESQ. and GARRETT L. SILVEIRA, ESQ., of Counsel), for Respondent

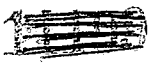
BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Newburgh Enlarged City School District (District) to the decision of the Administrative Law Judge (ALJ), which sustained the charge of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally required certain unit employees to record their presence at their workplace on a time clock.

FACTS

The parties stipulated that on July 17, 1986, for the first time, and without prior negotiations with CSEA, the District required unit members employed at the District's library to record on a "time clock" their arrival at the beginning of the workday and their departure at the end of the workday, as well as their departure for and arrival from lunch. The parties further stipulated that, since at least April, 1984, said unit employees were only required to record their arrival at the beginning of the workday by signing or marking a sheet bearing their printed names. The record also established that there are 40 to 50 part-time unit members among the 75 employed at the District's library, and that these part-time employees have, since 1984, been required to record their attendance by noting on a "master sheet" the number of hours they worked each day, at the end of their workday.

The parties further stipulated that the new procedure has not curtailed unit members' free time or extended the length of the workday. The record also establishes that the District instituted the new recording requirements because they were thought necessary in order to comply with the recordkeeping requirements of the Fair Labor Standards Act.



ALJ DECISION

The ALJ determined that, while the mere substitution of the time clock for previous manual recording of attendance was not a negotiable change in terms and conditions of employment, the imposition of additional recording requirements on the unit employees beyond those required by past practice constituted a negotiable change in terms and conditions of employment. Therefore, he ordered the District to rescind its policy of requiring unit members to record their times of arrival at and departure from their workplace, "except insofar as such recording is a mechanical substitution for that which said unit members had performed once each day prior to July 17, 1986".

EXCEPTIONS

In its exceptions, the District asserts that the ALJ failed to apply a balancing test to determine whether the additional recording requirements imposed a sufficient impact on terms and conditions of employment to warrant a finding of negotiability in light of the asserted important managerial interests in complying with the Fair Labor Standards Act and in controlling its employees' attandance. The District also asserts that inasmuch as unit members had previously been required to record their attendance once a day, "the threshold of participation" has been passed and the "slight increase" in participation revealed by this record did not constitute a negotiable change.

DISCUSSION

We affirm the decision of the ALJ.

It is undisputed that the District has unilaterally increased the extent of the unit members' participation in the recording process, as well as instituting the use of a "time clock". The District urges that the extent of the increased participation of the employees is minimal and does not constitute a negotiable change in terms and conditions of employment.

The District's basic managerial right to maintain a record of attendance and presence of its employees is not in issue. That right exists by virtue of its accountability for the expenditure of public funds and for the acts of its employees. The maintenance of such a record by the employer is beyond the scope of mandatory negotiations. An employer may not, however, without agreement of the employees' negotiating representative, require its employees to participate in the recording process. Applying our usual balancing test, we conclude that the clear and direct primary impact of such a work rule is on conditions of employment and not upon essential managerial responsibilities.[1/] Thus, the imposition of such a work rule is a negotiable change in terms and conditions of employment. It is the imposition

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[1/] Police Association of New Rochelle, New York, Inc., 13 PERB ¶3082 (1980).

of the work rule, not the use of a time clock, which must be negotiated. Where a work rule has been in effect requiring employees to participate in the managerial function of recording their attendance and presence, and such work rule continues unchanged, the mere substitution of a mechanical device for the manual means of recordation is not a negotiable change in terms and conditions of employment.[2/]

The change in work rule at issue herein is from a once-a-day recording of attendance to the recording of arrival and departure and, for those employees affected, the recording of departure and arrival at lunch time. The primary impact of such change continues to be on conditions of employment. We reject the District's contention that the once-a-day recording of attendance constitutes a "threshold" beyond which further participation in the recording process should be left solely to the employer to determine. We are not persuaded that the interests of the employer warrant permitting it to impose unilaterally additional recordkeeping responsibilities on employees solely because there is already some employee participation in the recording process.

[2/] See Hampton Bays SD, 10 PERB ¶4596 (1977); Island Trees UFSD, 10 PERB ¶4590 (1977). Cf. Nathan Littauer Hospital Association, 229 NLRB No. 166, 95 LRRM 1296 (1977) and Rustcraft Broadcasting, 225 NLRB No. 65, 92 LRRM 1576 (1976).

We also reject the District's reliance on the Fair Labor Standards Act as a sufficient reason for permitting unilateral action by the District. The recent application of that Act to public employers did not change the basic responsibilities of a public employer regarding the maintenance of a record of attendance of its employees. The recordkeeping requirements of that Act do not justify management's unilateral delegation of its responsibilities to the unit members.

Accordingly, we find that the District violated §209-a.1(d) of the Act by failing to negotiate with CSEA concerning the additional recording requirements imposed upon unit members employed at its library.

NOW, THEREFORE, WE ORDER the Newburgh Enlarged City School District:

1. To rescind its policy of requiring unit members to record their times of arrival and departure at their workplace, except insofar as such recording is a mechanical substitution for that which said unit members had performed once each day prior to July 17, 1986;
2. To expunge any personnel records derived from the extended recording system;
3. To negotiate in good faith with CSEA concerning unit members' terms and conditions of employment; and

4. To sign and post the attached notice at all locations customarily used to post notices to unit members.

DATED: September 17, 1987
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

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 all employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the Newburgh Enlarged City School District:

1. Will rescind its policy of requiring unit members employed at its library to record their times of arrival and departure at their workplace except insofar as such recording is a mechanical substitution for that which said unit members had performed once each day prior to July 17, 1986;

2. Will expunge any personnel records derived from the extended recording system; and

3. Will negotiate in good faith with CSEA concerning unit members' terms and conditions of employment.

NEWBURGH ENLARGED CITY SCHOOL DISTRICT

.....

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

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered defaced, or covered by any other material.

11206

#2H-9/17/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and- CASE NO. U-8347

THOMAS C. BARRY,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and- CASE NO. U-8664

MORRIS E. ESON,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and- CASE NO. U-8795

MORRIS E. ESON,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and- CASE NO. U-8890

GORDON GALLUP,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Respondent,

-and- CASE NO. U-8859

THOMAS C. BARRY,

Charging Party.

BERNARD F. ASHE, ESQ. (IVOR MOSKOWITZ, ESQ., of Counsel), for Respondent, in Case Nos. U-8347, U-8664, U-8795, U-8890 & U-8859

THOMAS C. BARRY, pro se, in Case Nos. U-8347 & U-8859

GLENN M. TAUBMAN, ESQ., National Right to Work Legal Defense Foundation, for Charging Parties, in Case Nos. U-8664, U-8795 & U-8890

BOARD DECISION AND ORDER

In our Decision of July 8, 1987, we determined that the agency shop fee refund procedure of the United University Professions (UUP) for the years 1984-85, 1985-86 and 1986-87

violated §§209-a.2(a) and 208.3(a) of the Act in certain specified particulars. We ordered UUP to submit within 30 days a revised agency shop fee refund procedure which would be in conformity with our Decision, together with steps for immediate implementation thereof.

UUP has submitted a procedure which, as subsequently amended, is set forth in the Appendix to this Decision. Having reviewed this proposed procedure, we conclude that it remedies the violations found by us except in the following respect.[1/]

Prior to determining the advance reduction, the proposed procedure obligates UUP to submit to the agency fee payers, no later than April 1, an audited statement of chargeable and nonchargeable expenditures. However, taking into account both constitutional and statutory obligations, this Board has previously found, and here confirms, that the information to be submitted to agency fee payers should include not only an audited statement of chargeable and

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1/With regard to the "Final Determination of Refund and Appeal" provisions of its procedure, the UUP has agreed to amend its proposal by adding language which will make clear that it retains the burden of proof but that, for purposes of issue identification, the objector should indicate the general categories of expenditures which are being challenged.

nonchargeable expenditures, but an audited statement of income and expenditures for the operative fiscal year.

We accept UUP's amended procedure subject, however, to the condition that it change its procedure to provide for the furnishing of such additional financial information. If UUP does not notify us within 10 days of receipt of this Decision that it accepts such change, UUP's agency fee procedure will be found to be deficient and we shall take whatever appropriate action we deem necessary in light of the failure of UUP to establish and maintain an acceptable agency fee refund procedure.[2/]

UUP proposes to implement its new procedure for the 1988-89 fiscal year which commences September 1, 1988. In addition, it has agreed to implement the "Final Determination of Refund and Appeal" provision of the new procedure in its 1987-88 Agency Fee Refund Procedure.[3/]

[2/]UUP has advised that it has placed all agency fee monies received after September 1, 1987 in a separate interest-bearing account and that it will maintain these monies in such account until the final approval or disapproval of UUP's proposed procedure. Because of the separate holding out of these monies and its several efforts to come into compliance, an immediate suspension is not required.

[3/]Many of the deficiencies found in our July 8 Decision are also present in UUP's 1987-88 procedure.

It also advises that it has furnished to agency fee payers who filed objections for the 1987-88 fiscal year an advance reduction which includes the 10 percent cushion required by the 1988-89 procedure. In these circumstances, UUP's program of implementation is reasonable and is accepted.

UUP has submitted a Motion for Reconsideration of our decision of July 8. We have reviewed UUP's submissions and find no basis to alter our decision. Accordingly, UUP's Motion for Reconsideration is denied in all respects.

WE, THEREFORE, ORDER THAT:

1. The revised agency fee refund procedure of UUP, set forth in the Appendix to this Decision, is approved subject, however, to the condition that UUP amend such procedure in the manner required by this Decision;
2. UUP notify this Board within 10 days of receipt of this decision whether it will make the change directed herein;
3. If UUP fails to accept such change, the extant and revised agency fee refund procedure shall be deemed deficient;

4. UUP's motion for reconsideration be, and it hereby is, denied in all respects.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

APPENDIX

AGENCY FEE REFUND PROCEDURES FOR THE 1988-89 FISCAL YEAR

Any person making service payments to the Union in lieu of dues, pursuant to Chapter 677, Laws of 1977, as amended by Chapter 678, Laws of 1977 and Chapter 122, Laws of 1978, shall have the right to object to the expenditure of any part of the agency fee which represents the employee's pro-rata share of expenditures by the Union or its affiliates (hereinafter "Union") in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

Such objections shall be made, if at all, by the objector individually notifying the Union President of his/her objection by mail during the period between April 15 and May 15 of the year prior to the fiscal year of the Union to which the objection applies.

The agency fee of such objectors shall be reduced for the next fiscal year by the approximate proportion of the agency fees spent by the Union for such purposes, based on the latest fiscal year for which there is a completed and available audited financial statement. An audited statement of the Union's chargeable and non-chargeable expenditures, based on the fiscal year, shall be mailed to each agency fee payer no later than April 1 of any fiscal year. An objector shall be provided prior to the beginning of the new fiscal year with an advance payment equal to the amount of the reduction, together

with an explanation as to how such advance reduction was calculated. A cushion of ten percent (10%) shall be added to each advance payment.

APPEAL OF ADVANCE REDUCTION

If an objector is dissatisfied with the amount or appropriateness of the reduced fee, he/she may appeal that determination in writing and send it to the Union President by mail within thirty (30) days following receipt of the advance reduction. At such time, the objector must indicate to the Union President the percent of agency fees which he/she believes are reasonably in dispute. Such amount, but in no event more than 100% of the agency fee paid by the objector, will be placed in escrow in an interest bearing savings account to be established in the Union's name for that purpose. The question of appropriateness of the advance reduction will thereafter be submitted by the Union to a neutral party appointed by the American Arbitration Association for expeditious hearing and resolution in accordance with its rules for agency fee determinations. The costs for any appeal to a neutral party shall be borne by the Union.

The Union, at its option, may consolidate all appeals and have them resolved at one hearing held for such purpose. An objector may present his/her appeal in person.

FINAL DETERMINATION OF REFUND AND APPEAL

At the close of the Union's fiscal year, as soon as available, the Union will provide each objector with a copy of the audited financial statements, including the final refund determination and payment, if any, covering the fiscal year for which the objection was made. Within thirty-five (35) days of mailing such material, objectors may file objections by mail to the Union President from the final refund determination of the Union. The objector must indicate the percent of agency fees which he/she believes is reasonably in dispute and the general categories of expenditures which are being challenged. Such amount, but in no event more than 100% of the agency fee, will be placed in escrow in an interest bearing savings account to be established in the Union's name for that purpose. All objections to the final determination will thereafter be referred for expeditious hearing and determination to a neutral appointed by the American Arbitration Association in accordance with its rules for agency fee determinations. The costs for any such appeal to a neutral party shall be borne by the Union.

The Union at its option, may consolidate all appeals and have them resolved at one hearing held for such purpose. An objector may present his/her appeal in person.

Nothing shall preclude the union from including appeals from the amount of the advance reductions in the same

proceeding with appeals from the final determination of refund. The neutral, however, will be required to make independent findings on each issue.

#3A-9/17/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 887, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

-and-

CITY OF NEW ROCHELLE,

CASE NO. C-3232

Employer,

-and-

LOCAL 663, NEW YORK COUNCIL 66, AFSCME,

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 Local 663, New York Council 66, AFSCME has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the

11217

settlement of grievances.

Unit: Included: Unit as defined in January 1, 1985 Collective Bargaining Agreement (see attached list).

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 663, New York Council 66, AFSCME. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

11218

LABOR GRADE I

Cleaner B

Laborer B

LABOR GRADE II

Cleaner A

Laborer A

LABOR GRADE III

Sewer Maintainer "B"
Street Maintainer "B

Community Service Worker I
Semi Skilled Laborer

LABOR GRADE IV

Mechanics Helper
Maintenance Worker
Park Groundsworker
Sanitation Worker

Sewer Maintainer "A"
Street Maintainer "A"
Assistant Custodian "B"
Stock Clerk "B"

LABOR GRADE V

Assistant Custodian "A"
Recreation Maintenance Worker
Stock Clerk "A"
Traffic Marker

Weighmaster
Automotive Stock Clerk
Community Service Worker II

LABOR GRADE VI

Motor Equipment Operator
Custodian "B"
Parking Meter Technician

Skilled Laborer
Traffic Signal Aide

LABOR GRADE VII

Custodian "A"
Maintenance Worker-Electrical "B"
Motor Equipment Operator
(Specialized)

Park Maintenance Man
Street Light Maintainer

LABOR GRADE VIII

Automotive Mechanic
Heavy Equipment Operator

Maintenance Worker -
Electrical "A"

#3B-9/17/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 2300, UNITED AUTO WORKERS,

Petitioner,

-and- CASE NO. C-3239

TOWN OF COVERT,

Employer.

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 Local 2300, United Auto Workers 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 laborers employed in the Highway Department in the Town of Covert.

Excluded: Seasonals and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 2300, United Auto Workers. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

#3C-9/17/87

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALLEGANY COUNTY DEPUTY SHERIFF'S ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3222

COUNTY OF ALLEGANY and the SHERIFF OF ALLEGANY COUNTY,

Joint Employers,

-and-

NEW YORK COUNCIL 66 and LOCAL 2574, AMERICAN FEDERATION OF STATE, COUNTY and MUNCIPAL EMPLOYEES, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Allegany County Deputy Sheriff's 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: All employees employed by the County of Allegany and the Sheriff of Allegany County in the following job classifications: sergeant, chief deputy, deputy, correction officer, account clerk typist, cook and civil deputy.

Excluded: Sheriff, undersheriffs and lieutenants, temporary employees, part-time employees and per diem court deputies.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Allegany County Deputy Sheriff's Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 17, 1987
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

11223