STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 896, AFL-CIO,

Charging Party,

-and-

CASE NO. U-9439

CITY OF BATAVIA,

Respondent.

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

OSHLAG AND SALEH, ESQS. (JEFFREY D. OSHLAG, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the International Association of Fire Fighters, Local 896, AFL-CIO (IAFF) from the dismissal of its improper practice charge against the City of Batavia (City). IAFF alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, in May 1987, it reduced the salary of fire fighters by 5% without negotiations with their bargaining agent, IAFF.

The City defended against the charge upon the ground that the reduction by 5% in the salary of fire fighters was

authorized by an interest arbitration award issued on October 22, 1985. The arbitration award arose out of an impasse over the impact of a mid-contract reduction in staffing of fire fighters. The interest arbitration panel made the following award concerning the issue:

> The panel awards a 5% salary increase effective September 1, 1985. This 5% increase will be reduced by 1 1/4% for each additional staffing level above 28 until a level of 32 is reached. For example, if staffing is increased to 30 the 5% would be reduced to 2 1/2%. At a level of 32 the 5% would be reduced to zero.

The award makes no mention of its duration as compensation for reduced staffing and increased work.

On April 28, 1987, the City hired 2 new fire fighters, and, on May 2, 1987, hired an additional 2 fire fighters, raising the complement of staff in the department to 32. Commencing with the May 3, 1987 payroll period, the City reduced the fire fighters' salaries by 5%, asserting that the interest arbitration award authorized it to do so, based upon the increased staffing level.

The IAFF opposed the salary reduction upon the ground that the arbitration award, although silent concerning its duration, is most reasonably construed as having a one-year limit. The IAFF argues that if the award expired prior to the salary reduction, the reduction in salary by 5% constituted a unilateral change in terms and conditions of employment.

The City argues, on the other hand, that a proper reading of §209.4(c)(vi) of the Act requires the conclusion that where the arbitration award is silent as to duration, the award is effective for a period of two years.[1/]

The ALJ agreed with the reasoning of the City, and held that §209.4(c)(vi) sets the term of an interest arbitration award at two years where the award is otherwise silent as to its duration.

We agree with the ALJ that the award contains no language from which its term might reasonably be inferred, and we further agree that there is no basis for concluding that the absence of a "year two benefit" is reasonably construed to imply a one-year term, as argued by the IAFF. This type of interest arbitration award, which is mid-contract term and which concludes impact negotiations over reduced staffing, does not lend itself to the same type of analysis, for purposes

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[1/] Section 209.4(c)(vi) of the Act provides as follows:

> [T]he determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the panel, but in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement or if there is no previous collective bargaining agreement then for a period not to exceed two years from the date of determination by the panel . . . .

of establishment of its duration, as might be the case with an award which concludes usual contract negotiations typically involving percentage increases for each year it remains in effect. There is no basis upon which it could be said that the term of the award is one year.

We also agree with the ALJ that §209.4(c)(vi) of the Act is most reasonably construed as setting a term of two years from date of determination by the arbitration panel as the term of an award whose term cannot be adduced from its language. It is therefore our conclusion that the City acted in conformity with the interest arbitration award then in effect when, in May 1987, it increased staffing of fire fighters to 32 and reduced the salaries of fire fighters by 5% concomitantly.[2/]

On the basis of the foregoing, we hold that the improper practice charge fails to allege a violation of §209-a.1(d) of the Act inasmuch as it complains that the City applied the conditions for reduction and elimination of a 5% salary increase while, in fact, it was an application ordered by the parties' interest arbitration panel.

[2/] See, e.g., Gananda CSD, 17 PERB ¶3095 (1984).

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

DATED: November 24, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 252, TRANSPORT WORKERS UNION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-9107

METROPOLITAN SUBURBAN BUS AUTHORITY,

Respondent.

GLADSTEIN, REIF & MEGINNIS, ESQS. (WALTER M. MEGINNISS, JR., ESQ., of Counsel), for Charging Party

HELENA E. WILLIAMS, ESQ. (CINDY L. DUGAN, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Local 252, Transport Workers Union, AFL-CIO (TWU) from the dismissal, on motion, of its charge that the Metropolitan Suburban Bus Authority (Authority) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally implementing new drug and alcohol testing procedures and related disciplinary penalties for bargaining unit employees.

In addition to filing an improper practice charge, TWU filed a contract grievance against the Authority, alleging that the parties' agreement implicitly required the

continuation of existing practices concerning testing for drug and alcohol use for the duration of the agreement. While the improper practice charge was pending, the parties proceeded to arbitration on the contract grievance, which resulted in an arbitration award. The arbitrator held that there was no specific contract language restricting the right of the Authority to promulgate a drug and alcohol testing procedure, even though a departure from past practice, and that the right of the Authority to engage in random drug and alcohol testing falls within the scope of its right to discipline or discharge its employees, contained in the Management Functions clause[1/] of the parties' agreement. The arbitrator accordingly found that the Management Functions clause of the parties' agreement specifically authorized the Authority to unilaterally implement a random drug and alcohol testing program which significantly differed from its previous practice.

1/Article 1, §8 of the parties' agreement, entitled "Management Functions," provides as follows: "(a) [to] the extent that any such rights are not limited by the provisions of this Agreement or any separate agreement relating solely to pension matters, the management of the affairs of the Authority, the direction and control of its property and operations and the hiring, direction, promotion, demotion, discipline, discharge and layoff of its employees are the exclusive function of the Authority."

Based upon the filing of the contract grievance by the TWU, the ALJ found that PERB is without jurisdiction over the improper practice charge pursuant to §205.5(d) of the Act. The ALJ further found that, in any event, even if PERB had jurisdiction over the charge, it should be dismissed upon the ground that deferral to the arbitration award which interpreted the parties' agreement is appropriate under the standards set forth in NYC Transit Authority, 4 PERB ¶3031 (1971).[2/]

As we recently held in Herkimer County BOCES, 20 PERB ¶3050, at p. 3109 (1987): "[D]eferral 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." Consistent with that holding in Herkimer County BOCES, supra, we find that unconditional dismissal of the charge exclusively upon the ground that the TWU had filed a contract grievance concerning the implementation of the

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[2/] In that case we enunciated, at p. 3670, the standards applicable to deferral to an arbitration award. They are (a) that the issues raised by the improper practice charge were fully litigated in the arbitration proceeding, (b) that the arbitration proceedings were not tainted by unfairness or serious procedural irregularity, and (c) that the arbitrator's determination was not "clearly repugnant to the purposes and policies" of the Act.

random testing and penalty procedures for drug and alcohol use is not required by §205.5(d) of the Act.

The ALJ went further and held that, even if PERB had jurisdiction over the charge, deferral[3/] to the arbitration award is appropriate and warrants dismissal of the charge.

The TWU argues that the arbitration award issued in connection with this matter is repugnant to the policies of the Act and, accordingly, should not have formed the basis for dismissal of the charge. In support of its contention, the TWU argues that this Board and the courts have frequently held that a broadly worded management rights clause does not give rise to a waiver of a union's bargaining rights.[4/] Thus, it asserts that an arbitration award interpreting a management rights clause must also meet this standard for finding a waiver, which has been frequently enunciated by this

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3/Deferral in this sense is understood to mean giving substantial weight to, or granting deference to, the arbitration award.

4/See, e.g., State of New York (SUNY Albany), 10 PERB ¶4578 (1977), aff'd, 11 PERB ¶3026 (1978); Steuben-Allegany BOCES, 13 PERB ¶4511, aff'd, 13 PERB ¶3096 (1980); County of Rensselaer, 13 PERB ¶3080 (1980).

Board and by the courts[5/] before deferral to an arbitration award is appropriate. TWU asserts that the standards for a finding of waiver were not applied by the arbitrator (since the scope and nature of the arbitrator's review differed from the scope of review of this Board), that the standards for waiver should be applied in the instant case, and that, if applied, a finding should be made that the TWU did not waive its right to bargain concerning random alcohol and drug testing and penalties for drug and alcohol use.

In Steuben-Allegany BOCES, supra, we held that a general management rights clause did not constitute an explicit waiver of the right to negotiate concerning employee smoking restrictions which had been unilaterally implemented by the employer. In that case, the arbitrator denied the employee

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[5/]The Appellate Division, Third Department, held in CSEA v. Newman, 88 A.D.2d 685, 686, 15 PERB ¶7011, at 7022 (3d Dep't 1982), appeal dismissed, 57 N.Y.2d 775, 15 PERB ¶7020 (1982), that "a waiver must be clear, unmistakable and without ambiguity", citing the Court of Appeals in City of New York v. State of New York, 40 N.Y.2d 659, 669 (1976), where the Court defined a waiver as "the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it . . . ." The standards enunciated by the Third Department and by the Court of Appeals have, as the TWU points out, been adopted by this Board in numerous cases, e.g. County of Genesee, 18 PERB ¶3016 (1985); State of New York (SUNY Albany), 16 PERB ¶3050 (1983), aff'd in part, 61 N.Y.2d 1001, 17 PERB ¶7007 (1984); City of Mt. Vernon, 5 PERB ¶3057 (1972).

organization's grievance upon the ground that the smoking restrictions in issue were reasonable and that, because no express and specific contractual restriction appeared elsewhere in the parties' agreement, the general management rights clause permitted the employer to act. In doing so, we recognized that to defer to the arbitration award would have resulted in shifting the burden from the employer to negotiate before changing terms and conditions of employment, to the union to achieve contractual restrictions on such employer actions, in contradiction of the policies of the Act.

Based upon the same reasoning as expressed in Steuben-Allegany BOCES, supra, on the facts in this limited record, we find that deferral to the arbitration award is not warranted. We so find because the standard of review used in the context of arbitration was whether the TWU had achieved a contractual limitation upon the Authority's otherwise unfettered right to act, whereas the standard applicable to improper practice charges pursuant to §209-a.1(d) of the Act is whether the employer can establish that it negotiated the right to act or that the TWU waived its right to negotiate. This difference in the nature of the inquiry and burden of proof warrants our finding that the Act requires us to make an independent review and determination as to whether waiver of the right to negotiate took place in this case. This is

particularly necessary in view of our recent holding in City of Buffalo, 20 PERB ¶3048 (1987). We there held that implementation of a random drug testing program affects constitutional rights of employees and is accordingly a subject over which the employee organization may choose not to bargain. Where constitutional rights are at issue, waiver of those rights on behalf of bargaining unit members must certainly be carefully scrutinized.

Based upon the foregoing, we find that deferral to the contractual arbitration award is not appropriate in this case, and that this matter should be remanded to the Director for further proceedings consistent herewith.

IT IS, ACCORDINGLY, HEREBY ORDERED that the dismissal of the charge is reversed.

IT IS FURTHER ORDERED that the charge be, and it hereby is, remanded to the Director for further proceedings consistent herewith.

DATED: November 24, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HAROLD ALSTON,

Charging Party,

-and-

CASE NOS.U-9024
and U-9228

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

HAROLD ALSTON, pro se

ALBERT COSENZA, General Counsel (by RICHARD DREYFUS, Assistant General Counsel) for Respondent

BOARD DECISION AND ORDER

This matter comes before us on the exceptions of the New York City Transit Authority (Authority) to an Administrative Law Judge's (ALJ) decision, which found that the Authority violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act), when it served disciplinary charges upon Harold Alston (Alston) for activity protected by the Act.

On August 14, 1986, Alston was accused by an Authority supervisor of causing a disruption in service when he stopped his empty bus in order to use a bathroom during the course of a five-hour, 58 minute run. Notwithstanding Alston's claim that he requested and obtained permission by telephone to

make a bathroom stop, he was suspended for ten days for this infraction. Thereafter, on or about September 24, 1986, Alston distributed to various persons within the bargaining unit as well as at least one supervisor a copy of his notice of work rule violation, together with his written response thereto, which was entitled "N.Y.C. bus driver suspended ten days for delaying service, to use toilet after five hours of continuous driving."

On October 9, 1986, Alston was again served with a disciplinary notice, imposing a five-day suspension for the possession and circulation of this material on Authority property. He thereupon filed the instant improper practice charges, alleging that the issuance of the October 9, 1986 disciplinary notice was in violation of the Act.

The issue before the ALJ, and before us, is whether Alston's possession and distribution of the literature concerning his disciplinary action constitutes a statutorily protected right. If so, his discipline for the exercise of that right violates the Act.

We find that the ALJ correctly construed the material distributed by Alston as constituting a communication to fellow bargaining unit members about perceived improper treatment, as well as a solicitation of bargaining unit support for his position that disciplinary action under the circumstances was inappropriate and improper. These purposes

fall within the proper range of participation in employee organization activities and lie within the context of the employer-employee relationship. We accordingly agree with the ALJ that ALston's activity in this regard was both concerted and protected.[1/]

Having found, under the facts of this case, that the distribution of a notice of discipline and Alston's response thereto constitutes activity encompassed within the right to participate in employee organizational activity, we conclude that consequent disciplinary action constitutes coercion and interference with such right in violation with §209-a.1(a) and (c) of the Act.

Finally, we concur with the finding of the ALJ that the Authority's withdrawal of the disciplinary notice following the filing of the instant charges does not preclude the

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[1/]The Authority asserts that our decision in Dutchess County Community College (17 PERB ¶3093 (1984), conf'd sub nom Rosen v. PERB, 124 A.D. 657, 20 PERB ¶7006 (2d Dep't 1986) (Pending on appeal to the Court of Appeals) requires a contrary result. In that case, however, we dealt with the question of whether, and to what extent, statutory rights are afforded to unrepresented employees. In the instant case, Alston was a bargaining unit employee, seeking to communicate with and gain assistance from bargaining unit members and union officials. The case is accordingly distinguished from the case now before us.

exercise of our jurisdiction, and is otherwise immaterial, except as it impacts upon the remedy to be applied. Alston is no longer an employee of the Authority, and since no disciplinary action was in fact implemented in connection with the at-issue disciplinary charge, the extent of the remedy ordered by the ALJ constitutes an appropriate disposition of the case.[2/]

IT IS THEREFORE ORDERED that the Authority cease and desist from interfering with, restraining, coercing or discriminating against employees in the exercise of their rights under the Act.

IT IS FURTHER ORDERED that all materials pertaining to the imposition of disciplinary notice 170-126T-86 be removed from any employment or personnel files maintained by the Authority or its agents.

[2/]Alston's original response to the Authority's exceptions to the ALJ decision sought affirmance only. He subsequently filed an untimely exception to the decision seeking monetary relief for his participation in a disciplinary hearing for which he was not paid. This request for additional relief was not timely argued before the ALJ nor timely filed in the form of exceptions or cross-exceptions as required by our Rules of Procedure. Additionally, no showing of extraordinary circumstances excusing the late filing was made. The remedy directed by the ALJ must accordingly be affirmed.

IT IS FURTHER ORDERED that the Authority sign and post notice in the form attached at all locations at which notices of information to Authority employees are posted.

DATED: November 24, 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 that the New York City Transit Authority (Authority):

1. Will not interfere with, restrain, coerce or discriminate against employees in the exercise of their rights under the Act;

2. Will remove all materials pertaining to the imposition of disciplinary notice 179-126T-86 from any employment or personnel files maintained by the Authority or its agent.

NEW YORK CITY TRANSIT AUTHORITY

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

11308

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

AMERICAN SECURITY CONSULTANTS BENEVOLENT ASSOCIATION,

Petitioner,

-and-

NEW YORK CONVENTION CENTER OPERATING CORPORATION,

CASE NO. C-3253

Employer,

-and-

CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C. (SHELDON ENGELHARD, ESQ. of Counsel), for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the American Security Consultants Benevolent Association (Petitioner) to the decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition seeking to represent certain employees of the New York Convention Center Operating Corporation who are presently represented by City Employees Union Local 237, International Brotherhood of Teamsters. The petition was

dismissed by the Director because it was not accompanied, when filed, by a declaration of authenticity as required by §201.4(d) of our Rules of Procedure.[1/] After having been advised that the petition would be dismissed unless it was withdrawn, Petitioner filed a declaration of authenticity.

In its exceptions, Petitioner urges that we determine that the filing of a declaration of authenticity pursuant to §201.4(d) of the Rules is a technical requirement which was

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[1/] Section 201.4(d), as amended effective February 11, 1985, provides:

> A declaration of authenticity, signed and sworn to before any person authorized to administer oaths, shall be filed by the petitioner or movant with the director simultaneously with the filing of the showing of interest or any evidence of majority status for the purpose of certification without an election, pursuant to section 201.9(g)(1) of this Part. Such declaration of authenticity shall contain the following:
>
> (1) the name of the individual executing the declaration, and a statement of his authority to execute it; if on behalf of an employee organization, his position with the employee organization, and a statement of his authority to execute the declaration on its behalf; and
>
> (2) a declaration that, upon his personal knowledge, or inquiries that he has made, the persons whose names appear upon the evidence submitted have themselves signed such evidences on the dates specified thereon, and the persons specified as current members are in fact current members.

substantially met by Petitioner's subsequent filing of a declaration of authenticity accompanied by a motion to permit its filing nunc pro tunc as of the date of the filing of the petition. Petitioner argues that our decision in Town of Amherst[2/] supports the conclusion that it has substantially complied with the rule.

We have recently reaffirmed our view that our Rules regarding the filing of the showing of interest should be strictly applied.[3/] That practice should be followed with regard to the requirement that a declaration of authenticity of the showing of interest be filed simultaneously with the petition. Petitioner failed to file any declaration of authenticity with its petition. Such deficiency cannot be cured by a subsequent filing accompanied by a nunc pro tunc motion. The dismissal of the petition, therefore, was proper.

Petitioner's reliance on our decision in Town of Amherst is misplaced since there we concluded that what the petitioner had filed with its petition was in substantial compliance with the requirements of §201.4(d) of our Rules, thus warranting an extension of time to change substantial compliance to complete compliance. Since no declaration of

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[2/] 13 PERB ¶3074 (1980).

[3/] City School District of the City of Schenectady, 20 PERB ¶3008 (1987).

authenticity was filed simultaneously with the instant petition, there can be no finding of substantial compliance.

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

DATED: November 24, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

11312

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 74, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-9122

MONTICELLO CENTRAL SCHOOL DISTRICT,

Respondent.

MANNING, RAAB, DEALY & STURM, ESQS. (IRA A. STURM, ESQ., of Counsel), for Charging Party

ROSENBERG & UFBERG, ESQS. (SHELDON ROSENBERG, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Monticello Central School District (District) to an Administrative Law Judge's (ALJ) decision that the District violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it failed to notify Local 74, Service Employees International Union, AFL-CIO (SEIU) regarding the disposition of a grievance filed by a bargaining unit member on or about September 15, 1986.

The ALJ made findings of fact as follows. On September 15, 1986, Fred Schreier, a maintenance employee

with the District, filed a grievance with his supervisor, at step one of the grievance procedure, concerning the issuance to him of a warning notice on September 3. In response to the step one filing, Timothy Corwin, Assistant Superintendent for Business, denied the grievance in a letter dated September 17. Following receipt of the denial of his grievance, Schreier contacted Richard Bennardo, SEIU's Business Representative, for assistance.

Bennardo filed a second grievance, which consisted of a restatement of Schreier's original grievance, to Corwin, who was the designated step two reviewer under the parties' grievance procedure. Following the submission, Bennardo contacted Corwin to schedule a meeting to discuss Schreier's claims, which was held on October 1, 1986, in Corwin's office. When the meeting did not produce any resolution, on October 3, Bennardo filed a demand for arbitration, in accordance with step three of the grievance procedure.

On October 6, Corwin notified Schreier, in writing, that the warning notice which had given rise to the grievances had been rescinded and that the grievance should accordingly be deemed settled. The District took no steps to communicate with SEIU concerning the disposition of the September 3 warning notice issued to Schreier. After learning from Schreier that the issue had been resolved, SEIU filed the instant charge.

In support of its exceptions the District argues, among other things, that in notifying only Schreier of the disposition of his case, and not SEIU, it was merely following a multi-year practice of communicating only with the party (whether an individual or SEIU) who filed the grievance. However, the arguments made by the District in support of this contention indicate that the practice existed at step one of the grievance procedure, and not at step two. In fact, receipt of a response by SEIU at step two triggers the filing of a demand for arbitration, which is within the exclusive purview of the SEIU, and not of an individual grievant. SEIU must, accordingly, be a recipient of step two decisions. The October 1 meeting and Corwin's October 6 letter were, without question, at a step two level.

The District also argues that it was only responding to Schreier's grievance, and not to Bennardo's grievance, when it issued its October 6 letter of disposition. However, that Corwin treated the Schreier and Bennardo grievances as one is evident from the facts that no separate response was ever issued to Bennardo concerning his grievance, and, notwithstanding the argument made at and after the hearing in this matter, no claim was made by Corwin, during the course of the events in question, that the Bennardo grievance was untimely or that he had any intention of treating the two grievances separately.

It thus appears that the Bennardo grievance was merely treated as a step two appeal of Schreier's grievance. Based upon these findings, the ALJ found that the District owed a duty to SEIU to communicate with it concerning a grievance in which SEIU had appeared on behalf of, and provided actual representation to, a bargaining unit member.

On the basis of our review of the record in this matter, we concur with the factual findings of the ALJ, and confirm her conclusion that the failure of the District to communicate with SEIU concerning the disposition of a grievance in which SEIU had appeared and provided representation to the grievant violated §§209-a.1(a) and (d) of the Act where the District has failed, as here, to establish that SEIU has waived its right to receive such communication.[1/]

IT IS THEREFORE ORDERED that the District:

1. Cease and desist from interfering with, restraining or coercing unit employees in the exercise of their protected Taylor Law rights.

[1/] City of Mount Vernon, 5 PERB ¶3057 (1972); CSEA v. Newman, 88 A.D.2d 685, 686, 15 PERB ¶7011 (3d Dep't 1982), appeal dismissed, 57 N.Y.2d 775, 15 PERB ¶7020 (1982); City of Albany, 16 PERB ¶3101 (1983).

2. Provide the SEIU with notice of the disposition of Schreier's grievance filed on September 15, 1986, and, unless the parties otherwise agree, henceforth notify the SEIU of the disposition of grievances in which SEIU has appeared and provided representation on behalf of unit employees.

3. Negotiate in good faith regarding terms and conditions of employment.

4. Sign and conspicuously post a notice in the form attached at all locations ordinarily used to communicate information to unit employees.

DATED: November 24, 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 of the Monticello Central School District in the unit represented by Local 74, Service Employees International Union, AFL-CIO that the District:

1. Will not interfere with, restrain or coerce unit employees in the exercise of their protected Taylor Law rights.

2. Will provide the SEIU with notice of the disposition of Fred Schreier's grievance filed on September 15, 1986, and, unless the parties otherwise agree, henceforth notify the SEIU of the disposition of grievances in which SEIU has appeared and provided representation on behalf of unit employees.

3. Will negotiate in good faith regarding terms and conditions of employment.

MONTICELLO CENTRAL SCHOOL DISTRICT

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

11318

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

WEST IRONDEQUOIT TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-8217

WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT,

Respondent.

-and-

BOARD OF COOPERATIVE EDUCATIONAL SERVICES for the FIRST SUPERVISORY DISTRICT OF MONROE COUNTY,

Intervenor.

In the Matter of

WEBSTER TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO, LOCAL #3099,

Charging Party,

-and-

WEBSTER CENTRAL SCHOOL DISTRICT,

Respondent,

CASE NO. U-8220

-and-

BOARD OF COOPERATIVE EDUCATIONAL SERVICES for the FIRST SUPERVISORY DISTRICT OF MONROE COUNTY,

Intervenor.

In the Matter of

EAST IRONDEQUOIT TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT,

Respondent, CASE NO. U-8222

-and-

BOARD OF COOPERATIVE EDUCATIONAL SERVICES for the FIRST SUPERVISORY DISTRICT OF MONROE COUNTY,

Intervenor.

JOHN J. MOODY, for West Irondequoit Teachers Association

RUBEN A. CIRILLO, for Webster Teachers Association,

GILBERT BIANCUCCI, for East Irondequoit Teachers Association

DANIEL R. MOONEY, ESQ., for West Irondequoit Central School District

GREISBERGER, ZICARI, MC CONVILLE, COOMAN, MORIN & WELCH, P.C. (DENNIS T. BARRETT, ESQ., of Counsel), for Webster Central School District and East Irondequoit Central School District

MATTHEW R. FLETCHER, ESQ., for Board of Cooperative Educational Services for the First Supervisory District of Monroe County

ROBERT WRIGHT, ESQ., for New York State Education Department, Amicus Curiae

NORMAN H. GROSS, ESQ. (HENRY F. SOBOTA, ESQ., of Counsel), for New York State School Boards Association, Amicus Curiae

INGERMAN, SMITH, GREENBERG, GROSS & RICHMOND, ESQS. (WARREN H. RICHMOND III, ESQ., of Counsel), for Board of Cooperative Educational Services, Third Supervisory District, Suffolk County, Amicus Curiae

BOARD DECISION AND ORDER

These matters come to us on the exceptions of the West Irondequoit Central School District, Webster Central School District and East Irondequoit School District (Districts) and of the Board of Cooperative Educational Services for the First Supervisory District of Monroe County (BOCES) from three decisions issued by Administrative Law Judge (ALJ) Marilyn Zahm. Although three separate decisions were issued by the ALJ, the decisions followed a consolidated hearing in which all parties participated. These cases have been consolidated for decision by this Board upon the ground that the facts and circumstances giving rise to the improper practice charges are interrelated, and that the legal issues presented are virtually identical.

Briefly stated, the facts in these cases are as follows.[1/] In July 1985, the West Irondequoit Teachers Association (WITA), the Webster Teachers Association (WTA) and East Irondequoit Teachers Association (EITA) (hereinafter

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[1/] A detailed description of the facts in each case is fully set forth in the decisions issued by the ALJ at 19 PERB ¶¶4623, 4612 and 4614, and will not be repeated here. Except as may otherwise be indicated in this Decision and Order, the facts found by the ALJ in each case are adopted here in full.

referred to collectively as TAs) filed improper practice charges alleging that their respective school districts had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when they unilaterally contracted out the function of providing summer school academic programs for 1985 to BOCES without negotiation. Prior to 1985, the Districts had conducted their own individual academic summer schools,[2/] the teachers employed to conduct the courses offered were already, or became upon employment, members of the bargaining units represented by the TAs, and provision was made in each agreement for terms and conditions of employment of summer school teachers.

In 1984, the New York State Legislature enacted legislation permitting Boards of Cooperative Educational Services to provide "academic and other programs and services in the school year on a cooperative basis, including summer programs and services." (§1950.4 bb Education Law). Prior thereto, BOCES did not possess the necessary statutory authority to conduct academic summer school programs.

In 1985, following execution of agreements with the Districts and approval of the program by the Commissioner of Education, BOCES offered a summer school program to the

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2/During some prior summers, the East and West Irondequoit School Districts had taken each other's students into their respective summer school programs, but that practice ended prior to 1985.

students of all three Districts, consisting of 27 courses to students of the three Districts, with an enrollment as follows: from Webster Central School District, between 535 and 595 students; from West Irondequoit Central School District, 285 students; and from East Irondequoit Central School District, 360 students. Each District paid BOCES on a per enrollee basis for each of its students who participated in the academic summer school program. The courses provided by BOCES in 1985 were no different in scope or content than courses offered by the Districts in their regular school curricula, and these courses had been offered in different years by each of the Districts, although they had never all been offered at the same time by any individual District. The Districts provided no summer school programs in 1985.

Notwithstanding the provision by BOCES of a wider variety of courses offered simultaneously to a larger number of students, the ALJ found that the provision of academic summer school courses had been exclusively bargaining unit work, that the takeover of the academic summer schools by BOCES from the three Districts involved constituted contracting out, and that the Districts' actions were not taken outside the scope of bargaining by a change in the level of service or qualifications for and duties of the work to be performed, or by public policy considerations.

We find, first, that the relationship between the Districts and BOCES constitutes a contractual relationship, despite their contentions that the arrangement was merely a "sharing of services".[3/] We so find because BOCES is in fact and in law a separate entity from the individual school districts within its geographical area, having its own staff, revenues and operating independence.

Furthermore, we find that contracting out occurred here because the Districts were not divested of the responsibility for providing academic summer school courses to their students. The Districts did not "get out of the business" of providing academic summer school courses to their students, but instead paid BOCES on a per enrollee basis, pursuant to the terms of written agreements, to perform work which they would otherwise have performed themselves. This being so, the reasoning of the U.S. Supreme Court in First National Maintenance Corp. v. NLRB, 452 U.S. 664, 107 LRRM 2705 (1981), which held a partial plant closing to be a nonmandatory subject of bargaining, is inapplicable to this case, notwithstanding the arguments of the Districts to the contrary. Additionally, to the extent that Otis Elevator II, 15 LRRM 1281 (1984), may represent an extension of First

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[3/]Even were we to agree with the Districts that their relationship with BOCES was merely a sharing of services, we would nevertheless be compelled to conclude that bargaining unit work was unilaterally transferred to nonunit employees, itself a mandatory subject of bargaining.

National Maintenance, supra, and/or a departure from Fibreboard Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964), we decline to apply it here. Otis Elevator II indicates that subcontracting in the private sector is a mandatory subject of negotiations only where the decision to subcontract turns upon a reduction of labor costs. 115 LRRM 1281 at 1283. However, within our jurisdiction, we have found, and we again affirm, that the contracting out of bargaining unit work to nonbargaining unit employees is a mandatory subject of bargaining, and that a reduction in labor costs goes to the wisdom of the decision to subcontract only, to be addressed during negotiations. See, e.g., Saratoga Springs CSD, 11 PERB ¶3037 (1978), conf'd, 68 A.D. 2d 202, 12 PERB ¶7008 (3d Dep't 1979), motion for leave to appeal denied, 47 N.Y. 2d 74, 12 PERB ¶7012 (1979); City of Poughkeepsie, 15 PERB ¶3045 (1982), conf'd, 95 A.D. 2d 101, 16 PERB 7021 (3d Dep't 1983), appeal dismissed, 60 N.Y. 2d 859, 16 PERB ¶7027 (1983). Recognizing, as we have often done, the distinctions between public and private sector bargaining laws and policies, we deem it appropriate in this case to adhere to the principles developed in the line of cases decided by this Board and the courts of New York with reference to public sector subcontracting.

The fact that BOCES offered a larger variety of courses to a combined larger number of students than had previously been offered by each individual District in any prior single summer school year does not require the conclusion

that each District had not previously or could not have provided educational services to its own students on the same or a similar scale.[4/] The numbers of students enrolled in individual summer school programs in prior years, although subject to substantial fluctuation,[5/] adequately support a finding that the 1985 enrollments in the BOCES program do not reflect a meaningful difference in the level or scope of services provided, so as to take the BOCES program outside the scope of bargaining.[6/]

In any event, the mere number of enrollees from each individual District fails to reveal whether a larger course offering caused higher enrollment levels or whether higher enrollment levels (resulting from a variety of causes, including the Regents' Action Plan) caused the offering of a wider variety of courses. It is certainly possible that if each individual District had offered a greater range of courses, enrollments would have approximated the enrollments

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4/It is not seriously argued, and we accordingly do not address the argument in any detail, that the courses offered by BOCES differed from those offered by the Districts in terms of curriculum, nor is it contended that the BOCES teachers who taught in 1985 possessed qualifications or skills different from those possessed by District teachers.

5/We note, too, that an overall reduction in student enrollment may account in part for the decline in enrollment in summer school programs in recent years.

6/See Niagara Frontier Transportation Authority, 18 PERB ¶3083 (1985); Town of West Seneca, 19 PERB ¶3028 (1986).

of students from each individual District who attended the 1985 BOCES program. The record evidence shows that, financial considerations aside, the individual Districts had the capacity to offer the same range and number of courses as offered by BOCES. The Districts take the position that it is not financially feasible to offer a course unless there is an enrollment of at least 15 students, and that an enrollment of less than 15 means that the course will not be offered. Thus, they argue that the BOCES program, which draws its enrollment from all three Districts, can offer more courses because more courses will be enrolled in by 15 or more students. However, this argument is based upon a fiscal decision that it would be too expensive to employ a teacher to teach a summer school course to a smaller number of students. While the Districts are well within their rights to reach this financial decision, they may not use it to excuse themselves from the duty to bargain their decision to subcontract. This financial consideration, like the consideration that BOCES-run summer school programs are reimbursed at a higher rate by the State and may therefore be more financially attractive to the Districts, go to the wisdom of the decision to subcontract, and not to whether it is subject to bargaining. In essence, the decision to subcontract in these cases was a financial one, rather than one based upon educational mission.

Based upon the foregoing, we conclude that the decision by the Districts to utilize BOCES to operate their summer school programs in 1985 constituted subcontracting, was primarily related to terms and conditions of employment rather than formulation or management of public policy, and was therefore a mandatory subject of bargaining. The Districts' failure to bargain with the TAs before subcontracting to BOCES constitutes a violation of §209-a.1(d) of the Act.

We have considered the remaining issues raised in the exceptions to the ALJ decisions. Those issues were also raised before the ALJ and we find that they are fully and appropriately addressed and dealt with in her decisions and we accordingly adopt the ALJ's reasoning and conclusions here.

IT IS THEREFORE ORDERED that the West Irondequoit School District, East Irondequoit School District and Webster School District:

1. Cease and desist from unilaterally subcontracting the unit work of the summer school teachers to nonunit employees.
2. Restore all such unit work to unit employees.
3. Pay unit members any lost wages or benefits suffered as a result of subcontracting, plus interest at the legal rate, minus interim earnings.

4. Negotiate in good faith with the employee organization representing its summer school teachers concerning the terms and conditions of employment of unit members.

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

DATED: November 24, 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 of the West Irondequoit Central School District in the unit represented by West Irondequoit Teachers Association, NYSUT, AFT, AFL-CIO, that the District:

1. Will not unilaterally subcontract the unit work of the summer school teachers to nonunit employees.

2. Will restore all such unit work to unit employees.

3. Will pay unit members any lost wages or benefits suffered as a result of subcontracting, plus interest at the legal rate, minus interim earnings.

4. Will negotiate in good faith with the Association concerning the terms and conditions of employment of unit members.

WEST IRONDEQUOIT CENTRAL SCHOOL DISTRICT

.....

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

11330

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.

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 of the Webster School District in the unit represented by Webster Teachers Association, NYSUT, AFT, AFL-CIO, Local #3099, that the District:

1. Will not unilaterally subcontract the unit work of the summer school teachers to nonunit employees.

2. Will restore all such unit work to unit employees.

3. Will pay unit members any lost wages or benefits suffered as a result of subcontracting, plus interest at the legal rate, minus interim earnings.

4. Will negotiate in good faith with the Association concerning the terms and conditions of employment of unit members.

WEBSTER CENTRAL SCHOOL DISTRICT

.....

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

11331

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.

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 of the East Irondequoit Central School District in the unit represented by East Irondequoit Teachers Association, NYSUT, AFT, AFL-CIO, that the District:

1. Will not unilaterally subcontract the unit work of the summer school teachers to nonunit employees.

2. Will restore all such unit work to unit employees.

3. Will pay unit members any lost wages or benefits suffered as a result of subcontracting, plus interest at the legal rate, minus interim earnings.

4. Will negotiate in good faith with the Association concerning the terms and conditions of employment of unit members.

EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT

.....

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

11332

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

LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

-and- CASE NO. C-3199

VILLAGE OF BELLPORT,

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 Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO, has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Laborers, Maintenance Mechanic III, Auto Equipment Operators, Groundsmen I, Custodial Worker I.

Excluded: All elected officials, Labor Foreman and all other titles.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO. 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: November 24, 1987
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

11334

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1120, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3258

TOWN OF SAUGERTIES,

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 Communications Workers of America, Local 1120, AFL-CIO, has been designated and selected by a majority of the employees of the above-named employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full and part-time Landfill Operators, Landfill Laborers and Animal Control Officers.

Excluded: All other employees.

11335

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Communications Workers of America, Local 1120, AFL-CIO. 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: November 24, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

11336

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CATTARAUGUS COUNTY DEPUTY SHERIFF'S ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3238

COUNTY OF CATTARAUGUS,

Employer,

-and-

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

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Cattaraugus County Deputy Sheriff's Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

11337

Unit: Included: Detective Lieutenant, Detective Sergeant, Deputy Sheriff Sergeant, Deputy Sheriff/Technical Sergeant, Deputy Sheriff/Fire Investigator, Deputy Sheriff, Emergency Services Dispatcher, Correction Sergeant, Correction Officer Dispatcher, Cook Manager, Correction Officer, Dispatcher, STOP-DWI Program Coordinator, Senior Civil Clerk, Pistol Permit Clerk, Stenographer and Civil Clerk.

Excluded: Sheriff, Undersheriff, Temporary Employees, Special Law Enforcement Employees, All Employees who work less than twenty hours per week, Secretary to the Sheriff, Corrections Lieutenant.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Cattaraugus 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: November 24, 1987
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

11338

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTHERN ADIRONDACK SUBSTITUTE TEACHER ALLIANCE,

Petitioner,

-and-

CASE NO. C-3207

BOLTON CENTRAL SCHOOL DISTRICT,

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 Southern Adirondack Substitute Teacher Alliance 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 per diem substitutes who have received a reasonable assurance of continuing employment, as referenced in §201.7(d) of the Civil Service Law.

Excluded: All other employees.

11339

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Southern Adirondack Substitute Teacher Alliance. 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: November 24, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

11340