STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

THOMAS C. BARRY,

Charging Party,

-and-

CASE NO. U-9835

UNITED UNIVERSITY PROFESSIONS,

Respondent.

THOMAS C. BARRY, pro se

BERNARD F. ASHE, ESQ. (IVOR R. MOSKOWITZ, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

In this improper practice charge, Thomas C. Barry, the charging party, alleges that the United University Professions (UUP) violated the Public Employees' Fair Employment Act (Act) when it adopted an agency shop fee refund procedure for its 1988-89 fiscal year which contains no provision "for the advance refund payment to all 'agency fee payers' as required by the principle of the [Board's] order of 8 July 1987" in UUP (Barry, Eson and Gallup), 20 PERB ¶3039 (1987). The charging party asserts that, to the extent the Board approved the UUP 1988-89 procedure without this provision, it did so in violation of its own decision and order. In that case, we found that UUP's agency fee refund procedure violated the Act in certain respects. We ordered UUP to present to the Board for approval a new

procedure, to be fully in place for the 1988-89 fiscal year, which conformed with our decision. UUP subsequently presented a proposed procedure which was approved, with certain conditions, later satisfied, by Board decision dated September 17, 1987.[1/]

The Director dismissed the instant charge upon the ground that implicit in the approval by the Board of the at-issue 1988-89 procedure is a determination that the procedure presented by UUP conforms with the Board's decision of July 8, 1987.

At the outset, we note that, contrary to the contention of the charging party, we did not, in our July 8 decision, direct UUP to make an advance reduction payment to all agency fee payers. In fact, we stated that UUP must make a payment to all agency fee payers if, and only if, it chooses to make a single lump sum payment of the advance reduction <u>at the same time</u> as it issues its determination of the amount of the advance reduction payment. Alternatively, UUP would have, under our decision, the opportunity to make an advance reduction payment to objecting agency fee payers only, so long as the advance reduction determination was communicated to all agency fee payers prior to the objection period. In promulgating its 1988-89 procedure, UUP selected the latter rather than the former alternative.

[1/] 20 PERB ¶3052.

Based upon the foregoing, it was and is our determination that the agency fee refund procedure promulgated by UUP for the 1988-89 fiscal year is in conformity with our July 8 decision and order. In any event, even if the charging party were correct in his assertion that the two are in conflict with each other, the proper method for challenging the allegedly nonconforming procedure would have been by way of review of the Board's order approving the procedure rather than by way of a separate improper practice charge.

Based upon the foregoing, the decision of the Director dismissing the charge is affirmed, and the charge is hereby dismissed in its entirety.

DATED: March 11, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SHELDON SETH HAAS,

Charging Party,

-and-

CASE NO. U-9850

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Respondents.

SHELDON SETH HAAS, pro se

BOARD DECISION AND ORDER

The charging party, Sheldon Seth Haas, excepts to the dismissal, as deficient, of his charge against the Board of Education of the City School District of the City of New York (District) and the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) by the Director of Public Employment Practices and Representation (Director). The charge alleges that the District and the UFT each failed and refused to negotiate in good faith in violation of §209-a.1(d) and §209-a.2(b) of the Public Employees' Fair Employment Act (Act), respectively. In particular, Haas alleges in his charge that negotiations between the parties were not begun at the appropriate time, did not include subjects which are

customarily raised by parties during collective bargaining, and were conducted without consultation with certain bargaining unit employees.

The Director dismissed the charge upon the ground that an individual has no standing to file a charge alleging a failure to negotiate in good faith on the part of either an employer or an employee organization, citing our decision in Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, 19 PERB ¶3006 (1986). In that case, which was also filed by the charging party herein, we held that "the obligation that recognized or certified employee organizations and the appropriate public employers owe to each other to negotiate in good faith is exclusive; neither one owes such a duty to an individual public employee and no public employee has standing to bring a charge alleging a violation of the duty to negotiate in good faith" (19 PERB ¶3006, at 3010). In so holding, we cited State of New York, 13 PERB ¶3063 (1980). As we noted in Board of Education, supra, a claim of a violation of a union's duty of fair representation is cognizable under §209-a.2(a) of the Act, and a claim of improper collusive arrangements between the employer and union might give rise to a charge of violation of §209-a.1(a) or (b) of the Act. However, none of these sections, nor any facts in support of a claimed violation of these sections, is

presented in the instant case. The sole allegations contained in the charge relate to a claimed failure to negotiate in good faith.

Based upon our prior holding, WE AFFIRM the decision of the Director dismissing the instant charge upon the ground that the charging party is without standing to allege a failure to negotiate in good faith, and ORDER that the charge be, and it hereby is, dismissed in its entirety.

DATED: March 11, 1988
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

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,

CASE NO. U-9130

-and-

SPENCER-VAN ETTEN CENTRAL SCHOOL DISTRICT,

Respondent.

MARJORIE E. KAROWE, ESQ., General Counsel, CSEA Law Department (PAUL D. CLAYTON, ESQ. of Counsel), for Charging Party

SAYLES, EVANS, BRAYTON, PALMER & TIFFT, ESQS. (JAMES F. YOUNG, ESQ. of Counsel), for Respondent

BOARD DECISION AND ORDER

Civil Service Employees Association, Inc., Local 1000, AFSCME/AFL-CIO (CSEA) filed a charge against Spencer-Van Etten Central SChool District (District) alleging that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted work performed by a unit employee, thereafter abolished that employee's position and refused CSEA's demand to negotiate the impact of its actions. The Administrative Law Judge (ALJ) found that the District violated the Act when it subcontracted one aspect of the employee's work and when it failed to respond to the impact

demand of CSEA. However, he found no merit to the charge that the District violated the Act by abolishing the employee's position, concluding that the abolition of the position was not caused by the subcontracting of the unit work. The ALJ ordered the District to restore the subcontracted duties to a position within CSEA's unit and to respond to CSEA's impact demand and negotiate with CSEA, but declined to award any back pay to the employee whose position was abolished.

The matter comes to us on the exceptions of CSEA to that part only of the ALJ's decision refusing to award back pay to the affected employee. The District has not filed any exceptions to the decision of the ALJ.

FACTS

The employee in question, Donna Giannino, was employed as a "district driver". As such, her duties were four-fold: a morning school bus run of students; a morning trip to transport food to the cafeteria and mail and banking materials; an afternoon run, on the District's garbage bus, transporting trash to a landfill; and an afternoon school bus run of students. The dispute, in this case, centers on the subcontracting of Giannino's trash run.

Under the circumstances set forth in the ALJ's decision, the District unilaterally subcontracted the trash run to a private carrier on June 24, 1986, commencing September 1, 1986. The ALJ

found that, in doing so, the District violated its negotiating obligation under the Act. On August 28, 1986, the District abolished Giannino's district driver position as a result of 1) elimination of the trash run; 2) elimination of the position's bus route as a cost-saving measure; 3) rearrangement of mail delivery responsibilities, including assignment to another unit employee; and 4) assignment of the food distribution duties to another unit employee. The ALJ credited the testimony on behalf of the District that the prime motivating factor for the abolition of the position was the economic savings which would result therefrom.

Having found that the elimination of Giannino's position was not improper, and inasmuch as the trash run constituted less than 25% of the duties of the district driver position, the ALJ concluded that a remedy requiring reestablishment of the district driver position would be inappropriate. He found it appropriate, however, to direct the District to restore the trash run duties of the former district driver position to a position within the CSEA unit.

In its exceptions, CSEA asserts that Giannino should be paid what she would have received had she performed her trash run duties during the 1986-87 school year, after her position was eliminated.

DISCUSSION

We affirm the ALJ's conclusion that the "restitution" claimed by CSEA on behalf of Giannino is not warranted in light of his unchallenged findings that the district driver position was properly eliminated and that Giannino would not have been retained to perform only the trash run.

The ALJ also properly noted that Giannino had rejected an offer of alternative full-time employment as a bus driver for the District. He relied on a decision of ours[1/] in which we found that reimbursement to affected employees for lost wages would not be appropriate where they rejected an offer for alternative employment that was substantially equivalent to the eliminated positions. CSEA argues that Giannino was not offered a substantially equivalent position, asserting that, although she was offered a full-time position, the job only paid for 7 hours of work, while her former position paid for 8-1/2 hours of work. In view of our primary conclusion, we need not treat with the argument other than to observe that the District's offer far exceeded the percentage of Giannino's work day attributable to the at-issue trash removal duties.

We do not need to consider the District's argument that CSEA's exceptions should be dismissed by virtue of the fact that, in response to the ALJ's order, CSEA and the District conducted

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[1/] Hilton CSD, 14 PERB ¶3038 (1981).

negotiations and signed a memorandum of understanding resolving all issues in this dispute.

NOW, THEREFORE, WE ORDER that CSEA's exceptions be, and they hereby are, dismissed.

DATED: March 11, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NIAGARA COUNTY UNIT, LOCAL 832,
CSEA, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

CASE NO. U-8615

-and-

COUNTY OF NIAGARA (MOUNT VIEW HEALTH FACILITY),

Respondent.

MARJORIE E. KAROWE, ESQ., General Counsel, CSEA Law Department (PAMELA NORRIX-TURNER, ESQ. of Counsel), for Charging Party

GLENN S. HACKETT, ESQ., Niagara County Attorney (VINCENT R. GINESTRE, ESQ. of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the County of Niagara (Mount View Health Facility) (County or Facility) and the cross-exceptions of the Niagara County Unit, Local 832, CSEA, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to the decision of the Administrative Law Judge (ALJ) sustaining an improper practice charge filed by CSEA. CSEA charged that the Facility violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally promulgating a memorandum reducing the areas in which unit employees could smoke.

FACTS

The ALJ'S extensive findings of fact are not challenged and, accordingly, we adopt and summarize them as follows.

The Facility is a 172-bed, skilled nursing facility, housing "long-term" patients below the level of acute care and providing specialized treatment to out-patients. The mean age of the Facility's resident patient population is 82 years. Approximately 15% of the residents are ambulatory.

On February 4, 1986, the Facility issued a memorandum regarding smoking in the Facility. Prior to its issuance, employees were allowed to smoke in the Facility's main lobby, first floor library, basement cafeteria and front outdoor entranceway on their break and lunch periods. The memorandum banned employee smoking in the main lobby, library and basement cafeteria, and permitted smoking only in the basement rest rooms and front door entranceway. Patients are housed in the second to fifth floors of the Facility, and employees have never been allowed to smoke on these floors, although patients may, under supervision, smoke in the dining rooms on those floors.

The lobby is used by patients with visitors, is carpeted and contains stuffed chairs, and is staffed by a receptionist 90% of the time. The library is adjacent to the lobby, contains books and stuffed furniture, is carpeted and is not readily observable from the outside. The library is not used by patients. The basement cafeteria is used by Facility employees, non-facility

employees of the County, visitors and out-patients. It is one room, approximately 20' x 20'. The basement rest rooms are approximately 16' x 11-1/2', poorly lit and inadequately ventilated.

The Facility's ban on smoking in these areas was prompted by its concern for the health hazards attributable to second-hand smoke, fire safety considerations and employee complaints. The Facility submitted, for our consideration, Part 25 - Regulation of Smoking - of the Rules and Regulations of the Public Health Council issued on February 6, 1987, which, among other things, sets forth findings of the Council regarding the hazards of second-hand smoke. As to fire hazards, a fire official has recommended to the Facility that smoking be limited to areas which are readily observable by other parties and are removed from patient housing. It was suggested by that official that the first floor be a "buffer" floor. Another fire official testified that the lobby and cafeteria would be safe for smoking if supervised at all times. He noted that the library was not an observable area.

In addition, the Facility has received, over the years, a number of complaints from employees, visitors, patients and non-facility employees of the County regarding smoking in the at-issue areas. These complaints have been referred to the Facility's Safety Committee and Policy Committee. The Safety Committee reviews Facility safety and consists of a

representative group of employees. The Policy Committee establishes policies and procedures for patient care, including the environment of the Facility. The Policy Committee consists of the Facility's administrator, representatives of the professional employees and of the housekeeping and building and grounds departments. The Policy Committee reviewed and approved the at-issue memorandum prior to its promulgation.

ALJ DECISION

The ALJ determined that the Facility's imposition of a smoking ban in the lobby, library and cafeteria contravened its duty to negotiate and violated §209-a.1(d) of the Act. The ALJ rejected the argument that the Public Health Council's February 6, 1987 regulations are an expression of New York State public policy on the subject of the health hazards of second-hand smoke. She also found no freestanding public policy supporting the right of the Facility to act unilaterally in the matter. Accordingly, she applied a balancing test to determine whether smoking rules, as work rules, can be promulgated unilaterally by the Facility. Balancing the employees' interests in the subject and the employer's concerns, she concluded that the employer has not considered reasonable alternatives to the ban on smoking which it established and that, accordingly, the balance must be struck in favor of the employees' negotiating rights.

EXCEPTIONS

In its exceptions, the County urges that, in applying our balancing test, more weight must be given to the mission of the Facility, which is charged with the responsibility for the care of the medical and environmental needs of elderly patients and out-patients, all of whom suffer from chronic long-term illness. Protecting these patients from a significant health hazard is, the County argues, directly related to its mission.

The County also asserts that the evidence that second-hand smoke is a significant health hazard is now more compelling than it was at the time of the decision in Steuben-Allegany BOCES, 13 PERB ¶3096, aff'g 13 PERB ¶4552 (1980). In this regard, the County states that it relies on the Public Health Council's regulations, not as a statement of public policy or as a precise standard for establishing no-smoking regulations, but as evidence that second-hand smoke has been found to be hazardous to health, especially to the elderly ill.

In its cross-exceptions, CSEA urges affirmance of the ALJ's conclusion that this case deals with "employees' use of their free time while on the job" and that this is a work rule that was unilaterally promulgated in violation of the employer's duty to negotiate. It also urges, however, that any suggestion in the ALJ's decision that alternatives to the total ban might be acceptable without negotiations should be rejected by the Board.

DISCUSSION

The County states that it does not rely on the Public Health Council's Rules and Regulations as a statement of public policy regarding second-hand smoke. In light of the recent decision of the Court of Appeals[1/] holding that the Public Health Council exceeded its authority when it issued its smoking regulations, we obviously cannot conclude that those regulations preempt or supersede any bargaining obligations under the Taylor Law with respect to the implementation of smoking regulations. Nor does the County urge that there is any freestanding public policy which would insulate it from the duty to negotiate the smoking regulations which it imposed, to the extent that the Taylor Law requires such negotiations.

Since there is no public policy, as yet, which requires or permits a public employer to ban smoking in the work place or in its facilities, we continue to believe that employee smoking regulations are work rules subject to the balancing test which we have previously employed[2/] to determine whether unilaterally promulgated work rules violate the Act. Smoking regulations affect terms and conditions of employment, and the record in this case establishes the nature of the inconvenience to the employees.

[1/] Boreali v. Axelrod, 71 N.Y.2d 1 (1987).

[2/] See, e.g., County of Rensselaer, 13 PERB ¶3080 (1980); Steuben-Allegany BOCES, 13 PERB ¶3096 (1980); State of New York, 18 PERB ¶3064 (1985).

What we stated in County of Montgomery,[3] regarding our balancing test, bears repetition:

> Implicit in this [balancing] test is the recognition that simply because a work rule relates to the employer's mission, it does not follow that the employer is necessarily free to act unilaterally in the manner in which it chooses to act. If it is faced with an objectively demonstrable need to act in furtherance of its mission, the employer may unilaterally impose work rules which are related to that need, but only to the extent that its action does not significantly or unnecessarily intrude on the protected interests of its employees. Thus, we must weigh the need for the particular action taken by the employer against the extent to which that action impacts on the employees' working conditions.

In order to be accorded the right to act unilaterally insofar as smoking regulations are concerned, a public employer must demonstrate that there is a need related to its mission for the restrictions which it imposed on employee smoking in its facilities.[4] Further, the employer must show that those restrictions do not go beyond what is needed to further its mission.

In support of its claim of prerogative, the County stresses its role and duty as a health care facility, the mean age and infirmities of its clientele, and its physical setup. It relies

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[3] 18 PERB ¶3077 at 3167 (1985).

[4] This Board's powers relate solely to the enforcement of the interests protected by the Act. We are not empowered to protect the interests of the non-smoking public who may have access to the facilities of the employer.

on evidence of the health hazards posed to its clientele and others by environmental tobacco smoke, and by potential fire hazards in its building.

In this regard, the County argues that, while the Public Health Council's regulations may not have set the public policy of the State of New York, the Council's findings as to the hazards of second-hand smoke, particularly with regard to elderly people and people suffering from chronic long-term illness, should be accepted. We agree with the ALJ that the Council's findings, in this regard, are not, on this record, in question. We conclude that the record, in this case, presents a compelling situation for finding a direct relationship between mission and smoking regulations. A health facility treating the elderly ill may, in furtherance of its mission, ban smoking by its employees in those areas of its facilities which are customarily used by its patients.

The areas of the Facility in dispute, in this case, are the lobby and the library on the first floor and the cafeteria. The lobby is visited regularly by patients. The other two locations are not.[5/] We do not consider it appropriate for us to question whether the use of the lobby by patients is in furtherance of the employer's mission. Inasmuch as that area has, in the past, been used by resident patients, we accept that such use is in

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[5/]There is some evidence that some out-patients do use the basement cafeteria.

furtherance of the Facility's mission. Accordingly, we conclude that the banning of smoking by employees in the lobby was directly related to the County's mission and did not go beyond what is needed to further that mission.

It has not been demonstrated in this record, however, that the employer's prerogative to protect its patients from the health hazards of second-hand smoke warranted the unilateral imposition on the employees of a smoking ban in the library and cafeteria. The library is a separate, enclosed room, not customarily used by patients. The cafeteria is also not used by resident patients. Its use by some out-patients does not warrant the significant intrusion on the protected interests of the unit employees by the at-issue memorandum. The access of outpatients to the cafeteria appears to be no different in nature than that of the public generally.

There remains for consideration the Facility's argument that its mission also includes the protection of its patients and facilities from fire hazards. The ALJ agreed that the potential fire hazard to the lobby and library is "a verified and serious concern...and goes beyond unit employee safety". Nevertheless, the ALJ found that a total ban on employee smoking at these two locations was not established as necessary to meet the employer's fire safety concerns. She concluded that fire safety concerns can give rise to a right to unilateral action only if the employer demonstrates that the need can only be met by the action taken.

We agree that reliance on fire safety concerns to justify the unilateral imposition of a total ban on smoking in an employer's facility or in particular locations in the facility can only be proper if based on objectively demonstrable need. In our view, the testimony in this regard is, at best, ambiguous. The fire officials' statements were recommendations only. The need for a "buffer" floor can be questioned in light of the permission granted to patients to smoke in the upper floors' dining areas. The library, a non-public, non-working area, appears to have been used at break and lunch time as an employee smoking lounge. There is little in this record to support the conclusion that fire safety concerns justify the unilateral imposition of a smoking ban in the basement cafeteria. We agree with the ALJ that reasonable alternatives to a total ban on smoking in the library and cafeteria to meet fire safety concerns were not considered or negotiated. For these reasons, we affirm the ALJ's determination with regard to the library and cafeteria.

In response to CSEA's cross-exceptions, we wish to emphasize that, in making these findings, we are concerned only with determining whether aspects of employee smoking regulations should or should not be negotiated. We express no opinion as to the need for or desirability of such regulations. We do believe that the bilateral negotiating process mandated by the Act is a viable means for resolving many of the conflicting interests related to employee smoking bans.

Accordingly, we find that the Facility violated §209-a.1(d) of the Act to the extent that its February 4, 1986 memorandum banned smoking in the library and basement cafeteria.

NOW, THEREFORE, WE ORDER that the County of Niagara (Mount View Health Facility):

1. Immediately rescind and cease enforcement or implementation of its February 4, 1986 memorandum and its practice thereunder, in regard to the library and cafeteria;

2. Immediately remove and destroy all disciplinary documents issued pursuant to said memorandum and/or practice, in regard to the library and cafeteria, from any files kept or maintained by the County or its agents;

3. Negotiate in good faith with the CSEA with respect to terms and conditions of employment of unit employees; and

4. Sign and post notice in the form attached at all locations ordinarily used to post written communications to unit employees.

DATED: March 11, 1988
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 County of Niagara (Mount View Health Facility) in the unit represented by the Niagara County Unit, Local 832, CSEA, Inc., Local 1000, AFSCME, AFL-CIO that the County:

1. Will immediate rescind and cease enforcement or implementation of its February 4, 1986 memorandum and its practice thereunder, in regard to the library and cafeteria;

2. Will immediate remove and destroy all disciplinary documents issued pursuant to said memorandum and/or practice, in regard to the library and cafeteria, from any files kept or maintained by the County or its agents;

3. Negotiate in good faith with the CSEA with respect to terms and conditions of employment of unit employees.

County of Niagara
(Mount View Health Facility)

.....

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

11461

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MORRIS E. ESON,

Charging Party,

-and-

CASE NO. U-9520

UNITED UNIVERSITY PROFESSIONS,

Respondent.

GLENN M. TAUBMAN, ESQ., for Charging Party

BERNARD F. ASHE, ESQ. (IVOR R. MOSKOWITZ, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

Morris E. Eson, charging party, excepts to certain portions of an Administrative Law Judge (ALJ) decision in connection with an improper practice charge alleging violations of §209-a.2(a) of the Public Employees' Fair Employment Act (Act) by the United University Professions (UUP). In particular, the charge asserts that UUP failed to give charging party notice of its agency fee refund procedure for the 1987-88 fiscal year, and failed to provide him with financial information upon which an advance reduction payment for the 1987-88 fiscal year was based prior to the period for filing objections to the use of agency fees for purposes

impermissible under the Act.[1] The charge also alleges that the UUP procedure itself violates the Act because it does not provide for financial disclosure before the objection filing period.

The ALJ found that charging party was not provided with a copy of UUP's agency fee rebate procedure for 1987-88 because his name did not appear in the listing of current employees used by UUP for its mailing which was provided by the State of New York (employer) immediately prior to the publication of the newspaper containing the description of UUP's agency fee refund procedure. Charging party was not included in the list provided by the employer because he was at the time on a six-month leave-without-pay from the employer. The ALJ found that UUP's reliance upon the list of current employees provided by the employer was not inappropriate under the Act and that the omission of charging party from the mailing list could not be attributed to any fault, negligence or error by UUP. The ALJ accordingly dismissed that portion of the charge.

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[1] Section 208.3(a) of the Act requires employee organizations collecting agency shop fees to establish and maintain a procedure which provides "for the refund to any employee demanding the return [of] any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

The second claim made by charging party before the ALJ was that he was not provided with financial disclosure prior to the objection period. The ALJ concluded that, because charging party was not on the mailing list of current employees provided by the employer at the time that financial disclosure could or would have taken place, he would not have received financial disclosure even if it had issued. Accordingly, the ALJ found that UUP's failure to provide financial information to charging party prior to its objection period did not violate the Act as to him.

The ALJ did, however, find that UUP's agency fee refund procedure for 1987-88 violated the Act when it failed to provide for the furnishing of financial information prior to the filing of objections by agency fee payers, and by failing to provide for an end-of-year correction in the amount of the agency fee refund. In so finding, the ALJ relied upon a decision of this Board, to which this charging party was also a party, in UUP (Eson, Barry, Gallup), 20 PERB ¶3052 (1987). The ALJ concluded, however, that no further remedial action was required in this case because, in the earlier case (which was issued after UUP's 1987-88 procedure had been partially completed), the Board approved immediate prospective corrections in UUP's procedure to conform with

the Act.[2/]

Charging party excepts to the ALJ decision in three respects. First, he argues that the ALJ "erred in holding that the UUP's use of its internal union newspaper, 'The Voice', was sufficient to place agency fee payers on notice as to their statutory and constitutional rights . . . ." We have previously found the use of UUP's newspaper as a means to communicate to all bargaining unit members its agency fee refund procedure to be in compliance with the Act.[3/] No ground has been offered here which would support reversal of this decision. We therefore deny the exception of the charging party in this respect.

The second exception of charging party asserts that the ALJ "erred in holding that the UUP did not have to take additional steps to insure that actual notice and financial disclosure was received by Prof. Eson and other nonunion agency fee payers . . . ." We concur with the finding of the

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[2/]Although in UUP (Eson, Barry, Gallup), 20 PERB ¶3039 (1987), we had before us charges relating to UUP's agency fee refund procedure for fiscal years prior to and not including the 1987-88 year at issue here, the remedial relief ordered in that case relating to changes in UUP's procedure applied to the portions of the 1987-88 procedure which had not yet taken place, as well as for the years to come. See UUP (Eson, Barry, Gallup), 20 PERB ¶3052 (1987), in which we approved (with certain conditions) a new procedure in accordance with our July 8 decision in the same case.

[3/]UUP (Barry), 17 PERB ¶3102 (1984). This decision was recently affirmed by this Board in UUP (Eson, Barry, Gallup), 20 PERB ¶3039 (1987), and was not appealed by the charging parties, including charging party Eson.

ALJ that UUP is entitled to rely upon the list of current employees provided to it bi-weekly by the employer as the basis for its mailing list to agency fee payers, and that the Act places it under no affirmative duty to seek out other persons who are not in payroll or "current employee" status. In fact, it would not be unreasonable for UUP to expect agency fee payers such as charging party to notify it of their desire to continue on mailing lists during extended periods of leave-without-pay, and to proffer current mailing addresses during such periods.

In his third exception, charging party asserts that the ALJ erred in failing to order a refund of his agency fee for the 1987-88 fiscal year, having found that the agency fee refund procedure for 1987-88 improperly failed to provide for financial disclosure in advance of the objection period.

In the context of UUP (Eson, Barry, Gallup), supra, we ordered UUP to cease and desist from utilizing an agency fee refund procedure which fails to conform to the Act in the respects asserted by charging party in this case, and directed UUP to develop an agency fee refund procedure in conformity with the Act, to be implemented effective immediately. In a September 17, 1987 decision, we approved a new agency fee refund procedure submitted by UUP, which prospectively remedied the flaws complained of by charging party in the instant case. At issue, then, is whether

charging party is entitled to a refund of his agency fees paid for the 1987-88 fiscal year because the refund procedure promulgated by UUP for the year was, but is no longer, in violation of the Act. We find that it would not effectuate the policies of the Act in this case to require UUP to refund the agency fees paid to date by charging party for the 1987-88 fiscal year and we decline to exercise our discretion to order an agency fee refund. In view of the unintentional omission of his name from the mailing list of persons to whom financial disclosure and a copy of the agency fee refund procedure were to be sent, which we have found not to constitute an improper practice by UUP, charging party was not prejudiced in fact by the failure of UUP to provide for financial disclosure prior to the objection period in its procedure. The charging party's claim of failure to provide for end-of-year review of the advance reduction determination has already been remedied for the 1987-88 year in the context of our prior order, which requires UUP to conduct a year-end review for the 1987-88 year. No further relief is warranted in connection with this issue.

The charging party's exceptions are denied and the decision of the ALJ is affirmed for the reasons set forth herein.

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

DATED: March 11, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF SUFFOLK

Case No. S-0006

for a determination pursuant to Section 212 of the Civil Service Law.

BOARD DECISION AND ORDER

Pursuant to §212 of the Civil Service Law, the County of Suffolk has submitted an application by which it seeks a determination that its Local Law No. 4-1978, as amended on December 8, 1987 by Local Law No. 45-1987, is substantially equivalent to the provisions and procedures set forth in Article 14 of the Civil Service Law with respect to the State. Specifically, the amendment brings the County's local law into conformity with Chapter 204 of the Laws of 1987, which extended the Taylor Law's interest arbitration provisions for an additional two years.

Having reviewed the application and having determined that the subject Local Law, as amended, is substantially equivalent to the provisions and procedures set forth in Article 14 of the Civil Service Law with respect to the

State,

IT IS ORDERED that the application of the County of Suffolk be, and it hereby is, approved.

DATED: March 11, 1988
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,

Petitioner,

-and-

CASE NO. C-3317

TOWN OF PENFIELD,

Employer.

MARJORIE E. KAROWE, ESQ. for Petitioner

HARRIS, BEACH, WILCOX, RUBIN AND LEVEY (JAMES CHARLES HOLAHAN, ESQ. of Counsel) for Employer

BOARD DECISION AND ORDER

By decision dated February 1, 1988,[1/] the Director of Public Employment Practices and Representation (Director) found that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (petitioner) has satisfied the requirements for certification without an election, and is entitled to be certified as the negotiating agent of the employees in a unit stipulated by the parties to consist of the following:

Included: All full-time employees (that is, employees who regularly work at least 40 hours per week) employed in the Town of Penfield's Highway Department with the following titles: MEO I, MEO II, Laborer, and Senior Auto Mechanic.

[1/] 21 PERB ¶4003 (1988).

Excluded: Supervisors, managerial and confidential employees, and all other employees.

The Town of Penfield (employer) has filed exceptions to the Director's decision upon three grounds. First, the employer asserts that an election should be held in connection with petitioner's petition for certification because its showing of interest is "at best, marginal".[2/] Second, the employer asserts that the evidence of majority status should be rejected, because it is not "current" within the meaning of §201.9(g) of PERB's Rules of Procedure (Rules). The employer's third exception asserts that the Director's decision implies that petitioner, if certified, will be designated as the exclusive negotiating agent of the employees in the stipulated bargaining unit, when in fact the employer never agreed that petitioner should be accorded exclusive rights of representation.

The petitioner's response to the exceptions asserts only that it relies upon the Director's decision.

The employer's first exception raises no valid challenge of the Director's decision. Section 201.9(g)(1) of our Rules provides that in the event of a choice to the employees in a negotiating unit between selection or rejection of a single employee organization, "The employee organization involved <u>will</u> be certified without an election if a <u>majority</u>

[2/] The petitioner has presented dues deduction authorization cards on behalf of 19 of the 31 persons in the unit stipulated to by the parties.

of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the certification period" (emphases added). Our Rules provide no discretion to the Director to refuse certification in these circumstances if a majority of the employees in the unit indicate their choice of employee organization. Since a majority consists of more than 50%, and more than 50% of the persons in the bargaining unit in the instant case have indicated their choice of petitioner as their negotiating agent, the Director's decision fully conforms with our Rules in this respect, and the exception is accordingly denied.

The employer's second exception claims, without any explanation or detail, that the dues deduction authorization cards submitted by petitioner are no longer current, and should accordingly not be considered in determining whether certification without election should take place.

In Village of Webster, recently decided by this Board, we stated that individual designation cards must have been executed within six months prior to issuance of an Order of Certification by us, and that dues deduction authorization cards must be current at the time of issuance of an Order of Certification before certification without an election can issue. We there stated that the term "current" has always been construed "to mean reasonably current, and certainly not

more than six months old, which is the limit contained in our Rules for the use of individual designation cards for certification without an election." Village of Webster, Case No. C-3226, 21 PERB ¶3002 (January 15, 1988). In that case, we remanded the petition to the Director for further processing because, at the time of consideration of the request for an Order of Certification by this Board, the dues deduction authorization cards presented in support of the certification petition were more than six months old. In the instant case, the dues deduction authorization cards are not, as of the date of this decision, more than six months old, and are accordingly deemed to be current. We therefore find that certification at this time is in conformity with §201.9(g) of our Rules and the employer's exception is denied.[3/]

Turning to the employer's final exception, we find no basis for the assertion that the Director's decision implies that the right of representation accorded in the Director's decision is exclusive. Nothing in the Director's decision so indicates, and it is well established that, in the absence of agreement to exclusivity by the employer, the right of representation is not exclusive in nature. Accordingly, the

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[3/] It is noteworthy that the employer presents no evidence or factual basis in support of its exception that the dues deduction authorizations presented by the petitioner are in fact not current or have been revoked, or that the composition of the bargaining unit has changed to the extent of affecting the petitioner's asserted majority status.

employer's third exception is also denied. Implicit in the right of representation which is not exclusive is the limitation of the right of representation to those persons in the designated unit who are members of the negotiating agent.

IT IS THEREFORE ORDERED that the exceptions are denied in their entirety, and

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as the representative of the employees in such unit who are members of the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO for the purpose of collective negotiations and the settlement of grievances:

Unit: Included: All full-time employees (that is, employees who regularly work at least 40 hours per week) employed in the Town of Penfield's Highway Department with the following titles: MEO I, MEO II, Laborer, and Senior Auto Mechanic

Excluded: Supervisors, managerial and confidential employees, and all other employees.

FURTHER, IT IS ORDERED that the Town of Penfield shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, 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: March 11, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LYNDONVILLE CENTRAL SCHOOL DISTRICT,

Employer/Petitioner,

- and -

LYNDONVILLE NON-TEACHING PERSONNEL ASSOCIATION,

Intervenor.

CASE NO. C-3347

BOARD ORDER

On December 18, 1987, the Director of Public Employment Practices and Representation issued a decision in the above matter finding that the petition filed by the Lyndonville Central School District (employer) to decertify the Lyndonville Non-Teaching Personnel Association as negotiating representative for certain of its employees should be granted for lack of opposition.[1/] No exceptions have been filed to the decision.

IT IS THEREFORE ORDERED that the Lyndonville Non-Teaching Personnel Association be, and it hereby is, decertified as the negotiating representative of the following unit of employees of the employer:

1/ 20 PERB ¶4086 (1987).

Included: Driver/Mechanic, Cleaner, Bus Driver, Aide, Clerk Typist, Typist, Account Clerk and School Nurse.

Excluded: All other employees.

DATED: March 11, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BUFFALO EDUCATIONAL SUPPORT TEAM, NEA/NY,

Petitioner,

-and-

CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO, CASE NO. C-3323

Employer,

-and-

AFSCME, LOCAL 264, 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 Buffalo Educational Support Team, NEA/NY 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 full-time teacher aides/school aides employed by the Board.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Buffalo Educational Support Team, NEA/NY. 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: March 11, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LEWISTON-PORTER UNITED EDUCATIONAL EMPLOYEES, NYSUT/AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3335

LEWISTON-PORTER CENTRAL SCHOOL DISTRICT,

Employer,

-and-

UNITED FOOD AND COMMERCIAL WORKER'S,LOCAL 1,

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 Lewiston-Porter United Educational Employees, NYSUT/AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of

collective negotiations and the settlement of grievances.

Unit: Included: All clerical employees, nurses, teacher aides, media associates and PDI aides regularly employed by the District.

Excluded: Teaching assistants (including inhouse suspension supervisors), substitutes and temporary employees, confidential employees, managerial employees, administrative employees, supervisory employees and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Lewiston-Porter United Educational Employees, NYSUT/AFT, 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: March 11, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member